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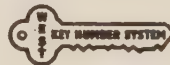
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CALIFORNIA REPORTER

293 PACIFIC REPORTER SECOND SERIES



46 Cal.2d 182

George G. EICHELBERGER and Elsie Hagerty, Plaintiffs and Appellants,

Frank C. Brennan et al., Plaintiffs,

v.

CITY OF BERKELEY, a municipal corporation, Fire Pension Board, Laurence L. Cross, John D. Phillips, Pauline Young, William Meinheit, John Holstrom, Mrs. Ruth Cunningham, and Weldon L. Richards, Defendants and Respondents.

Lewis WESCOTT, Plaintiff and Appellant,

v.

CITY OF BERKELEY, a municipal corporation, Fire Pension Board, Laurence L. Cross, John D. Phillips, Pauline Young, William Meinheit, John Holstrom, Mrs. Ruth Cunningham, and Weldon L. Richards, Defendants and Respondents.

S. F. 19100.

Supreme Court of California.
In Bank.

Feb. 10, 1956.

Proceeding to recover retirement pension. The Superior Court, Alameda County, Cecil Mosbacher, J., denied claim, and plaintiffs appealed. The Supreme Court, Carter, J., held that amendment to City of Berkeley pension ordinance repealing provision that pensions should not be increased in consideration of increases in pay of active officers disclosed intention to apply to pensions already granted, and firemen who retired, and widow of fireman who died before amendment, were entitled to increases in pension in proportion to pay increases granted active firemen of same rank.

Judgment reversed, trial court directed to enter judgment for plaintiff.

Opinion, 286 P.2d 83, vacated.

1. Officers ⇐94

Where a pension statute states that pension shall be a percentage of average salary attached to rank held by employee before retirement, it is construed as providing for a fluctuating pension which increases or decreases as salaries paid to active employees increase or decrease.

2. Municipal Corporations ⇐200(7)

Amendment to City of Berkeley pension ordinance repealing provision that pensions should not be increased in consideration of increases in pay of active officers disclosed intention to apply to pensions already granted, and firemen who retired, and widow of fireman who died before amendment, were entitled to the increases in pensions in proportion to pay increases granted active firemen of same rank.

3. Pensions ⇐1

Pension laws must be liberally construed to achieve their beneficent purposes.

Cornish & Cornish, Francis T. Cornish and Howard W. Wayne, Berkeley, for appellants.

Fred C. Hutchinson and Robert T. Anderson, Berkeley, for respondents.

CARTER, Justice.

This is an appeal from a judgment for defendant, city of Berkeley, in consolidated actions by plaintiffs to recover amounts al-

legedly accrued as payments due from pensions, and in some cases, death benefits alleged to be payable by defendant, and for declaratory relief.

Plaintiffs Eichelberger and Wescott, here appealing, retired and became entitled to pensions after long service as firemen employed by defendant. Their retirement commenced on July 1, 1938, and February 25, 1939, respectively. Plaintiff Elsie Haggerty, also appealing, is entitled to a pension as widow of George Haggerty who died on August 18, 1938, in the line of duty after long service as a fireman in the employ of defendant.

Defendant passed an ordinance, number 2188-N.S., effective April 28, 1938. It authorized retirement and pensions for members of its fire department who had theretofore served or should thereafter serve for a specified number of years. For those retiring, the pension was to be "one half of the average salary attached to the rank or ranks held during the three years immediately preceding the date of retirement." In the case of the widow of a fireman, killed in line of duty, the percentage was to be one third. Section 24 of that ordinance read: "The pensions granted under the terms of this ordinance shall not *increase nor* decrease with any changes in salary subsequent to the date of the granting of the pension for the rank or ranks upon which the pension was based, nor shall any changes of title or rank in the active service effect *an increase or* reduction in the existing pensions." (Italics ours.) Effective April 20, 1939, defendant adopted Ordinance No. 2254-N.S. amending Ordinance No. 2188-N.S., *supra*. One change here pertinent was in section 24, *supra*. The amendment eliminated the words under-

scored in the above quotation of section 24 in its original form.¹

There have been salary increases in the positions formerly held by Haggerty since his death and by plaintiffs Eichelberger and Wescott since their retirement and plaintiffs claim that they are entitled to have their pensions increased accordingly. They claim that under the original 1938 ordinance (2188-N.S.) they are so entitled and if not they are entitled to increased pensions because of the increase in firemen's pay since the 1939 amendment. (2144-N.S.) Defendant claims that section 24, *supra*, of the 1938 ordinance excluded a pension which would fluctuate up or down according to the pay of firemen, and to apply the 1939 amendment to plaintiffs, who retired prior to the effective date thereof, would give them the benefit of pay increases and give retroactive effect to said amendment contrary to the intent of the city council, the legislative body of the city, in violation of the rule that statutes must be construed as being prospective only unless the contrary is expressed.

[1] It is settled that where the pension statute states, as does the one here, that the pension shall be a percentage of the average salary attached to the rank held by the employee before retirement, it is construed as providing for a fluctuating pension which increases or decreases as the salaries paid to active employees increase or decrease. *Terry v. City of Berkeley*, *supra*, 41 Cal. 2d 698, 263 P.2d 833; *Casserly v. City of Oakland*, 6 Cal.2d 64, 56 P.2d 237; *English v. City of Long Beach*, 126 Cal.App.2d 414, 272 P.2d 875; *Aitken v. Roche*, 48 Cal.App. 753, 192 P. 464; *Klench v. Board of Pension Fund Com'rs*, 79 Cal.App. 171, 249 P.

1. In 1944 Ordinance No. 2188-N.S. was again amended. It was recited that it was the intention of the city council that by that ordinance there was to be "a fixed amount, which would neither increase nor decrease" and clarification was necessary, hence section 24 was amended to read: "The pensions granted under the terms of this ordinance shall be based upon the average monthly rate of salary which such members shall have received during the three years immediately pre-

ceding the date of retirement, and shall be for a fixed amount that shall not increase nor decrease, regardless of any change in salary subsequent to the date of granting of the pensions for the rank or ranks that the members held prior to the granting of the pensions." It was held in *Terry v. City of Berkeley*, 41 Cal.2d 698, 263 P.2d 833, that that amendment could not affect persons who, like plaintiffs, retired before it became effective.

46; Rumetsch v. Davie, 47 Cal.App. 512, 190 P. 1075.

Contrary to plaintiffs' contention the foregoing rule of construction of the above mentioned language does not create such an inconsistency with section 24 of the 1938 ordinance, *supra*, that it must have the effect of overriding that section. The whole ordinance must be read to properly construe it. Thus, while the language mentioned, standing alone, is susceptible of and will be given the construction stated in the Terry case, section 24 specifically covers the situation, and it expressly provides that pensions shall not fluctuate up or down in accordance with pay fluctuations of active firemen. It is clear, therefore, that for the period from the date of retirement in the case of plaintiffs Eichelberger and Westcott and the date of death in the case of Haggerty to the effective date of the 1939 amendment of the ordinance, said plaintiffs were not entitled to any increase in their pensions by reason of any pay increase for active firemen. This brings us, then, to the effect of the 1939 amendment and any pay increases after its effective date on the amount of pension to which plaintiffs are entitled. The 1939 amendment removed the language in section 24 which prevented the application of the rule announced in the Terry case, and hence under it, pensions do increase as the pay of active firemen is increased. Moreover, the clear implication of the 1939 amendment is that the rule in the Terry case shall prevail because it says, as the 1938 ordinance did, that a decrease in the pay of active firemen shall not *reduce* the pension. The inference is that an increase in pay should increase the pension. Therefore, if the 1939 amendment applies to plaintiffs, they are entitled to such increase in the amount of their pensions as will be reflected from any pay increase for active firemen.

[2,3] At the time of the 1939 amendment of section 24 of Ordinance No. 2188-N.S., section 7 was also amended to restate the law as it formerly existed insofar as it is here pertinent, that any member of the fire department at the effective date of the ordinance or thereafter shall receive

a pension which, on reaching various ages, shall be a percentage of "the average salary attached to the rank or ranks held during the three years immediately preceding the date of retirement"; the same is true of the death benefit provisions (sections 11 and 13). The 1939 amendment to section 24 restated it as it previously existed with the deletion of the words above mentioned and provided that the pensions "granted" under the ordinance shall not be decreased, which carries the implication that they will be increased in accordance with the fluctuation in pay of active firemen. The foregoing clearly indicates that the ordinance was intended to apply to existing pensioners especially when we bear in mind the rule that pension laws must be liberally construed to achieve their beneficent purposes, Terry v. City of Berkeley, *supra*, 41 Cal.2d 698, 263 P.2d 833. In this connection it has been said: "Another consideration for pension allowances for retired civil officers, and not the least in importance, is to pay such retirement compensation as will provide for the retired officer or employee means of proper subsistence. An increase in the cost of living always justly calls for an increase in the compensation of those who labor to earn a livelihood, and this proposition obviously applies as well to those who labor for the public as those engaged in private employment, and, of course, equally so to those who, for reasons prescribed by law, have been retired from a public service to which they devoted many years of faithful adherence. We may add the observation that members of police and fire departments of a city are required, as such, to perform public duties always beset by imminent perils to their lives and limbs—indeed, more so than any other officers or employees engaged in the civil department of the public service. It is, therefore, not at all strange but gratifying to find that the government, as in the present instance, so far as police officers are concerned, has been just enough to make such provision for the compensation of such officers or employees as affords not only a fair reward to them while they are actively performing their public duties, but enough to insure them, according to possible vary-

ing conditions as to the cost of living, against want or penury after they have been compelled from their accumulated years or from physical disabilities incurred while in discharge of their public duties to 'lay down the shovel and the hoe.'" *Klench v. Board of Pension Fund Com'rs*, supra, 79 Cal.App. 171, 189, 249 P. 46, 52. In *Sweesy v. Los Angeles, etc., Retirement Board*, 17 Cal.2d 356, at page 361, 110 P.2d 37, at page 39, although the increase in pension benefits was expressly made retroactive, it was also stated: "It must be accepted as the settled law of this state that unless the contrary intention plainly appears persons having a pensionable status are entitled to receive any increase of benefits which may be provided. Sweesy's pension rights vested at the time he was retired from service, that is, upon the happening of the contingency upon which the pensionable right depended." In commenting on other cases the court said at page 360 of 17 Cal.2d, at page 39 of 110 P.2d: "In *Klench v. Board of Pension Fund Com'rs*, supra, it was held that under the law there involved a pensioner was entitled to the benefits afforded by the increases in the pay attached to the rank he held at the time of his retirement, and that his right to payment was not limited to the amount he was receiving at the time of his retirement. *The conclusion was based on the observation that one who has been regularly placed on the pension roll is entitled to all the benefits of the system.* The case followed *Aitken v. Roche*, supra, wherein it was held that under the system and the charter provisions the pensioner was afforded the benefits of subsequent increases in the pay attached to the rank he held at the time of retirement." (Emphasis added.) In *Brummund v. City of Oakland*, 111 Cal.App.2d 114, 244 P.2d 441, the fireman was an employee and member of the retirement system when the city charter was amended in 1943 to give a widow of a fireman who died while in service from a non-service cause \$1,000 (which had previously been the case) or a return of all the contributions made by the fireman, whichever the widow chose. Plaintiff's husband died in 1950 and it was held

she could recover the amount contributed including that contributed prior to 1943, the court stating at page 117 of 111 Cal. App.2d, at page 443 of 244 P.2d: "As the section states that in the event of the death of a member under the circumstances therein set forth, his widow shall elect whether to receive \$1000 or the 'refund of all such sums as have been deducted from his pay and contributed to' the fund, it is obvious that this would include the sums paid before the amendment as well as after, unless there is some legal reason why the section cannot be made retroactive in that sense. Appellants contend that the amendment operates only prospectively, that the deductions from pay paid into the fund were not contributions but public moneys, and that to give the amendment a retroactive effect would be making a gift of public moneys and therefore illegal. * * *

"In our case the refunds provided by section 104(2) are in nowise limited to those deducted pursuant to the provisions of any particular section but 'of all such sums as have been deducted' from the firemen's pay and contributed to the fund. Thus there is no apparent intention of the Legislature to limit the refunds to sums deducted at any particular time. In determining whether section 104(2) is to apply only to moneys deducted after its enactment date, the rule set forth in *Cordell v. City of Los Angeles*, 67 Cal.App.2d 257, 266, 154 P.2d 31, 36, must be borne in mind: 'Neither can we be unmindful of the rule so firmly established in this state that pension legislation must be liberally construed and applied to the end that the beneficent results of such legislation may be achieved. Pension provisions in our law are founded upon sound public policy and with the objects of protecting, in a proper case, the pensioner and his dependents against economic insecurity. In order to confer the benefits intended, such legislation should be applied fairly and broadly.'" In *Busch v. Turner*, 26 Cal.2d 817, 161 P.2d 456, 458, 171 A.L.R. 1063, the Legislature in 1943 amended the statute fixing the salary of the district attorney stating that the district attorney should receive a salary of \$2,400; it had formerly been \$1,800. The court

said: "The 1943 legislation was sufficiently broad in its terms to include incumbents", that is, persons holding the office when the amendment was made, and further, "A statute purporting, in general terms, to increase salaries would ordinarily be construed to include incumbents * * *." In harmony with that line of reasoning it has been held that an amendment to a pension law which increases the amount of the pensions applies to those already retired. Board of Trustees of Policemen's Pension Fund v. Schupp, 223 Ky. 269, 3 S.W.2d 606; People ex rel. Albright v. Board of Trustees of Firemen's Pension Fund, 103 Colo. 1, 82 P.2d 765, 118 A.L.R. 984; McNichols v. Walton, 120 Colo. 269, 208 P.2d 1156; see, Ridgley v. Board of Trustees, etc., 371 Ill. 409, 21 N.E.2d 286; Raines v. Board of Trustees, etc., 365 Ill. 610, 7 N.E.2d 489; McCord v. Iowa Employment Security Commission, 244 Iowa 97, 56 N.W.2d 5.

The foregoing interpretation is further indicated by the circumstance that to apply the 1939 amendment to plaintiffs from its effective date, is in a sense not a retroactive application inasmuch as pension payments are a continuing obligation and the ordinance is being applied only to the pensions thereafter payable. This is nevertheless true whether we say the pension right is vested when the employee enters the employment or a pension system is established after he enters the employment, or is vested when the employee retires. It could hardly be doubted that the 1939 amendment applies to firemen then in the city service. No less does it apply to an employee because he has retired. Hence Aetna Casualty & Surety Co. v. Industrial Accident Comm., 30 Cal.2d 388, 182 P.2d 159, is readily distinguishable because there the employer's liability was fixed by a prior injury which was not merely an antecedent fact. Here the retirement is only an antecedent fact because the pension obligation is a continuing one and has force from the time the employment begins (see, Allen v. City of Long Beach, 45 Cal.2d 128, 287 P.2d 765), and the retirement does not change the employees' rights insofar as the instant case is concerned. In Gregory v.

State of California, 32 Cal.2d 700, 197 P.2d 728, 4 A.L.R.2d 924, we held that an amendment to a statute authorizing interest on taxes paid under protest to the state was applicable to a recovery of taxes after the effective date of the amendment even though the recovery of interest was not allowed when the taxes were paid, and distinguished the Aetna case on the ground that the amendment operated on future events. (See, also, Record v. Indemnity Ins. Co., 103 Cal.App.2d 434, 229 P.2d 851.)

The cases relied upon by defendant such as O'Dea v. Cook, 176 Cal. 659, 169 P. 366; Jordan v. Retirement Board, 35 Cal.App.2d 653, 96 P.2d 973; Chaney v. Los Angeles County Retirement Board, 59 Cal.App.2d 413, 138 P.2d 735; Holmberg v. City of Oakland, 55 Cal.App. 270, 203 P. 167, and Brophy v. Employees Retirement System, 71 Cal.App.2d 455, 162 P.2d 939, are distinguishable. In the O'Dea case the question was whether an amendment fixing a time limit of death within one year after injury would cut off the widow of an employee previously injured, who later died, and the court felt not "compelled" to give a retroactive effect to the amendment. As was pointed out in Kern v. City of Long Beach, 29 Cal.2d 848, 851, 179 P.2d 799, the O'Dea case considered the pension as vested and not subject to be taken away. In the Chaney case the change in the law would adversely affect the pensioner and the language indicated the pensioner could choose the old law or the new law. In the Brophy case the statute by its language was prospective and construed to apply to those then receiving pensions. We do not have language and legislative action equivalent to that used here in any of the cited cases. The Jordan and Holmberg cases are out of harmony with the cases hereinabove discussed and are disapproved.

The judgment is reversed and the trial court is directed to enter judgment in accordance with the views herein expressed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.

46 Cal.2d 220

Thomas M. JENKINS et al., Petitioners,
v.

Goodwin J. KNIGHT, Governor of the State
of California, Respondent.

Ross H. BOYD et al., Petitioners,
v.

Goodwin J. KNIGHT, Governor of the State
of California, Respondent.

Herbert LICKER et al., Petitioners,
v.

Goodwin J. KNIGHT, Governor of the State
of California, Respondent.

Sac. 6639, 6637, 6638.

Supreme Court of California,
In Bank.

Feb. 14, 1956.

Original proceedings in mandamus to compel Governor to call special elections to fill vacancies in the legislature. The Supreme Court, Gibson, C. J., held that duty imposed upon Governor by Constitution, West's Ann.Const. art. 4, § 12, to issue writs of election to fill vacancies in the legislature was mandatory and ministerial in character and hence subject to writ of mandamus, but that act of Governor in fixing date for such elections so as to coincide with presidential primary election, thereby avoiding expense of special elections, was not abuse of discretion, since it was already too late to hold elections in time for persons elected to fill such vacancies to qualify until near close of budget session of the legislature.

Alternative writs discharged and peremptory writs denied.

1. Mandamus ⇨71

Mandamus will issue to compel Governor to perform ministerial acts required by law, either statutory or constitutional.

2. Mandamus ⇨72

Inherently executive or political acts of Governor, such as granting pardons, calling special sessions of the legislature and signing or vetoing bills, which require the exercise of judgment or discretion, are not subject to judicial control by mandamus.

3. Mandamus ⇨71

In determining whether an act required by law is "ministerial" in character and hence subject to mandamus, the critical question is whether such act involves exercise of judgment and discretion.

See publication Words and Phrases, for other judicial constructions and definitions of "Ministerial".

4. Mandamus ⇨74(2)

The duty imposed upon Governor by Constitution to issue writs of election to fill vacancies in the legislature is mandatory and "ministerial" in character, and hence subject to judicial control by mandamus, particularly since it is provided by statute that when such vacancies occur the Governor shall issue writs of election at once. West's Ann.Gov.Code, § 1773; West's Ann.Const. art. 1, § 22; art. 4, § 12.

5. Constitutional Law ⇨35

Provisions of state Constitution are mandatory and prohibitory unless expressly declared to be otherwise. West's Ann. Const. art. 1, § 22.

6. Mandamus ⇨63

The propriety or impropriety of issuing a writ of mandamus is to be determined by the nature of the thing to be done and not by the office of the person to whom the writ is directed.

7. Elections ⇨32

Exercise of duty enjoined upon Governor by Constitution to issue writs of election to fill vacancies in the legislature cannot be made dependent upon whether county board of supervisors considers an election to fill such vacancy to be in the public interest. West's Ann.Gov.Code, § 1773; West's Ann.Const. art. 4, § 12.

8. Elections ⇨38

Since statutes do not fix maximum time within which special elections to fill vacancies in the legislature must be held but specify that at least 70 days' notice of such election must be given, Governor has discretion to set such election for some date after expiration of the 70-day period within a reasonable time after issuance of proclamation ordering such election. West's Ann.Elections Code, § 1001; West's Ann.

Gov.Code, § 1773; West's Ann.Const. art. 4, § 12.

9. Mandamus ⇨74(2)

Delay in issuing proclamations ordering special elections to fill vacancies in the legislature until after proceedings in mandamus had been commenced to compel Governor to act and it was too late to give required notice of and hold such elections in time for persons elected to fill such vacancies to qualify until near the close of budget session of legislature could not be remedied in mandamus proceeding. West's Ann. Elections Code, §§ 1001, 5932.5; West's Ann.Gov.Code, § 1773; West's Ann.Const. art. 4, § 12.

10. Mandamus ⇨74(2)

Where, at time proclamations were issued on January 4, 1956, ordering special elections to fill vacancies in the legislature, which had occurred in January and July, 1955, it was already too late to give required 70-day notice of and hold such elections and count absentee ballots in time for persons elected to fill such vacancies to qualify until near close of 1956 budget session of the legislature, fixing date of such elections to coincide with presidential primary election on June 5, 1956, thereby avoiding expense of special elections, was not abuse of discretion subject to judicial control by mandamus. West's Ann.Elections Code, §§ 1001, 5932.5; West's Ann. Gov.Code, § 1773; West's Ann.Const. art. 4, § 12.

Aaronson & Cohn, Melvin E. Cohn, Michael Aaronson, San Carlos, Frank W. Rose, William W. Penaluna, San Mateo, Roger Kent, San Francisco, and Lester Van Tatenhove, Santa Ana, for petitioners.

Edmund G. Brown, Atty. Gen., and Leonard M. Friedman, Deputy Atty. Gen., for respondent.

GIBSON, Chief Justice.

The Constitution of California provides that when vacancies occur in either house of the Legislature the Governor "shall issue writs of election to fill such vacancies", Cal.Const. art. IV, § 12, and it is

provided in section 1773 of the Government Code that when such vacancies occur the Governor shall issue writs of election "at once."

Three seats in the Assembly became vacant as a result of the resignation or death of persons elected for the term ending December 31, 1956. One of the vacancies occurred on January 3, 1955, and the other two in July of that year. The Governor failed to call special elections to fill the offices, and on August 29, 1955, petitioners brought these original proceedings in mandamus to compel him to act. After briefs had been filed and the cases had been orally argued, the Governor, on January 4, 1956, issued proclamations ordering special elections to be held on June 5, 1956, the date of the presidential primary election.

These proceedings raise questions involving the power of the court to require the Governor to act, and the extent, if any, to which he has discretion with respect to calling and fixing the date for special elections to fill legislative vacancies.

[1] There is a conflict of authority in this country as to whether a governor is amenable to mandamus with respect to any of his duties. See 105 A.L.R. 1124; Kumm, Mandamus to the Governor in Minnesota (1924), 9 Minn.L.Rev. 21; cases collected in Holcomb, Mandamus to the Chief Executive of the State (1922), 3 S.W. Pol.Sci.Q. 25. In some jurisdictions courts refuse to issue the writ against a governor under any circumstances, on the theory that interference with his action constitutes a violation of the doctrine of separation of powers or upon the ground that the issuance of a writ is inexpedient because of possible difficulty in enforcing it. See 105 A.L.R. 1124, 1128, 1144; Kumm, Mandamus to the Governor in Minnestota (1924), 9 Minn.L.Rev. 21, 32; Holcomb, Mandamus to the Chief Executive of the State (1922), 3 S.W.Pol. Sci.Q. 25-29. This reasoning has been rejected in many jurisdictions, including California where it has been consistently held for more than three quarters of a century that the writ will issue to compel a governor to perform ministerial acts required by law. *Stuart v. Haight*, 39 Cal. 87, 91;

Harpending v. Haight, 39 Cal. 189, 209 et seq.; Elliott v. Pardee, 149 Cal. 516, 520, 86 P. 1087; Hollman v. Warren, 32 Cal.2d 351, 354 et seq., 196 P.2d 562; see McCauley v. Brooks, 16 Cal. 11 (overruled on other grounds in Stratton v. Green, 45 Cal. 149).

These decisions are based on the fundamental principle that under our system of government no man is above the law. Chief Justice Stephen Field, speaking for the court in the early case of McCauley v. Brooks, 16 Cal. 11, 54-55, stated that where no discretion exists and a specific legal duty is imposed, ministerial in its character, an officer of the executive department of government, like any other citizen, is subject to judicial process and that, if this were not so, the government would cease to deserve the "high appellation" of being a government of laws. In the leading cases of Harpending v. Haight, 39 Cal. 189, 211-213, and Elliott v. Pardee, 149 Cal. 516, 520, 86 P. 1087, it was held that the Governor should not be exempted from judicial process solely because he is the chief executive and that, like subordinate officers, he is amenable to mandamus to compel the discharge of a ministerial duty which a body of citizens has a right to have performed. The duties whose performance was compelled in the cited cases were enjoined by statute, but there is no indication that a different result would have been reached had they been imposed by the Constitution. Although the courts in a few jurisdictions have held that they will not enforce ministerial duties imposed upon a governor by a constitution, we can see no logical basis for this classification. It would seem just as important to enforce duties directed by the people through the Constitution as those prescribed by the Legislature. Cf. O'Brien v. Olson, 42 Cal.App.2d 449, 109 P.2d 8.

[2,3] Many acts of the Governor are, of course, inherently executive or political in nature, such as granting pardons, calling special sessions of the Legislature and signing or vetoing bills. See Harpending v. Haight, 39 Cal. 189, 208. They require the exercise of judgment or discretion, and for this reason the courts will not interfere with their performance. *Unfettered*

terms "political" and "executive" have been used loosely in some jurisdictions as an explanation for denying the writ in cases where the courts failed to make a proper analysis of the nature of the duty to be performed. The critical question in determining if an act required by law is ministerial in character is whether it involves the exercise of judgment and discretion.

[4,5] It is clear that the duty imposed upon the Governor to issue writs of election to fill vacancies in the Legislature is ministerial in character. The Governor has no discretion to determine whether an election should be called; he is commanded by the Constitution to issue a proclamation. Const. art. IV, § 12. The provisions of our Constitution are mandatory and prohibitory unless expressly declared to be otherwise, see Cal.Const. art. I, § 22, and the duty to call elections to fill legislative vacancies is mandatory.

[6] In related cases where officers enjoined by law to call a special election failed to act, it has been established that the duty is ministerial and that its performance may be compelled by mandamus. *Blotter v. Farrell*, 42 Cal.2d 804, 270 P.2d 481; *Wahl v. Waters*, 11 Cal.2d 81, 77 P.2d 1072; *Morrow v. Board of Directors*, 219 Cal. 246, 26 P.2d 292; *Othmer v. City Council of City of Long Beach*, 207 Cal. 263, 277 P. 857; *Hill v. Board of Supervisors*, 176 Cal. 84, 161 P. 514 (overruled on other grounds in *Simpson v. Hite*, 36 Cal.2d 125, 222 P.2d 225); *Scheafer v. Herman*, 172 Cal. 338, 155 P. 1084; *Hopping v. Council of City of Richmond*, 170 Cal. 605, 150 P. 977 (overruled by implication on other grounds in *Simpson v. Hite*, 36 Cal.2d 125, 222 P.2d 225); *Teague v. Board of Trustees*, 156 Cal. 351, 104 P. 581; *Frederick v. City of San Luis Obispo*, 118 Cal. 391, 50 P. 661; *People ex rel. Miller v. Common Council*, 85 Cal. 369, 24 P. 727; *Gibbs v. Bartlett*, 63 Cal. 117; *Dye v. Council of the City of Compton*, 80 Cal.App.2d 486, 182 P.2d 623 (overruled on other grounds in *Hunt v. Mayor*, 31 Cal.2d 619, 191 P.2d 426); *Whittemore v. Seydel*, 74 Cal.App.2d 109, 168 P.2d 212 (overruled on other grounds in *Hunt v. Mayor*, 31 Cal.2d 619, 191 P.2d 426);

Brown v. City Council, 103 Cal.App. 113, 284 P. 254; *Martin v. Board of Trustees*, 96 Cal.App. 705, 274 P. 1015; *Hilliker v. Board of Trustees*, 91 Cal.App. 521, 267 P. 367; *Magoon v. Heath*, 79 Cal.App. 632, 250 P. 583; *Ratto v. Board of Trustees*, 75 Cal.App. 724, 243 P. 466; *Worth v. Downey*, 74 Cal.App. 436, 241 P. 96; *Sidler v. City Council of City of Bakersfield*, 43 Cal.App. 349, 185 P. 194; *Wrigley v. South San Joaquin Irr. Dist.*, 31 Cal.App. 162, 159 P. 985; *Osborn v. Board of Supervisors*, 27 Cal.App. 85, 148 P. 970; *Bigelow v. Board of Supervisors*, 18 Cal.App. 715, 124 P. 554; *Locher v. Walsh*, 17 Cal.App. 727, 121 P. 712; *Conn v. City Council*, 17 Cal. App. 705, 121 P. 714, 719; *Good v. Common Council*, 5 Cal.App. 265, 90 P. 44. The authority of these cases with respect to the ministerial character of the function is not lessened by the fact that they involve local officials. "It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined." *Marbury v. Madison*, 1 Cranch 137, 170, 2 L.Ed. 60; see *Harpending v. Haight*, 39 Cal.2d 189, 210; *McCauley v. Brooks*, 16 Cal. 11, 44.

[7] The attorney general argues that, since no time is fixed in the Constitution within which the Governor must act after a vacancy occurs, his action involves an element of discretion. The answer to this argument is found in section 1773 of the Government Code which provides that, when vacancies occur, the Governor shall issue writs of election "at once." Shortly after the vacancy occurred in January 1955, the Governor stated that he then saw no necessity for calling a special election to fill the office in the absence of an expression of policy from the county board of supervisors. It is apparent that the Governor wished to avoid requiring the taxpayers to bear the expense of holding a

special election unless the supervisors were of the view that the expenditure would be warranted under the circumstances.¹ However, the exercise of the duty enjoined upon the Governor by the Constitution cannot be made dependent upon whether a board of supervisors considers an election to fill a vacancy in the Legislature to be in the public interest. The policy in this field has been determined by the people in section 12 of article IV of the Constitution. The importance of the duty to call special elections to fill vacancies in the Legislature is evident from the fact that failure to comply with the constitutional mandate would vitally affect the membership and operation of a coordinate branch of government as well as the basic right of the people to representation.

[8-10] The question remains whether the Governor, when he issued the proclamations on January 4, 1956, acted in accordance with the law in fixing June 5, 1956 as the date on which the special elections are to be held. Petitioners argue that since the budget session of the Legislature will convene on March 5 and last for not more than 30 days, the elections should have been set at the earliest possible date so that the districts would be represented for at least a part of that session. The statutes do not fix a maximum time within which such elections must be held but specify that a minimum of 70 days' notice must be given, Elections Code, § 1001.² The Governor therefore has discretion to set the election for some date after the expiration of the 70-day period, but it must, of course, take place within a reasonable time after the issuance of the proclamation. For example, if the Governor had issued a proclamation promptly after the first vacancy occurred on January 3, 1955, and had then fixed the date of the special election for June 5, 1956, a serious question would have arisen as to whether his action constituted a rea-

1. In *Gibbs v. Bartlett*, 63 Cal. 117, 118, this court held that when the duty to hold a special election is enjoined by law, performance of the duty cannot be refused upon the ground that there may not be sufficient funds in the treasury to defray the expenses of the election.

2. Section 1001 of the Elections Code, prior to its amendment effective September 7, 1955, provided that the proclamation should issue at least ten days before the date fixed for the election.

sonable exercise of discretion. We are not, however, confronted with that problem. The delay in issuing the proclamations cannot be remedied now; we are limited to the question of whether the Governor has abused his discretion in setting the date of the elections for June 5, 1956. The earliest possible date on which the elections could be held after January 4, 1956, the date the proclamations were issued, is March 14, and 16 additional days would have to be allowed for counting the absentee ballots. Elections Code, § 5932.5. Were the election to be held on March 14, and were the budget session to last the full 30 days, the session would be nearly over before the person elected could qualify. In these circumstances it certainly cannot be said that the Governor acted unreasonably in fixing the date at June 5 to coincide with the presidential primary, thus sparing the counties involved the expense of holding two elections within a three-month period.

The alternative writs are discharged, and the peremptory writs are denied.

SHENK, CARTER, TRAYNOR,
SCHAUER, SPENCE, and McCOMB, JJ.,
concur.



46 Cal.2d 169

Arthur W. HILL and Norman C. Clsna,
Petitioners,

v.

The SUPERIOR COURT of the State of California,
IN AND FOR the COUNTY OF
HUMBOLDT, Respondent.

Sac. 6646.

Supreme Court of California,
In Bank.

Feb. 10, 1956.

Original proceeding by two attorneys for writ commanding Superior Court, Humboldt County, to allow reasonable compensation for services and expenses in criminal case wherein attorneys as court-

appointed counsel had defended one charged with murder, assault with intent to commit murder, and with kidnapping. The Supreme Court, Spence, J., held that the allowance of \$1,000 to the attorneys was not, under the circumstances, an abuse of discretion.

Alternative writ discharged, and peremptory writ denied.

Carter and Schauer, JJ., dissented.

Opinion, 286 P.2d 382, vacated.

1. Attorney and Client ⚖️132

Under statute providing for allowances of reasonable compensation to court-appointed attorneys for representing indigent clients in criminal cases criteria ordinarily used in determining what constitutes reasonable fee in private transaction between counsel and solvent client are of little assistance, and more appropriate criteria may be found by considering amounts deemed proper as compensation for services of court-appointed counsel in other jurisdictions and also by considering compensation paid to public officers generally. West's Ann.Pen. Code, § 987a.

2. Statutes ⚖️223.2(1)

The statute providing for allowance of "reasonable sum" to court-appointed attorneys for representing indigent clients in criminal cases must be read in light of related statutes and of history of development of statutory provisions for payment of compensation to appointed counsel, all of which factors have a bearing upon legislative purpose and meaning in enacting the statute. West's Ann.Pen. Code, § 987a.

3. Attorney and Client ⚖️132

The continuing duty of counsel to represent the "defenseless" regardless of personal considerations, must be kept in mind in measuring extent of right which Legislature intended to confer upon counsel by use of phrase "reasonable sum" in statute providing for allowance of reasonable sum to court-appointed attorneys for representing indigent clients in criminal cases. West's Ann.Pen. Code, § 987a; West's Ann. Bus. & Prof. Code, § 6068(h).

4. Evidence ⇨25(1)

It is common knowledge that compensation generally paid to district attorneys and public defenders is substantially lower than the amount that would be deemed appropriate for corresponding legal work for private clients.

5. Attorney and Client ⇨132

The criteria to be used in determining a "reasonable sum" under statute providing for allowance of reasonable sum to court-appointed attorneys for representing indigent clients in criminal cases are statutory provisions of other jurisdictions for compensation, and general level of compensation paid to public officers for performing legal services in prosecution and defense of criminal proceedings. West's Ann.Pen. Code, § 987a; West's Ann.Bus. & Prof. Code, § 6068(h).

6. Attorney and Client ⇨132

Award of \$1,000 to two attorneys appointed by court to defend accused charged with murder, assault with intent to commit murder, and kidnapping was not under the circumstances, an abuse of discretion. West's Ann.Pen. Code, § 987a; West's Ann. Bus. & Prof. Code, § 6068(h).

Arthur W. Hill and Norman C. Cissna, Eureka, in pro. per.

Edmund G. Brown, Atty. Gen., Doris H. Maier and Frederick G. Girard, Dep. Attys. Gen. and Harold L. Hammond, Dist. Atty., Humboldt County, Eureka, for respondent.

SPENCE, Justice.

Petitioners seek a writ of mandate to compel the respondent court to allow "additional compensation to petitioners for services and expenses" while acting as the court-appointed counsel for Ezra Linwood Witham. The petition was originally filed in the District Court of Appeal, which court issued an alternative writ, and ordered a reference to ascertain the facts.

There is no dispute here concerning the essential facts. Petitioners Hill and Cissna were appointed by the respondent court to defend Witham, who was charged with murder, assault with intent to commit mur-

der, and kidnapping. Petitioner Hill had previously represented Witham by court appointment at the preliminary hearing. It is conceded that petitioners were experienced attorneys and prominent members of the bar of their county; and that they ably represented Witham on his trial. The record before us does not show the precise result of the trial. Apparently Witham was convicted but the death sentence was not imposed. Petitioner Hill, who had represented Witham at the preliminary hearing, also acted for him at the arraignment, and during eight days of trial and one night session. In addition, it appears that he spent 25½ hours in preparation for trial. This time included conferences with Witham and his witnesses, researching legal points, and drawing jury instructions, but did not include time spent in reviewing the transcript. Petitioner Cissna performed somewhat similar services except for the fact that he did not represent Witham at the time of the preliminary hearing.

Following the trial, petitioners applied to the respondent court for reasonable compensation under the provisions of section 987a of the Penal Code. They claimed that an award of \$5,000 to each petitioner, or a total of \$10,000 for both petitioners, would be reasonable compensation within the meaning of said section. After a hearing, the respondent court found that \$500 was a "reasonable sum" to be awarded to each petitioner, or a total of \$1,000 for both petitioners, and ordered that amount paid from county funds. Petitioners then filed their petition for a writ of mandate to compel the allowance of a greater sum.

The demurrer and answer to the petition have raised the question of the availability of the writ of mandate to control the discretion of the respondent court. We have concluded, however, that regardless of the procedural question of whether mandamus would be available in the event of a showing of an abuse of discretion, no such showing has been made here and therefore the writ must be denied.

At the time involved, the pertinent provisions of section 987a of the Penal Code read as follows:

"In any case in which counsel is assigned in the superior court to defend a person who is charged therein with crime, * * * such counsel * * * shall receive a reasonable sum for compensation and for necessary expenses, the amount of which shall be determined by the court, * * *." Stats. 1951, chap. 1160, § 2.

[1,2] The question of whether the respondent court abused its discretion depends upon the meaning of the phrase "reasonable sum" appearing in the above section. It is the theory of petitioners that the total award of \$1,000 is so unreasonably small as to constitute an abuse of discretion. Their view of the meaning of the phrase "reasonable sum" is apparently based upon the criteria ordinarily used in determining what constitutes a reasonable fee in a private transaction between counsel and a solvent client. We are of the opinion, however, that such criteria are of but little assistance here, as the transaction is not a private transaction and the client is not a solvent client but one who "is unable to employ counsel." Penal Code, § 987. As we view the situation it is essentially one where court-appointed counsel, as officers of the court, perform a public service at public expense. More appropriate criteria, therefore, may be found by considering the amounts deemed proper as compensation for the services of court-appointed counsel in other jurisdictions, and also by considering the compensation paid to public officers generally. Furthermore, section 987a must be read in the light of related statutes and of the history of the development of the statutory provisions for the payment of compensation to appointed counsel. All of the foregoing factors have a bearing upon the legislative purpose and meaning in enacting the section.

[3] Prior to 1941, there was no statutory provision for the compensation of court-appointed counsel and, in the absence of statute, county funds could not be expended for that purpose. *Rowe v. Yuba County*, 17 Cal. 61; *Lamont v. Solano County*, 49 Cal. 158. In that year, the Legislature enacted section 987a and pro-

vided that boards of supervisors might, by ordinance, provide a "reasonable sum" for such compensation out of public funds, and determine the amount thereof. Stats. 1941, chap. 451, § 1. In 1951, the section was amended to provide that court-appointed counsel should receive a "reasonable sum" for their compensation out of public funds, "the amount of which shall be determined by the court." Stats. 1951, chap. 1160, § 2. It is significant that both before the enactment of the section in 1941 and at all times since, section 6068(h) of the Business and Professions Code has provided that "It is the duty of an attorney: * * * (h) Never to reject, for any consideration personal to himself, the cause of the defenseless or the oppressed." Thus the continuing duty of counsel to represent the "defenseless," regardless of personal considerations, must be kept in mind in measuring the extent of the right which the Legislature intended to confer upon counsel by the use of the phrase "reasonable sum" in section 987a.

We now turn to the consideration of the statutes of other jurisdictions providing for the compensation of court-appointed counsel. Respondent has furnished a compilation of such statutes, and petitioners have not challenged its accuracy. It appears that in ten states (Arizona, Connecticut, Delaware, Florida, Kentucky, Louisiana, Missouri, South Carolina, Tennessee, and Utah) no provision is made for the compensation of court-appointed counsel in any case. In five states (Massachusetts, Mississippi, New Jersey, North Carolina, and Pennsylvania) no provision is made for such compensation except in homicide cases. In eight states where compensation is allowed (Illinois, Iowa, Kansas, Minnesota, Rhoda Island, Texas, Washington, and Wisconsin) a *per diem fee* for trial days has been fixed by statute, and the average *per diem* in these states is slightly in excess of \$25. The highest such *per diem* is provided in Minnesota and Wisconsin, where \$50 is allowed for each trial day and a lesser amount for each day spent in preparation. Minn.Stats.1953, § 611.07, M.S.A.; Wis.Stats.1951, § 357.26. In fifteen states where compensation is allow-

ed, no fixed per diem is specified, but the trial court fixes the total fee within the maximum limits permitted by statute. The maximum amount which may be allowed in homicide cases is higher in some of these states than that allowed in other felony cases, but taking the maximum allowed for the preparation and trial of homicide cases, it appears that the average maximum fee for such cases in these fifteen states is \$258. New York fixes the highest maximum fee for homicide cases. There the maximum is \$1,000 if there is but one appointed counsel and \$1,500 if there are two appointed counsel, with a further maximum of \$1,000 for expenses. New York Code of Criminal Procedure, § 308, as amended in 1949. The next highest maximum is that provided in Pennsylvania, where the maximum is \$500. Purdon's Pa.Stats.Annotated, Title 19, § 784, as amended in 1953. In computing the above-mentioned average maximum of \$258 in the fifteen states, the figure of \$1,500 has been used as applicable to New York, and the figure of \$500 has been used as applicable to Pennsylvania. Obviously, the maximum allowed in the remaining thirteen of these fifteen states is much lower. Alabama \$100, Code of Alabama 1940, Title 15, § 318; Arkansas \$250, Acts of Arkansas 1953, Act 276; Georgia \$150, Georgia Laws, Nov.-Dec. Session 1953, p. 478; Illinois \$250, Illinois Revised Statutes 1953, chap. 38, § 730; Mississippi \$150, Miss.Code 1942, § 2505, as amended 1950; Nevada \$300, Nev.Compiled Laws Supp.1943-1949, § 11357; New Hampshire \$150, Rev.Laws New Hamp.1942, chap. 428, § 3; Oklahoma, \$25, Okl.Stats.1951, Title 22, § 1271; Oregon \$150, Oregon Rev.Stats. 1953, Title 14, § 135.330; South Dakota \$50, S.D.Code 1939, Title 34, chap. 34.1901; Virginia \$50, Code of Virginia 1950, Title 14, § 14-181 as amended in 1954; West Virginia \$50, W.Va.Code 1955 annotated, chap. 62, § 6190; Wyoming \$200, Wyo. Comp.Stats.1945, § 10-806 as amended in 1951. It is thus apparent that the states last mentioned have not deemed it appropriate to fix the compensation to be paid to court-appointed counsel from public funds upon the same basis that compensation is fixed in private transactions between coun-

sel and solvent clients. Furthermore, petitioners have not called our attention to any case in which the compensation of court-appointed counsel has been fixed on that basis in any of the states, including the fourteen states which, like California, allow such compensation but do not prescribe by statute any fixed per diem or maximum fee. (Colorado, Idaho, Indiana, Maine, Maryland, Massachusetts, Michigan, Montana, Nebraska, New Jersey, North Carolina, Ohio, Rhode Island, and Vermont.)

[4] With respect to the compensation of public officers, it is a matter of common knowledge that the compensation generally paid to district attorneys and public defenders is substantially lower than the amount that would be deemed appropriate for corresponding legal work for private clients. To illustrate, it is only necessary to consider the salary provided at the time for the district attorney of the county in question, and the salary which has since been provided there for the newly created office of public defender. The salary of the district attorney was \$9,000 per year, and he was not permitted to engage in private practice. The salary of the public defender is \$4,800 per year, and he is permitted to engage in private practice, but he must maintain his office at his own expense for the performance of his public duties.

Petitioners cite the minimum fee schedule adopted by the bar of their county, which prescribes a minimum fee of \$750 for representing a defendant charged with murder, and a minimum fee of \$250 for representing a defendant charged with any other felony. While such minimum fee schedule may have some bearing in determining appropriate compensation in a private transaction between counsel and a solvent client, such is not the case here. It should be noted in this connection that if the accused had been possessed of \$1,000 in cash and had no other obligations, he could not have been deemed to be, in any fair sense of the term, a person "unable to employ counsel", Pen.Code, § 987; and more particularly in view of the above-mentioned duty imposed upon counsel by sec-

tion 6068(h) of the Business and Professions Code. Is it reasonable to assume that the Legislature intended that the accused who is possessed of \$1,000 should be compelled to obtain private counsel out of his own funds, while the accused who is entirely without funds should be entitled to court-appointed counsel who would receive compensation out of public funds in a much greater amount? We believe that the question answers itself.

[5,6] For the reasons stated, we conclude that the criteria to be used in determining a "reasonable sum" for compensation in this type of case are not the same as those ordinarily used in fixing fees for services performed as the result of a private transaction between counsel and a solvent client. On the contrary, we believe that it was intended that such compensation should be determined in the light of counsel's continuing duty to the "defenseless" Bus. & Prof.Code § 6068(h); and that the more reliable guides for the determination of proper compensation for court-appointed counsel under our statute are to be found by considering the statutory provisions of other jurisdictions for compensation in such cases, and by considering the general level of compensation paid to public officers for performing legal services in the prosecution and defense of criminal proceedings. Giving due consideration to these criteria, it cannot be said that the trial court abused its discretion in awarding the total sum of \$1,000 for the services performed by petitioners. While the award of a somewhat greater amount might have been sustained as being within the discretion of the trial court, it seems entirely clear that the sum awarded cannot be declared unreasonable when compared with the amounts deemed appropriate as compensation for like services under like circumstances.

The alternative writ is discharged and the peremptory writ is denied.

GIBSON, C. J., and TRAYNOR and McCOMB, JJ., concur.

SHENK, Justice.

I concur in the judgment.

CARTER, Justice.

I dissent.

The major premise of the majority opinion is that the legislation, Pen.Code, § 987a, requiring the payment from public funds of counsel appointed to defend indigent defendants in criminal cases does not mean what it says when it specifies that "reasonable" fees should be allowed. It says that the test is not what would be reasonable if the defendant had the funds to employ counsel. The test given is something less than that but no other criterion is given except to compare the amounts allowed in other states or paid to a public defender. That is not and should not be the test, and, as applied here, the amount allowed is patently inadequate. The statute requires that the fees be "reasonable," a question later discussed, and it was adopted in a background of much research and effort on the part of lawyers, judges and others interested in endeavoring to make real and effectual the constitutionally guaranteed right to counsel. Section 987a should be interpreted in that light rather than under the test used by the majority which is that the fee is more than nothing but less than the usual and reasonable amount because various states have refused to allow a sufficient amount to obtain proper representation. Since when has it become the rule that California must follow other states in the adoption or interpretation of liberal legislation?

For illustration it is said by David Mars,¹ "In many states, however, the compensation paid to assigned counsel falls far below what may be considered reasonable lawyers' fees * * *."

1. "The author is associated with Government and International Relations at the University of Connecticut. He was formerly with the corresponding department at Rutgers University where he had done his post-graduate studies. At the same time he lectured in The Dep't of History and Political Science in Rutgers Univ.

College at Rutgers. His previous effort in the field of criminal law was an article on 'Public Defenders in Connecticut', which first appeared in *State Government* and was reprinted in the *Congressional Record—Editor*." 46 Jour.Crim.Law, Crim. & Pol. Sci., 199.

"If it is the State's duty to prosecute and to punish proven criminals, it is equally the State's duty to protect and to uphold the rights of all criminal defendants until the burden of proof against them has been successfully established. Where these defendants are impoverished or bankrupt, some provision for legal assistance in their cases must be made. If such a situation appears ridiculous, then the opposite picture must be imagined: a case in which a poor person is being prosecuted in a criminal proceeding, with no one to defend him or his interests. Such a picture would be at complete variance with the underlying spirit of our system of jurisprudence." 46 Jour.Crim.Law, Crim. & Pol.Sci., 199, 200, 205. It is said: "Payment of appointed counsel varies strikingly, from five dollars to one thousand dollars, depending on the service and the state. A more realistic examination of this problem is essential if the right to counsel as extended in theory is to become equally substantial in practice." Beane, *The Right to Counsel in American Courts*, p. 139. And: "Payment of counsel is a subject intimately connected with the duty to appoint counsel and the quality of service furnished by counsel. It is a well-established American principle that one should be paid for work done at the request of, and for the benefit of, others. Nevertheless, from an early date, members of the legal profession, like medical practitioners in analogous circumstances, have given freely of their services to those facing criminal prosecution. Willingness to serve for absurdly low fees and upon insubstantial promises must be classed with the 'volunteered' defense as evidence of legal humanitarianism.

"But as the practice of law has become a mass-production enterprise in large cities and as the nation has moved toward industrialization and urbanization, the close contact which lawyers once enjoyed with the general public has been broken, or at least severely weakened * * *.

"The duty of defending prisoners without prospect of payment seems unfair to most attorneys; to some it is a real hardship. Their objection is that most people will not perform useful tasks without pay; when

charitable medical care is mentioned, the answer is that doctors can give a short time each day or each week to needy individuals and still maintain a substantial income, whereas lawyers, once appointed, must devote all or nearly all of their time to a pending case, sometimes with the prospect of the trial lasting for weeks.

"Whether resulting from the greater influence of state bar associations upon state governments or from some other cause, statutory provisions of a sort exist in most states for the payment of appointed counsel, but appointed counsel in federal courts continues to go unrewarded by Congress. * * * In general, it can be said that the payments allowed by the various states are far below the fees which most attorneys would charge, although numerous exceptions to such a statement can be found * * *.

"In the absence of a statutory provision there is no duty upon a county to pay appointed counsel. This attitude is based on the argument that the attorney is discharging a public duty, a duty as an officer of the court, or a burden assumed with a lawyer's oath, or simply that there is no obligation on the part of the county. Two exceptions to this reasoning are provided by the highest courts of Indiana and Wisconsin. In each, statutes which denied any duty of the counties to pay attorneys appointed by the court were held invalid. The subject of payment for appointed counsel will undoubtedly receive increased attention as the practice of appointing counsel becomes more general. Certainly the present situation is highly unsatisfactory." *Id.*, p. 135. Samuel Rubin of the Maryland Bar has this to say: "In most criminal cases there is more or less unequal combat between the accused on the one hand and the forces of the state on the other. This inequality is so glaring that it is not unusual for the average citizen to assert that the courts exist not for the good of all regardless of wealth or power, but for the benefit of the fortunate few as against the many. This is especially true in the case of the destitute who have no adequate facilities for their legal defense and for the safeguarding of their rights. There are no

adequate legal facilities available for this purpose *without cost to the accused*. All destitute persons charged with crime should be able to obtain justice in our courts. They should be given adequate counsel and, what is of equal importance, means of making investigations, in order that the truth in the case may be brought to the attention of the court and jury, and a proper verdict and sentence rendered * * *.

"One of the weaknesses of the assignment system is the fact that the able and experienced lawyers do not care for such appointments. The system leads to abuse and favoritism if the attorney is compensated, and if there is no compensation the system has little value. There are comparatively few lawyers with extensive experience in criminal practice, and lawyers in civil practice rarely have the experience to handle criminal cases adequately. If the fees are small the interest of the attorney is only half-hearted, and he will often advise the client to plead guilty, giving as his reason that by avoiding a protracted trial the prisoner is more likely to receive leniency than if he enters a plea of 'not guilty'. The system rarely works satisfactorily * * *.

"Legal assistance to the destitute in criminal cases is a matter affecting the well-being of the whole community. It is important that the innocent be adequately protected. It is also important that the guilty be justly treated. To this end the poor man charged with crime should be provided with adequate legal protection without cost. Such a provision will dissipate the idea that only the rich can avail themselves of their legal rights, and it will mark a notable step forward in the proper administration of justice throughout the country." 39 Am.Bar.Assn.Jour. 893. The Honorable Henry P. Chandler, Director, Administrative Office of the United States Courts, in discussing the representation of indigent defendants in criminal cases in the federal courts, says: "But notwithstanding the law, the practical provision for counsel in the case of poor persons accused of crime in the federal courts, is only rudimentary and inefficient, because there is no provision for compensating counsel appointed by

the courts to represent such persons, or even to reimburse them for their ordinary expenses incurred in the defense * * *.

"For approximately twenty years now the conviction has been growing among persons acquainted with the conduct of criminal cases in the federal courts, that for poor persons the spirit of the Sixth Amendment that persons accused of crime shall have the assistance of counsel for their defense, is far from being fulfilled. In fact the lack of provision for compensating counsel appointed to defend poor persons accused of crime or even paying their out-of-pocket expenses, has come to be regarded as perhaps the most serious single defect in the federal judicial system." 28 Calif. State Bar Jour. 473. Mr. Harry Graham Balter, an eminent member of the Los Angeles Bar, states: "To a considerable extent, in the state courts, the traditional concept of assignment of individual members of the Bar to represent indigent accused, without being compensated, but as a gratuitous discharge of the lawyer's professional obligation, has gradually given way to the *more realistic concept* of either (a) the Public Defender, supported by taxes, (b) the Voluntary Defender, patterned after the Public Defender System, but supported by philanthropic funds or by Community Chest funds, or (c) appointment of counsel in a specific case, but with provisions for reasonable compensation. In spite of the decided trend towards more systematized representation for indigent accused, that the constitutional safeguard of adequate legal representation does not always measure up to the standards set by the Supreme Court of the United States, is evidenced by the 'flood of petitions' reaching that court, alleging deprivation of the accused in some of the state courts of due process of law and other constitutional rights, usually centering around the question of proper legal representation afforded the accused." Emphasis added; 24 Calif.State Bar Jour. 114. In regard to the fees paid in other states to appointed counsel Emery A. Brownell, a leader in the field of legal aid, states: "Only twenty-three states provide any compensation for attorneys in other than capital cases. In a

majority of these states the maximum fees allowed are grossly unremunerative—especially when it is considered that there is no compensation for preparation before the trial except in Wisconsin, and no provision for expenses except in California and Wisconsin.” Brownell, Legal Aid in the United States, p. 124.

Section 987a must be viewed in the light of the foregoing thoughts. Manifestly its object was to assure more efficient and satisfactory representation of indigent defendants in criminal cases. If this court and the superior courts allow only token fees or fees that bear no relation to the services performed, as does the majority here, the object of the section is defeated. The situation that gave rise to its passage has not been ameliorated.

Section 987a states that a reasonable fee should be allowed. That is a phrase long known in the law and many factors are taken into consideration. “The reasonableness of the fee charged or allowed must be determined like any other fact in issue in a judicial proceeding, and in making such determination all the facts and circumstances of the particular case, including so far as applicable those enumerated herein below, must be taken into consideration.

“In determining what is a reasonable attorney’s fee or allowance for legal services rendered, many and varied elements or factors are to be considered. Among the principal elements or factors to be considered are the amount and character of the services rendered, the nature, and importance of the litigation or business in which the services were rendered, the degree of responsibility imposed on, or incurred by, the attorney, the amount of money or the value of the property affected by the controversy, or involved in the employment, the degree of professional ability, skill, and experience called for and exercised in the performance of the services, and the professional character, qualifications, and standing of the attorney, and also the amount recovered.

“The labor, time, and trouble involved and expended by the attorney, are also elements to be considered, although it has

been held that the element of time is of minor importance, and standing alone is not a basis for compensation. Time, in this connection, means the length of time employed by the attorney in preparation for, and trial of, the case, and not the length of the time the litigation has been permitted to remain in court. * * *

“The customary charges or fees, if any, for similar services is an important element to be considered in determining the reasonable value of services rendered by an attorney, and not what the attorney thinks is reasonable; and speaking generally, in the absence of a special contract, an attorney is entitled to the amount that is reasonable and customary in the same vicinity for services of like kind, performed under like conditions and circumstances. Employment of an attorney with knowledge of his rate of charges, without stipulating as to price, may be regarded as evidence of a contract to pay at such rate; but the fact that the client, when informed, during the pendency of a suit, of the charges his attorney is making, fails to express dissatisfaction, is not an acquiescence in those charges, and does not bind him to pay at such rate for future services in the same suit. An unentered order fixing the compensation of an attorney for services rendered cannot control the amount of recovery in a subsequent action for such services.

“*Bar association schedule of charges.* In determining the reasonableness of an attorney’s fee, the schedule of minimum fees prescribed by the local bar association is persuasive, but not conclusive, of the reasonable value of the services; and in the absence of a special or implied agreement, a client is not necessarily bound to pay according to the rates prescribed by the rules and regulations of the bar association. * * *

“*Financial ability or prominence of client.* The financial ability of a client may be taken into consideration, not for the purpose of enhancing the amount above a reasonable compensation, but for the purpose of determining whether or not he is able to pay a fair and just compensation for the services rendered, and as a factor in determining the value of the attorney’s

services, or as an incident in ascertaining the importance and gravity of the interests involved in the litigation. The prominence of a litigant is ordinarily entitled to no consideration in fixing the value of his attorney's services, although it may sometimes be taken into consideration in fixing the value of the legal services rendered." 7 C.J.S., Attorney and Client, § 191(a)(2). (See, also, 5 Am.Jur., Attorneys at Law, § 198.) (See 143 A.L.R. 672.) No doubt many of those factors were taken into consideration by the bar association of the county where the trial was held when it adopted a minimum fee schedule. The amount awarded here (\$500 for each attorney) was \$250 less than that minimum. The members of the bar in adopting the schedule were well aware of all the overhead costs and other factors to be considered and which were appropriate to the community. They knew more about those things than the courts. The schedule lists "minimum" fees which means the least that should be charged under the most favorable circumstances and still retain a semblance of correlation between the services performed and the compensation received. The fees here allowed are plainly inadequate. The trial consumed eight days which means an allowance of a gross amount of about \$63 per day without allowing anything for a retainer or fee for preparation work essential to the presentation of any case to a court or jury, and no allowance was made for office overhead or other expense in the preparation and handling of the case.

The salaries paid district attorneys and public defenders is not a proper measure for determining the compensation allowable to attorneys appointed to defend those charged with crime. With such positions go prestige and a certain steady income which may in a measure account for the difference between it and the cost of handling the legal work on a piece basis. These officials have no overhead expense as do attorneys engaged in private practice and all expenses incurred by such officials in the investigation and handling of criminal cases are paid out of public funds. Moreover, it is a matter of common knowl-

edge that the salaries of government officers do not match what they would receive for similar work in private activities whether it be legal or administrative work.

I would issue the writ on the ground that the court abused its discretion although I believe the order is appealable. It is not an order made after judgment substantially affecting the judgment but is a final order in a special civil proceeding which is made appealable by section 963(1) of the Code of Civil Procedure.

SCHAUER, J., concurs.



46 Cal.2d 76

Arthur Paul SCOTT, a minor, by his guardian ad litem, Henry R. Scott, Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION
of the State of California, Respondent.

Pacific Coast Borax Company et al., Real
Property in Interest.

L. A. 23315.

Supreme Court of California.

In Bank.

Feb. 3, 1956.

Original proceeding for prohibition or mandamus against industrial accident commission to halt proceedings therein until final judgment was reached in Superior Court action involving same subject matter. The Supreme Court held where personal injury action was brought in Superior Court, and defendant therein and its compensation carrier subsequently invoked jurisdiction of industrial accident commission by filing for adjustment of claim arising out of same personal injuries, prohibition would issue against industrial accident commission to bar it from proceeding before Superior Court made final determination of controlling jurisdictional question.

Writ of prohibition issued.

Opinion 283 P.2d 323 vacated.

1. Courts ⇐475(1)

Prohibition ⇐10(1)

When two or more tribunals in same state have concurrent jurisdiction, tribunal first assuming jurisdiction retains it to exclusion of all other tribunals in which action might have been maintained, and another tribunal, although it might originally have taken jurisdiction may be restrained by prohibition if it attempts to proceed.

2. Workmen's Compensation ⇐1177, 2084

Where at time of accident there is no workmen's compensation coverage, commission is without jurisdiction to grant workmen relief, and if there is such coverage superior court is without jurisdiction of damage action and must leave parties to pursue remedies before commission as superior court cannot award compensation benefits and commission cannot award damages for injuries. West's Ann.Labor Code, §§ 3201 et seq., 3706, 3755, 5302, 5313, 5501, 5502, 5800.5, 5814.

3. Judgment ⇐550

Workmen's Compensation ⇐1792

Determinations of industrial accident commission, like those of superior court, are res judicata in all subsequent proceedings, including court actions, between same parties or those privy to them, and after workman had filed superior court action for injuries, defendant therein and its workmen's compensation carrier filed with commission application for adjustment of claim arising out of same injuries, a determination as to coverage or jurisdiction in either commission or superior court would be res judicata in subsequent proceedings before other tribunal. West's Ann.Code Civ.Proc. § 416, West's Ann.Labor Code, § 5302.

4. Workmen's Compensation ⇐1178

Where proceedings pending in superior court and before industrial accident commission cover same subject matter, jurisdiction of commission and superior court are exclusive, not concurrent, in every respect except as to power to determine jurisdiction. West's Ann.Code Civ.Proc. § 416; West's Ann.Labor Code, § 5302, West's Ann.Const. art. 20, § 21.

5. Workmen's Compensation ⇐1177

Insurance carrier or employer, immediately upon occurrence of presumed industrial injury, and before or simultaneously with, furnishing hospital or medical care or compensation payments may file with commission application for adjustment of claim for liability and thus fix jurisdiction in commission to make controlling determination of jurisdiction and secure protection against any claim or delay in meeting obligations imposed by law. West's Ann. Labor Code, §§ 3755, 5501.

6. Prohibition ⇐6(2)

Where personal injury action was brought in superior court, and defendant therein and its compensation carrier subsequently invoked jurisdiction of industrial accident commission by filing for adjustment of claim arising out of same personal injuries, prohibition would issue against commission to bar it from proceeding before superior court made final determination of controlling jurisdictional question. West's Ann.Labor Code, §§ 3201 et seq., 3706, 3755, 5302, 5313, 5501, 5502, 5800.5, 5814.

7. Mandamus ⇐3(1)

Prohibition and not mandamus was appropriate remedy to bar industrial accident commission from proceeding with adjustment of claim where superior court had previously taken jurisdiction of injury action involving same injuries, until court would make final determination of jurisdiction. West's Ann.Labor Code, §§ 3201, et seq., 3706, 3755, 5302, 5313, 5501, 5502, 5800.5, 5814.

Hindman & Davis and E. Eugene Davis, Los Angeles, for petitioner.

Everett A. Corten and Daniel C. Murphy, San Francisco, for respondent.

Donald Gallagher and T. Groezinger, San Francisco, for real parties in interest.

Dryden, Harrington, Horgan & Swartz and Jacob Swartz, Los Angeles, as amici curiae on behalf of respondent and real parties in interest.

PER CURIAM.

Petitioner (sometimes herein called plaintiff) seeks by mandamus or prohibition to halt proceedings in a matter pending before respondent Industrial Accident Commission, until a final judgment shall have been reached in a superior court action in which recovery of damages is sought for the same personal injuries as are involved in the Industrial Accident Commission matter. Defendant in the superior court action claims, and plaintiff disputes that the injuries were suffered while plaintiff was acting as defendant's employee. We have concluded that a stay of the commission proceedings should be ordered.

Petitioner alleges that he is a minor, nineteen years of age and that on August 15, 1952, while on the premises of Pacific Coast Borax Company as an invitee, he suffered personal injuries through the negligence of such company. On December 23, 1953, through a guardian ad litem, he filed an action against the company in the superior court in Los Angeles, seeking recovery for his injuries. The company as defendant filed its answer. On October 19, 1954, pursuant to leave of court, defendant filed an amended answer, pleading as a fifth affirmative defense, "That the court herein has no jurisdiction of the action herein, the exclusive jurisdiction for injuries claimed by plaintiff being before the Industrial Accident Commission of the State of California." On October 27, 1954, the cause was set for trial for February 1, 1955.

On November 19, 1954, pursuant to plaintiff's motion to strike, the court struck the above quoted fifth affirmative defense from defendant's amended answer. The issue of jurisdiction of the commission remained in the case, however, by reason of other allegations of the answer.

On November 23, 1954, defendant in the superior court action and State Compensation Insurance Fund as its workmen's compensation insurance carrier filed with the

Industrial Accident Commission an application for adjustment of claim¹ arising out of the same personal injuries as those alleged by plaintiff in the superior court action, and at the same time requested a hearing thereon at the earliest possible date. This was the first proceeding filed with the commission in connection with the injuries, although it appears that immediately after petitioner was injured State Compensation Insurance Fund started paying him medical and compensation benefits under the Workmen's Compensation Law of this state, Labor Code, § 3201 et seq. These benefits, by December 23, 1953, the date petitioner filed the superior court action, totaled approximately \$1,400 for compensation payments, in addition to the medical and hospital care.

On January 7, 1955, over petitioner's request for a stay of proceedings by reason of pendency of the superior court action, a hearing was held before a referee of the Industrial Accident Commission, testimony was taken, and the matter was continued for further hearing to March 8, 1955.

On January 24, 1955, defendant in the superior court action moved for continuance of the trial therein, on the ground that "one of the main issues of the case is now being tried before the Industrial Accident Commission." The motion was denied. On February 1, 1955, defendant's second motion for a continuance was likewise denied and the superior court action proceeded to trial on the same day. Following the close of the evidence defendant moved for a directed verdict on the ground that the evidence showed as a matter of law that plaintiff had been injured in the course of his employment by defendant and that the Industrial Accident Commission had exclusive jurisdiction of the controversy. The motion was denied; the cause was submitted to the jury; the jury failed to agree and on February 14, 1955, was discharged. Defendant thereafter moved for entry of judgment in its favor under the provisions

1. It should be noted that petitioner does not challenge the right of the company, as the claimed employer, to initiate the proceedings before the commission. (See

Giaccalone v. Industrial Accident Comm., 1953, 120 Cal.App.2d 727, 730-733, 262 P.2d 79.)

of section 630 of the Code of Civil Procedure, on the same ground as it had moved for a directed verdict; the motion was denied on March 4, 1955; and the matter was set for retrial for June 14, 1955.

Following conclusion of the superior court trial in which the jury was discharged on February 14, 1955, petitioner again moved the Industrial Accident Commission to stay the proceedings before it and to continue the hearing set for March 8, 1955, but on February 24, 1955, his motion was denied by the referee who heard it. On March 8, 1955, petitioner filed this present stay proceeding with the District Court of Appeal. That court on March 24, 1955, issued its alternative writ of prohibition staying proceedings before the commission, and on May 16, 1955, filed its opinion ordering the issuance of a writ of mandamus. 283 P.2d 323. We granted a hearing and transferred the cause for further study of the problems involved. It appears that in the meantime a second superior court trial has been had and on June 27, 1955, judgment of nonsuit was rendered against plaintiff; on July 5, 1955, plaintiff filed notice of appeal, and the appeal is now pending in the District Court of Appeal, Second Appellate District.

The question thus presented is whether the Industrial Accident Commission may, and should, be required to suspend the exercise of its jurisdiction in the proceeding before it because of the pendency of the action in the superior court or on appeal therefrom. The issue is not one of simultaneous exercise of general concurrent jurisdiction; it is, rather, the right of proceeding simultaneously in two tribunals, the jurisdiction of each of which is essentially exclusive of the other but each of which has the power to make a determination of jurisdiction which, when final, will be conclusive upon the other.

[1] General principles applicable to controversies in which the same parties and the same subject matter are involved are these: When two or more tribunals in this state have concurrent jurisdiction, the tribunal first assuming jurisdiction retains it to the exclusion of all other tribunals in

which the action might have been initiated. Thereafter another tribunal, although it might originally have taken jurisdiction, may be restrained by prohibition if it attempts to proceed. *Greene v. Superior Court*, 1951, 37 Cal.2d 307, 310-311, 231 P.2d 821; *Browne v. Superior Court*, 1940, 16 Cal.2d 593, 597, 602, 107 P.2d 1, 131 A.L.R. 276; *Slinack v. Superior Court*, 1932, 216 Cal. 99, 105, 107, 13 P.2d 670; *Lee v. Superior Court*, 1923, 191 Cal. 46, 53, 214 P. 972; *M. H. Golden, etc., Co. v. Superior Court*, 1950, 98 Cal.App.2d 811, 221 P.2d 218; *Myers v. Superior Court*, 1946, 75 Cal.App.2d 925, 929-930, 172 P.2d 84; *Milani v. Superior Court*, 1943, 61 Cal.App. 2d 463, 469, 143 P.2d 402, 935; *Rilcoff v. Superior Court*, 1942, 50 Cal.App.2d 503, 507, 123 P.2d 540; *Wright v. Superior Court*, 1941, 43 Cal.App.2d 181, 183-184, 110 P.2d 529; *Gorman v. Superior Court*, 1937, 23 Cal.App.2d 173, 178, 72 P.2d 774. One reason for the rule is to avoid unseemly conflict between courts that might arise if they were free to make contradictory decisions or awards at the same time or relating to the same controversy; another reason is to protect litigants from the expense and harassment of multiple litigation. *Greene v. Superior Court*, 1951, *supra*, 37 Cal.2d 307, 311, 312, 231 P.2d 821; *Simmons v. Superior Court*, 1950, 96 Cal.App.2d 119, 130, 214 P.2d 844, 19 A.L.R.2d 288; *Gorman v. Superior Court*, 1937, *supra*, 23 Cal.App.2d 173, 178, 72 P.2d 774.

[2] In opposition to the granting of the writ respondent Industrial Accident Commission points out however, that the rules laid down in the cases are stated to apply and have been applied, in situations in which the first tribunal which exercised jurisdiction has such jurisdiction over the *same parties* and *subject matter*, could bring in any necessary new parties, and could do complete justice, dispose of the *whole* of the controversy, and afford all the relief sought. (See, e.g., *Greene v. Superior Court*, 1951, *supra*, 37 Cal.2d 307, 312, 231 P.2d 821 [child custody, guardianship]; *Browne v. Superior Court*, 1940, *supra*, 16 Cal.2d 593, concurring opinion at page 602, 107 P.2d 1, at page 5 [guardianship of incompetent]; *Slinack v. Superior Court*,

1932, *supra*, 216 Cal. 99, 106, 13 P.2d 670 [partition of personal property, appointment of receiver]; *M. H. Golden, etc., Co. v. Superior Court*, 1950, *supra*, 98 Cal.App. 2d 811, 815-816, 221 P.2d 218 [accounting, contract, money judgment]; *Simmons v. Superior Court*, 1950, *supra*, 96 Cal.App.2d 119, 131, 214 P.2d 844 [divorce, property rights]; *Myers v. Superior Court*, 1946, *supra*, 75 Cal.App.2d 925, 929, 172 P.2d 84 [rights in property, under purchase and sale contract]; *Rilcoff v. Superior Court*, 1942, *supra*, 50 Cal.App.2d 503, 505, 123 P.2d 540 [divorce, separate maintenance]; *Wright v. Superior Court*, 1941, *supra*, 43 Cal.App.2d 181, 183, 110 P.2d 529 [partnership dissolution]; *Gorman v. Superior Court*, 1937, *supra*, 23 Cal.App.2d 173, 177, 72 P.2d 774 [automobile collision damages]; see also *Reilly v. Police Court*, 1924, 194 Cal. 375, 378, 228 P. 860; *De Brincat v. Mogan*, 1934, 1 Cal.App.2d 7, 10, 36 P.2d 245; 13 Cal.Jur.2d 607-613; 21 C.J.S. Courts, § 492, pages 751-755; 14 Am.Jur. 437-440.) The same general principles appear to prevail where defendant enters a plea in abatement, by either demurrer or answer, on the ground that a prior action is pending between the same parties for the same cause. (See Code Civ.Proc. §§ 430, 597; 1 Cal.Jur.2d 45-59.) In the present situation, however, as already indicated, the two tribunals involved—the superior court on the one hand and the commission on the other—do *not* have concurrent jurisdiction over the whole of the controversy, and one of them will be without jurisdiction to grant any relief whatsoever, depending upon whether or not the injuries were suffered within the course and scope of an employment relationship and so covered by the workmen's compensation laws. In other words, as already indicated, the only point of concurrent jurisdiction of the two tribunals appears to be *jurisdiction to determine jurisdiction*; jurisdiction once determined will be exclusive, not concurrent. (See *Abelleira v. District Court of Appeal*, 1941, 17 Cal.2d 280, 302-305, 109 P.2d 942, 132 A.L.R. 715; *Palermo Land & Water Co. v. Railroad Commission*, 1916, 173 Cal. 380, 385, 160 P. 228.) If at the time of the accident there was no workmen's compensa-

tion coverage, then the commission is without jurisdiction to grant relief, and if there was such coverage then the superior court is without jurisdiction and must leave the parties to pursue their remedies before the commission. (See *Duprey v. Shane*, 1952, 39 Cal.2d 781, 789-790, 249 P.2d 8; *Edwards v. Hollywood Canteen*, 1946, 27 Cal. 2d 802, 805, 167 P.2d 729; *Baugh v. Rogers*, 1944, 24 Cal.2d 200, 213-214, 148 P.2d 633, 152 A.L.R. 1043; *Robbins v. Yellow Cab Co.*, 1948, 85 Cal.App.2d 811, 193 P.2d 956.) It is elementary that the type and extent of relief which can be granted and the factors by which such relief is determined differ materially between the two tribunals; the superior court cannot award workmen's compensation benefits, and the commission cannot award damages for injuries.

[3] The determinations of the commission, like those of the superior court, are *res judicata* in all subsequent proceedings, including court actions, between the same parties or those privy to them. (See Lab. Code, § 5302; *French v. Rishell*, 1953, 40 Cal.2d 477, 254 P.2d 26; *Duprey v. Shane*, 1952, *supra*, 39 Cal.2d 781, 790, 249 P.2d 8; *Goodman Bros. v. Superior Court*, 1942, 51 Cal.App.2d 297, 301-304, 124 P.2d 644.) Thus, if there is a final determination as to the matter of coverage (i.e., of jurisdiction) in either the commission or the superior court proceedings, such determination will be *res judicata* in subsequent proceedings before the other tribunal between the same parties or those privy to them. Petitioner's contention is that since the issue was first presented to the superior court and that court had assumed and was exercising jurisdiction, which attaches upon the service of process or the voluntary appearance of the person sued (Code Civ.Proc. § 416; see 13 Cal.Jur.2d 608-609, and cases there cited), the commission proceedings should be stayed until a final determination of the jurisdictional question in the superior court action. If in that action it is finally found that there was no coverage then, since the determination will be binding upon the commission the commission proceedings would perforce terminate. But if coverage is found, then commission proceedings would continue.

Other practical problems, and differences between this situation and that of completely concurrent jurisdiction in two different tribunals, are said to be these:

1. In a jury trial of the superior court action, it appears that a special interrogatory on the question of coverage would (at least in the absence of special circumstances) be necessary in order to disclose what was determined on that point, in case of a verdict for defendant. Without such a special interrogatory it could not be ascertained whether the verdict turned on one of the other pleaded defenses of absence of defendant's negligence, unavoidable accident, or contributory negligence of plaintiff, rather than on the issue of the employment relationship. This, however it is answered, is a mere incident of procedure which can be handled in the trial court.

2. By the provisions of section 21 of article XX of the California Constitution the Legislature is "expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workmen's compensation, by appropriate legislation * * * [including] full provisions for vesting * * * jurisdiction in an administrative body * * * to the end that the administration of such legislation shall accomplish substantial justice *in all cases expeditiously, inexpensively and without incumbrance of any character*; all of which matters are expressly declared to be the social public policy of this State, binding upon all departments of the State Government." (Italics added.) Section 21 of article XX, California Constitution, further provides that "all decisions of any such tribunal shall be subject to review by the appellate courts of this State." As to proceedings before such tribunal the Legislature has provided, in section 5502 of the Labor Code, that "The hearing, unless otherwise agreed to by all of the parties thereto, shall be held not less than 10 days nor more than 30 days after the filing of the application." And sections 5313 and 5800.5 by their terms make mandatory a decision by the commission within 30 days after submission of the application. To stay the commission's proceedings, as here sought, it is urged would

thus appear to defeat the intent and the letter of the Constitution and the statutes governing workmen's compensation proceedings. The Constitution and laws of this state, however, still vest the superior court with jurisdiction to proceed in actions for personal injuries and, generally at least, to determine the facts upon which its jurisdiction may depend.

[4] 3. In view of the provisions of section 3755 of the Labor Code, permitting substitution of the employer's compensation insurance carrier in lieu of the employer, and dismissal of the employer, in proceedings before the commission, it appears that the parties may differ in the commission proceedings from those in the superior court action. This is true, but it is merely another phase of the already recognized concept that the jurisdictions of the Industrial Accident Commission and of the superior court are exclusive, not concurrent, in every respect save as to the power to determine jurisdiction.

4. By the penalty provisions found in section 5814 of the Labor Code, "When payment of compensation has been unreasonably delayed or refused, either prior to or subsequent to the issuance of an award, the full amount of the * * * award shall be increased by 10 per cent. The question of delay and the reasonableness of the cause therefor shall be determined by the commission in accordance with the facts. * * *" It was pursuant to this assertedly applicable statutory duty that State Compensation Insurance Fund provided to the petitioner herein certain workmen's compensation benefits up to the date petitioner filed the superior court action. If petitioner was injured outside the employment relationship then the Fund has no duty to provide continuing benefits. Further, according to the argument of respondent commission, if "petitioner should be further injured by one of the doctors furnished by the Fund, the Fund would be liable. If he is covered by the Workmen's Compensation Act and he should become worse by the failure of the Fund to furnish treatment the Fund would be liable in that circumstance also. [See Duprey v. Shane, 1952, supra, 39 Cal.2d 781, 790, 249

P.2d 8.] The Fund is, therefore, entitled to a speedy determination of the question by the * * * Commission."

[5] The factual bases for the above stated argument, insofar as they are enumerated, are indisputable. But there are other pertinent considerations: The insurance carrier or the employer, immediately upon the occurrence of a presumed industrial injury, and before or simultaneously with, the furnishing of hospital or medical care or compensation payments, may file with the commission an application for adjustment of claim or liability, Labor Code, § 5501; *Giocalone v. Industrial Accident Comm.*, 1953, *supra*, 120 Cal.App.2d 727, 730-733, 262 P.2d 79; see also Labor Code, § 3755, and thus fix jurisdiction in the commission to make the controlling determination of jurisdiction and secure protection against any claim of delay in meeting the obligations imposed by the law.

The commission particularly relies upon the case of *Giocalone v. Industrial Accident Comm.*, 1953, *supra*, 120 Cal.App.2d 727, 262 P.2d 79, in which the widow of a deceased workman sought by mandamus to compel the commission to substitute Aetna, the workmen's compensation insurance carrier for one Battaglia, to dismiss the latter from the commission proceedings, and to restrain the commission from holding a hearing contrary to an agreement between Aetna and the widow. The widow herself had filed a superior court action alleging the relationship between the deceased workman and Battaglia was that of independent contractor, as well as an application with the commission alleging the relationship to be that of employe and employer. It appeared that Aetna and the widow had entered into certain agreements which contemplated dismissal of the commission application and possible later refile, whereas Battaglia sought a prompt determination by the commission of his liability with respect to the death. The commission intended to proceed. Under these circumstances it was held that, 120 Cal.App.2d at page 733, 262 P.2d at page 83, an employer is a party in interest with the right to maintain a commission proceeding, 120 Cal.App. 2d at pages 733-736, 262 P.2d at pages 83-85,

dismissal of an employer is not mandatory where the insurance carrier is substituted under section 3755 of the Labor Code and a possible conflict of interest between the two appears, and 120 Cal.App.2d at pages 736-739, 262 P.2d at pages 83-87, both the commission and the superior court would be allowed to proceed inasmuch as "the superior court has not exercised its jurisdiction and the commission has concurrent jurisdiction of the subject matter." In reaching this latter holding the court quoted in part from *Williams v. Southern Pac. Co.*, 1921, 54 Cal.App. 571, 575-576, 202 P. 356, 358, which in turn quoted from 15 Corpus Juris 1165 to the effect that the rule that where two tribunals have concurrent jurisdiction over the same parties and subject matter, the tribunal where jurisdiction first attaches retains it exclusively and will be left to determine the controversy, is "'limited to actions which deal either actually or potentially with specific property or objects, and where a suit is strictly *in personam*, nothing more than a personal judgment being sought, there is no objection to a subsequent action in another jurisdiction.'" In the *Williams* case the widow had filed both a court action for her husband's death and a commission application. The commission made an award and the court then held, at page 580 of 54 Cal. App., at page 360 of 202 P., that "Having recovered judgment for compensation in the proceeding before the commission by establishing the fact that the deceased was employed in intrastate commerce, and that judgment having become final, she could not recover in the action in the superior court by disproving the same fact on which the first judgment was necessarily based."

Also, reliance is placed by the commission upon the above quotation from 15 Corpus Juris 1165, which appears in *Williams v. Southern Pac. Co.*, 1921, *supra*, 54 Cal.App. 571, 575-576, 202 P. 356, 358, concerning limitation of the concurrent jurisdiction rule to "actions which deal either actually or potentially with specific property or objects." (See also *Cutting v. Bryan*, 1929, 206 Cal. 254, 257, 274 P. 326.) In this state, however, as indicated hereinabove, the rule has likewise been applied to

actions in which only a personal judgment is sought. (See *M. H. Golden, etc., Co. v. Superior Court*, 1950, *supra*, 98 Cal.App.2d 811, 815-816, 221 P.2d 218 [accounting, contract, money judgment]; *Gorman v. Superior Court*, 1937, *supra*, 23 Cal.App.2d 173, 177, 72 P.2d 774 [automobile collision damages].) Further, inspection of the *Corpus Juris* article reveals that the matter under discussion was concurrent jurisdiction of a state and a federal court, rather than potentially exclusive jurisdiction of two different tribunals within the same state. We therefore do not consider the *Giocalone* case, 1953, 120 Cal.App.2d 727, 262 P.2d 79, or the *Williams* case, 1921, 54 Cal.App. 571, 202 P. 356, to be controlling here and implications in the opinions in those cases contrary to the views expressed herein are disapproved.

The commission further relies upon the refusal of this court in the *Williams* case to grant the widow's application for mandamus to restrain the commission from proceeding pending outcome of her superior court action. The complete opinion of this court reads: "The respondent commission is acting entirely within its jurisdiction in hearing and determining the application pending before it, and we have no authority to supervise its conduct of the proceeding in the manner suggested." *Williams v. Industrial Accident Commission*, Cal.1919, 177 P. 989; 6 Ind.Acc.Com. Decisions 1. Insofar as the above quoted opinion is inconsistent with the views expressed herein it is overruled.

Another point which is argued is that if an employer is not insured under the Workmen's Compensation Law, then by the provisions of section 3706 of the Labor Code "any injured employee or his dependents may proceed against such employer by filing an application for compensation with the commission, and, *in addition*, may bring an action at law against such employer for damages, as if this division did not apply." (*Italics added.*) (See also *Chakmakjian v. Lowe*, 1949, 33 Cal.2d 308, 310, 201 P.2d 801: "Under section 3706 of the Labor Code, the injured employee may bring an action for damages in any case where his employer failed to carry compensation in-

surance, and this right may be exercised independently of any proceedings before the Industrial Accident Commission [citations]"; *Chakmakjian v. Lowe*, 1950, 101 Cal.App.2d 329, 225 P.2d 307; *Goodman Bros. v. Superior Court*, 1942, *supra*, 51 Cal.App.2d 297, 124 P.2d 644.) In the *Goodman Bros.* case it was held that although a prior commission decision is res judicata in a superior court action between the same parties on the question of whether the employer was insured at the time the accident occurred, nevertheless prohibition would not issue to restrain the superior court from trying the insurance issue, inasmuch as "The plea of res judicata does not oust a court of jurisdiction and therefore it cannot be enforced by prohibition." At page 306 of 51 Cal.App.2d, at page 649 of 124 P.2d. The parties were left to their remedy by appeal in case the trial court decided the res judicata issue incorrectly. We do not here have any question, on the facts, of applicability of Labor Code section 3706, nor do we have a question of res judicata; we have only the question as to whether the tribunal whose jurisdiction was subsequently invoked shall be barred from proceeding before final determination of the controlling jurisdictional question by the tribunal which first took jurisdiction.

[6] It has been suggested that to hold that the right to proceed in the exercise of jurisdiction shall depend on the fact of priority of invocation, will tend to promote a footrace to filing. It may be answered that initially both tribunals have jurisdiction to determine jurisdiction, and that if ultimate jurisdiction were to depend on the first final judgment, then we should still have the footrace but it would be a marathon rather than a sprint. With the law as it is, a race may be inevitable, but if it is, we prefer that it be a sprint.

We recognize, as we must in declaring the pertinent rule, that on occasion, conceivably, it may lead to hardship and to regrettable delay in administration of the benefits of workmen's compensation. Just as one interested party may race to one tribunal, an opposing party may race to the other tribunal. For example, in cases where questions as to possible negligence

of the employer, or as to the interpretation of a contract as creating a relationship of employer and independent contractor or employer and employe, or as to employe activity within the scope of employment, or as to employer or insurance carrier liability within the terms of a contract, are close, it may be that an employer (perhaps a self-insured one) would prefer to have those questions decided by the stricter rules governing court procedures and character of proof rather than the more liberal ones applicable before the Industrial Accident Commission. To that end, the employer might be encouraged to attempt to fix initial jurisdiction in the superior court by immediately filing a declaratory relief action in that court rather than an application for adjustment of claim by the Industrial Accident Commission. Such problems, if they arise, can be met. Perhaps the desirability of further legislative action is indicated. In any event the problem now is to declare a simple, workable rule upon the law as it exists.

We conclude that the general rule long recognized as governing tribunals whose jurisdiction is generally concurrent should be applied here where jurisdiction to determine jurisdiction is concurrent.

[7] A question remains as to the nature of the relief to be granted. Petitioner has asked for either mandamus or prohibition. As noted hereinabove, *supra*, 293 P.2d 21, the cases are almost unanimous in declaring that prohibition lies where proceedings are to be stayed in situations of concurrent jurisdiction. It has been suggested, however, in reliance on *Simmons v. Superior Court*, 1950, *supra*, 96 Cal.App.2d 119, 132-133, 214 P.2d 844, that mandamus is the proper remedy. In that case it appeared that actions between the same parties, involving the same subject matter and contesting the same issues, had been instituted in competent courts in Texas and in California. The Texas filing preceded that in California. As to the subsequently commenced action in California it was held that the trial court abused its discretion in denying a motion of the Texas plaintiff (a California defendant) to stay proceedings in the California action (in which the plaintiff

was the Texas defendant) until final determination of the Texas action. Conceivably both the Texas court and the California court could have jurisdiction to proceed and to determine the identical issues. The motion for a stay of proceedings, therefore, called for an exercise of judicial discretion which would not affect the jurisdiction, as such, of either court. Here, the final determination by either tribunal that it has jurisdiction to award relief in the case before it will be conclusive that the other lacks jurisdiction to proceed in the matter before it. The *Simmons* case, therefore, is not in point on the issue before us, and no implications inconsistent with the views we have announced should be attributed to its holding. We conclude, in accord with the cases cited *supra*, 293 P.2d 21, that prohibition is the proper remedy here.

For the reasons above stated, let the writ of prohibition issue as prayed.



46 Cal.2d 190

Glipson E. SIMMONS, Plaintiff and Appellant,

v.

RHODES & JAMIESON, Ltd. (a Corporation); and Harold Aydelotte, Defendants and Respondents.

S. F. 19357.

Supreme Court of California.

In Bank.

Feb. 10, 1956.

Rehearing Denied March 8, 1956.

Action by buyer of cement against seller and its agent for burns sustained while handling cement. The Superior Court, County of Contra Costa, Harold Jacoby, J., granted nonsuit, and plaintiff appealed. The Supreme Court, McComb, J., held, *inter alia*, that where cement was fit for purpose of laying a basement floor, the purpose for which it was sold, and there was

no showing that cement contained any unusual substance or was different from ordinary cement in any way, there was no breach of warranty although the cement, due to its inherent nature, produced burns on buyer, who handled it.

Judgment affirmed.

Carter, J., dissented.

Opinion, 284 P.2d 813, vacated.

1. Sales ⇨279

"Merchantable quality" within statute providing that where goods are bought by description there is an implied warranty that goods shall be of merchantable quality, means that substance sold is reasonably suitable for ordinary uses it was manufactured to meet. West's Ann.Civ.Code, § 1735.

See publication Words and Phrases, for other judicial constructions and definitions of "Merchantable Quality".

2. Sales ⇨284(1)

Where cement was fit for purpose of laying a basement floor, the purpose for which it was sold, and there was no showing that cement contained any unusual substance or was different from ordinary cement in any way, there was no breach of warranty although the cement, due to its inherent nature, produced burns on buyer who handled it. West's Ann.Civ.Code, § 1735.

3. Negligence ⇨121(3)

Where buyer bought ordinary cement from seller thereof, and while using it to lay basement floor, added water, and suffered cement burns, doctrine of *res ipsa loquitur* did not apply to buyer's action against seller, in absence of showing that seller had feasible means of discovering any defect or danger in commodity, or a showing that the water added by buyer did not contribute to injury.

4. Negligence ⇨27

In absence of evidence of feasible means of discovering defects or danger in commodity sold, seller is not liable for an injury resulting from use of commodity.

5. Negligence ⇨121(5)

When a plaintiff seeks recovery upon theory that a commodity sold contains a foreign substance, but admits that he added material to that delivered by seller, buyer must affirmatively show that substance he added did not cause injury.

6. Negligence ⇨121(2)

A plaintiff may properly rely upon doctrine of *res ipsa loquitur* even though he has participated in events leading to accident if evidence excludes his conduct as the responsible cause.

7. Evidence ⇨8

It is a matter of common knowledge that water activates the lime in cement.

Russell F. King, Richmond, for appellant.

Weinmann, Rode, Burnhill & Moffitt, L. R. Weinmann, Oakland, John N. James, Alameda, Hoey, Hall & Conti, James F. Hoey, Martinez, and Cyril Viadro, San Francisco, for respondents.

McCOMB, Justice.

Plaintiff purchased some ready mixed cement from defendant Rhodes & Jamieson, Ltd., through its employee, defendant Harold Aydelotte. After using the mixture for the purpose for which it was intended, plaintiff suffered severe burns. He brought this action against the two defendants, setting forth causes of action for a breach of warranty and for negligence. The trial court granted a nonsuit at the close of plaintiff's case. Plaintiff appeals.

The facts most favorable to plaintiff are:

Plaintiff, a welder by trade, was constructing his own home. Shortly after laying the foundations, he met defendant Aydelotte, an employee of defendant Rhodes & Jamieson. Plaintiff showed Mr. Aydelotte around the premises and particularly the area where it was proposed to lay the concrete basement floor. The state of construction existing when Aydelotte inspected the premises made it apparent that such slab could only be laid by working inside the basement area. Aydelotte solicited the sale of cement for his company, and plain-

tiff agreed to buy, leaving the type of mixture up to the seller. At 10:30 a. m. on November 10, 1952, the defendant company delivered its first load of mixed cement. In order to reach the basement area, the cement was poured down a chute through a window opening and into the forms. Plaintiff added ten gallons of water to it and requested that the succeeding loads be wetter. Three loads in all were delivered. Because plaintiff had difficulty in spreading the cement he secured the assistance of a neighbor. They leveled the cement by pushing it into position, using shovels and a long board for this purpose. During this maneuver plaintiff frequently got down on his hand and knees to shove the leveling board. At this time he was wearing galoshes, jeans, a khaki shirt and rubber gloves. Plaintiff testified that the galoshes were not worn to protect him from burns but to protect his feet from getting wet and to enable him to handle the slick shovel. He also testified that he had never seen anyone use rags or padding on their legs to protect them from the cement. He had observed that most cement workers worked while standing on boards, but believed they did this to keep from getting wet and dirty. No one had ever warned him of the danger of getting burned by cement, although he did know that exposure to wet cement caused a drying out of the skin. Prior to the accident he had had some experience with laying cement. On none of these occasions, although he had handled the cement with his bare hands, had he ever been injured by the use of the cement other than a roughening of the skin of his hands.

Plaintiff worked leveling the cement floor from 10:30 a. m. to 3:15 p. m. During half of this period his knees and legs were in contact with the wet cement. Shortly after 1 p. m. plaintiff began to notice a "tingle" on his legs, which became increasingly irritating. He continued to work, however, until the job was finished. Thereafter he washed his legs with soap and water, observed that his legs "looked green," changed his clothes and got a neighbor to drive him to the hospital. There he was bathed again, medication applied to his

legs, penicillin administered, and he was allowed to go home. Plaintiff returned to the hospital the next day for further treatment. Two days after the exposure to the cement plaintiff's temperature reached 103 degrees and he was hospitalized. It was then discovered that he was severely burned over 15 per cent of the area of his body, most of the burns being of the third degree type. As a result, two extensive skin grafting operations were performed and plaintiff was hospitalized for nearly two months. A doctor testified that plaintiff was not allergic to cement and "in my opinion this was definitely a chemical burn, due to contact with cement."

Notice of breach of warranty was reasonably and properly given.

On this evidence, on both causes of action, at the close of plaintiff's case, a nonsuit was granted.

These questions are presented:

First

Assuming that there was an implied warranty of fitness for the purpose of laying a basement floor including a secondary warranty that the cement was reasonably safe to handle, did the evidence disclose a breach of warranty?

No.

Section 1735 of the Civil Code provides in part: "* * * there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

"(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

"(2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality." Plaintiff

claims a breach of implied warranty under the provisions of the foregoing section, his theory being that the cement was not of merchantable quality.

No evidence was introduced to show that this cement contained any unusual substance or differed from ordinary cement in any way.

[1] "Merchantable quality" means that the substance sold is reasonably suitable for the ordinary uses it was manufactured to meet. (27 Words and Phrases and Pocket Part).

[2] It is conceded that the cement was fit for the purpose of laying a basement floor. This is the only purpose for which the test of merchantability could be applied under the facts of the present case. There is likewise no merit in the proposition that the cement had a concealed or hidden danger unknown to plaintiff and that defendant should have warned him that it would burn the skin. The injury occurred in the handling of a standard and common commodity.

Dushane v. Benedict, 120 U.S. 630, 7 S.Ct. 696, 30 L.Ed. 810, relied upon by plaintiff is not applicable to the facts in this case. In the cited case defendant sold rags to the plaintiff for the purpose of manufacturing paper. The rags were infected with smallpox and although they were made into satisfactory paper, several of plaintiff's employees died of smallpox in the process. There the court properly held there was a breach of warranty of fitness because rags are not normally infected with smallpox. In the present case, quicklime, which has a caustic effect, is one of the necessary ingredients of cement, and it is unquestioned that plaintiff was familiar with this fact.

Second

Was there a showing of negligence upon the part of defendants?

[3] No.

[4] The doctrine of *res ipsa loquitur* was not here applicable because in the absence, as in the present case, of evidence of feasible means of discovering the defects or danger in the commodity sold, the

seller is not liable for an injury resulting from the use of the commodity. (*Honea v. City Dairy, Inc.*, 22 Cal.2d 614, 618[3] et seq., 140 P.2d 369.)

The only evidence of any testing was that defendant Rhodes & Jamieson, Ltd. had its product tested for proper proportions of materials to be used for various types of construction.

[5] In addition, the doctrine of *res ipsa loquitur* was not here applicable for the reason that when a plaintiff seeks recovery upon the theory that a commodity contains a foreign substance and admits that he added material to that delivered by defendant, plaintiff must affirmatively show that the substance he added did not cause the injury. (*Zentz v. Coca Cola Bottling Co.*, 39 Cal.2d 436, 444[9], 247 P.2d 344.)

[6] Plaintiff may properly rely upon the doctrine of *res ipsa loquitur* even though he has participated in the events leading to the accident if the evidence excludes his conduct as the responsible cause. (*Zentz v. Coca Cola Bottling Co.*, supra.)

In the case at bar, plaintiff did not offer any evidence to show that the water which he had added to the cement had no effect.

[7] It is a matter of common knowledge that water activates the lime in cement. (See *Dalton v. Pioneer Sand & Gravel Co.*, 37 Wash.2d 946, 227 P.2d 173, 174 et seq.; also "lime," Webster's New International Dictionary (2nd ed. 1950) p. 1433; 6 Encyclopedia Britannica (1951 ed.) p. 207.) A street superintendent testified that lime does not give off heat until it becomes wet. Obviously, thinning the solution would allow it to soak through the plaintiff's clothes more quickly.

Therefore, it is obvious that when plaintiff added water to the cement, additional heat was created and the thinning of the cement caused the quicklime to be more readily absorbed by his clothing, which in turn resulted in his being burned.

Our conclusion is fully in accord with two recent decisions of this court. In *LaPorte v. Houston*, 33 Cal.2d 167, at page 170, 199 P.2d 665, at page 666, Mr. Chief Justice Gibson, speaking for the court, said:

"It was at least equally probable that the accident was caused by some fault in the mechanism of the car for which defendants were not liable as that it resulted from any negligent act or omission of the mechanic. Accordingly, it cannot be said that it is more likely than not that the accident was caused by the negligence of defendants, and hence the case was not a proper one for the application of the doctrine of *res ipsa loquitur*." In *Burr v. Sherwin Williams Co.*, 42 Cal.2d 682, at page 691, 268 P.2d 1041, at page 1046, the Chief Justice, speaking for a unanimous court, said: "The instructions given, however, were erroneous in that, while they purported to state all the conditions under which *res ipsa loquitur* would be applicable, they did not inform the jury that plaintiffs must show that the instrumentality which caused the damage was not mishandled *or its condition otherwise changed after control was relinquished by the person against whom the doctrine is to be applied.*" (Italics added.)

Since the doctrine of *res ipsa loquitur* is not applicable under the facts of the instant case and there is a total absence of any negligence upon the part of the defendants, the nonsuit was properly granted upon the second alleged cause of action.

The judgment is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

I disagree with the majority on both the question of implied warranty and breach thereof and *res ipsa loquitur*. The majority opinion omits important facts and states, contrary to the record, that there is no evidence on crucial points.

As appears more fully from the opinion of Mr. Presiding Justice Peters, hereinafter set forth, in speaking for the District Court of Appeal in this case, that there is evidence that the implied warranty of merchantability was breached because there is evidence that the cement caused the severe burns suffered by plaintiff and that such

burns are not to be expected from the use of properly mixed concrete. Plaintiff did not know of the danger and defendant, producer of the material, must be presumed to know the character of its product.

On the issue of *res ipsa loquitur*, and the inference of negligence arising therefrom, the same above mentioned evidence is present. It is not important that defendant's tests did not reveal the dangerous character of the concrete. The evidence shows that ordinarily concrete does not cause burns. It follows that as this concrete, over which defendant exercised control, did cause burns, there is an inference of defendant's negligence.

As above stated I adopt the opinion of Mr. Presiding Justice Peters as follows [284 P.2d 814]:

"Plaintiff, Gipson Simmons, purchased some ready-mixed cement from defendant Rhodes & Jamieson, Ltd., through its employee, defendant Harold Aydelotte. After using the mixture for the purpose for which it was intended plaintiff suffered severe burns. He brought this action against the two defendants, setting forth causes of action for a breach of warranty and for negligence. The trial court granted a nonsuit at the close of plaintiff's case. Plaintiff appeals.

"The facts most favorable to the plaintiff are as follows:

"Plaintiff, a welder by trade, during his spare time, was constructing his own home. Shortly after laying the foundations, he met defendant Aydelotte, an employee of defendant Rhodes & Jamieson. Plaintiff showed Aydelotte around the premises, and, in particular, showed him the area where it was proposed to lay the concrete basement floor, an area 13½' x 52' x 4". The state of construction existing when Aydelotte inspected the premises made it apparent that such slab could only be laid by working inside the basement area. Aydelotte solicited the sale of cement for his company, and plaintiff agreed to buy, leaving the type of mixture up to the seller. At 10:30 a. m. of November 10, 1952, the defendant company delivered its first load of mixed cement. In order to reach the

basement area the cement was poured down a chute through a window opening and into the forms. Because the mixture was not wet enough, the plaintiff added 10 gallons of water to it and requested that the succeeding loads be wetter. Three loads in all were delivered. Because plaintiff had difficulty in spreading the cement he secured the assistance of a neighbor. They leveled the cement by pushing it into position, using shovels and a long board for this purpose. During this maneuver plaintiff frequently got down on his hands and knees to shove the leveling board. At this time he was wearing galoshes, jeans, a khaki shirt and rubber gloves. Plaintiff testified that the galoshes and gloves were not worn to protect him from burns, but to protect his feet from getting wet and to enable him to handle the slick shovel. Plaintiff also testified that he had never seen anyone use rags or padding on their legs to protect them from the cement. He had observed that most cement workers worked while standing on boards, but believed they did this to keep from getting wet and dirty. No one had ever warned him of the danger of getting burned by cement, although he did know that exposure to wet cement caused a drying out of the skin.

"Plaintiff, prior to the accident, had had some experience with cement. He had helped to build some cement water tanks, had helped two neighbors pour cement foundations and flooring, and had occasionally poured cement while working with construction crews. On none of these occasions, although he had handled the cement barehanded, had he ever been injured by the use of the cement other than a roughening of the skin of his hands.

"Plaintiff worked leveling the cement floor from 10:30 a. m. to 3:15 p. m. During half of this period his knees and legs were in contact with the wet cement. His neighbor assistant did not come in direct contact with the wet cement to the same extent as did plaintiff. Shortly after 1 p. m. plaintiff began to notice a 'tingle' on his legs which became increasingly irritating. He continued to work, however, because of the necessity of leveling the floor

before the cement set. Upon finishing the job he washed his legs with soap and water, observed that his legs 'looked green,' changed his clothes and got a neighbor to drive him to the hospital. There he was bathed again, medication placed on his legs, penicillin administered, and his attending doctor, because there were no beds available in the hospital, allowed him to go home. Plaintiff returned to the hospital the next day for further treatment, and the doctor visited him at home. Two days after the exposure to the cement plaintiff's temperature reached 103 degrees and the doctor had him hospitalized. It was then discovered that plaintiff was severely burned over 15 per cent of the area of his body, most of the burns being of the third degree type. This means that for the most part the burn extended through the entire thickness of the skin, that is, through both the epidermis and corium and down to the subcutaneous fatty tissue. This required two extensive skin grafting operations, the first, with three doctors, requiring 8 hours, and the second 5½ hours. Plaintiff was hospitalized for nearly two months. The doctor testified that plaintiff was not allergic to cement, and that 'in my opinion this was definitely a chemical burn, due to contact with cement.' Although defendant claims that this answer was stricken, no order striking it was made. At any rate, the fact that the burns were caused by contact with the cement is at least a reasonable, if not inevitable, inference.

"The Street Superintendent of Richmond, after qualifying as an expert in concrete construction, testified that during his twenty-five years of experience he had seen men many times work for three or four hour periods in cement doing hand troweling without the protection of boards or padding, and during that entire time he had never seen a man burned to the extent of requiring medical care, having observed, at most, a few pimples or chapping caused by the exposure to the cement. The attending physician testified that prior to treating plaintiff he had observed but one prior burn caused by exposure to concrete, and that was a small burn. He also testified that there was very little medical literature on

the subject of cement burns, he having seen only one article on the subject. In that article no case was reported so severe as to require skin grafting.

"A dermatologist, who had examined and treated plaintiff, testified that he had never seen or heard or read of a concrete burn as extensive or deep as that suffered by plaintiff, and that the burn suffered by plaintiff was a chemical burn which, in his opinion, based on the history of the case, was due to the cement or some substance in it. The burn was not caused by an allergy towards cement. This had been determined by certain allergy tests of various kinds of cement, including one test made from the very slab here involved.

"Notice of breach of warranty was reasonably and properly given.

"On this evidence, on both causes of action, at the close of plaintiff's case, a nonsuit was granted.

"Propriety of Nonsuit on Warranty Cause of Action.

"Section 1735 of the Civil Code provides:

"* * * there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

"(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

"(2) Where the goods are bought by description from the seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality.'

"Clearly, it was proper to grant the nonsuit as to defendant Aydelotte as to this cause of action. Obviously, he was the agent of Rhodes & Jamieson, and was not himself the seller within the meaning of the section.

"As to defendant Rhodes & Jamieson it appears that for the purposes of a nonsuit, all the elements required by the quoted section can be found in the evidence or in reasonable inferences therefrom. There can be no reasonable doubt that plaintiff made known to the agent of the seller the particular purpose for which the goods were required. It is also a reasonable inference that plaintiff relied on the seller's skill and judgment to pick the proper type and mixture of cement for the flooring. There is no dispute that the cement furnished made a good cement floor. If it be assumed that the warranty here involved includes a warranty that the cement was safe to handle, a point later discussed, then it seems clear that it is a reasonable inference from the evidence that plaintiff relied on the seller's skill and judgment as to the cement being safe to handle. Plaintiff, to the seller's knowledge, had no means of testing the cement, and could not be reasonably expected to do so. The evidence shows that the seller used the service of a testing laboratory. Thus, it can reasonably be inferred that plaintiff relied upon the seller's superior knowledge as to the safety in handling the cement.

"The only debatable question is whether the implied warranty of fitness for a particular purpose includes not only the primary warranty that the cement was fit for the purpose of a cement floor, but also a secondary warranty that the cement was reasonably safe to handle in constructing the floor. On this subject there is a difference of opinion. There is at least one out-of-state authority directly in support of the seller's contention that the implied warranty here involved does not include a warranty of reasonable safety in handling. The case is *Dalton v. Pioneer Sand & Gravel Co.*, 37 Wash.2d 946, 227 P.2d 173. There, as here, ready-mixed cement was purchased to construct a cement floor and the purchaser, while laying the floor, received severe burns from coming into contact with the cement. There, as here, the purchaser relied upon a breach of the implied warranty. A motion for dismissal was granted at the close of plaintiff's case. This was affirmed. The opinion on the point in

question is quite short, contains no analysis of the nature of the warranty, and cites no cases in support of its conclusions. The court first pointed out 227 P.2d at page 174, that: 'No evidence was introduced to show that this cement contained any unusual substance, or differed from ordinary cement in any way.'* The court then disposed of the point in the following cursory manner: "“Merchantable quality” means that the substance sold is reasonably suitable for the ordinary uses it was manufactured to meet. 27 Words and Phrases, Perm.Ed., Pocket Part. No contention is made by the appellant that the cement was not satisfactory for the purpose of laying a basement floor. This is the only purpose for which the test of merchantability could be applied under the act. We find the act to be inapplicable to the situation here presented.'

"The other cases cited by respondent on this issue are not directly in point. They are primarily concerned with the question of whether, under the facts involved, there was a breach of warranty, and do not discuss the existence of the warranty with which we are here concerned.

"As opposed to the Washington case, there are several out-of-state cases that do extend the warranty of fitness to include, logically, a warranty of safety in the article's use. Thus, in *Dushane v. Benedict*, 120 U.S. 630, 7 S.Ct. 696, 30 L.Ed. 810, the seller sold the buyer rags to be used in the manufacture of paper. The rags were infected with smallpox. Workmen in the factory became infected. The finished product—the paper—was apparently not dangerous because the manufacturing process killed the germs. But nevertheless the court held that there was a breach of the warranty of fitness for a particular purpose. After setting forth the facts, the court stated, 120 U.S. at page 646, 7 S.Ct. at page 702: 'This was of itself (furnishing infected rags) sufficient evidence to be submitted to the jury of a warranty and a breach of it. A warranty, express or im-

plied, that rags sold are fit to be manufactured into paper, is broken, not only if they will not make good paper, but equally if they cannot be made into paper at all without killing or sickening those employed in the manufacture.'

"Plaintiff also cites a series of clothing and cosmetic cases that are not directly in point. In all of them clothing or cosmetics caused injury to the wearer or user. In all of them the court found a breach of the implied warranty. In such cases the purpose for which the clothing or cosmetics were sold was to wear or use them. Obviously, if they could not be worn or used safely they were not fit for the purpose for which they were sold. Thus, the cases are not directly in point. In one of them, however—the case of *Flynn v. Bedell Co.*, 242 Mass. 450, 136 N.E. 252, at page 253, 27 A.L.R. 1504—there appears the following pertinent language:

"‘It well may be that the scope of an implied warranty of fitness does not extend to fitness in respect of matters wholly unknown to the dealer and peculiar to the individual buyer. A seller of food presumably does not warrant that the particular kind of food which the buyer calls for will be suited to his peculiar idiosyncracies. * * * But it appears that the particular “defect” which injured the plaintiff would have similarly injured any normal person. * * *

"‘The scope of the statutory implied warranty cannot be limited so as to exclude a warranty against the latent presence of foreign substances which are injurious in the course of the normal use of the garment for the purpose intended.’

"Although the exploding bottle case of *Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, at page 464, 150 P.2d 436, at page 441, is not directly in point, in the concurring opinion of Mr. Justice Traynor, there appears some language that is helpful. It is as follows: 'The retailer, even though not equipped to test a product, is under an absolute liability to his customer, for the implied

inferred that exposure to cement normally does not cause severe burns to the user."

* "In this respect the Washington case differs from our case. In our case there is evidence from which it can be

warranties of fitness for proposed use and merchantable quality include a warranty of safety of the product.'

"On principle it would be unreasonable and unjust to hold that the warranty is limited to the safety of the end product and does not include a warranty that the goods furnished can be safely used in the construction of the end product. For that reason we are impressed with the reasoning of the United States Supreme Court in the *Dushane* case and are not impressed with the reasoning of the Washington court in the *Dalton* case. We, therefore, hold that for purposes of nonsuit there was an implied warranty that the cement was reasonably safe for the purpose of laying a concrete floor.

"The next question is whether there was any evidence of a breach of this warranty. In this connection, it must be kept in mind that as to this warranty the seller is not an insurer that the goods can be used with absolute safety or that they are perfectly adapted to the intended use. Section 1735 of the Civil Code merely requires that the goods be 'reasonably fit' for the intended use. See also *Tremeroli v. Austin Trailer Equip. Co.*, 102 Cal.App.2d 464, 227 P.2d 923; *Mix v. Ingersoll Candy Co.*, 6 Cal.2d 674, 59 P.2d 144.

"On this question of breach, it is a matter of common knowledge, and was known to plaintiff, that cement contains lime. Plaintiff knew that lime is a caustic, and that exposure to it irritated the skin. Plaintiff also knew that cement workers customarily wore boots and worked from boards, although he testified that he thought that the purpose of this was to keep from getting dirty, not to keep from getting burned.

"On the other hand, there is direct evidence that these burns were of unusual severity, and it can be inferred that such burns do not normally occur upon exposure to wet cement. The Street Superintendent testified that he had seen men working unprotected in wet cement for long periods and never had seen anyone burned, although he had observed some chapping and some pimples. Both doctors testified that they

had never seen, heard or read of a case of cement burn severe enough to require skin grafting. Plaintiff was not peculiarly allergic to cement. The evidence shows that it was reasonably necessary, in laying the floor, at least by an amateur, for plaintiff to expose himself to the cement, and that defendant knew the conditions under which the cement was to be used.

"For the purposes of a nonsuit, there can be no doubt that the evidence shows that the cement caused the burn. The two doctors so testified, and the hospital record indicated a cement burn. The irritation started two hours after exposure to the wet cement, and there is no evidence that plaintiff came into contact with any other substance that could have caused the burn.

"Thus, for the purposes of defeating a nonsuit, there was ample evidence of a breach of the warranty of fitness.

"It was, therefore, error to grant a nonsuit on the implied warranty cause of action.

"We now turn to the negligence cause of action. There is no evidence that defendant *Aydelotte* was negligent or had any control over the cement mixture. The nonsuit was proper as to him on this cause of action.

"As to defendant *Rhodes & Jamieson, Ltd.*, whether the nonsuit was properly granted depends upon whether the doctrine of *res ipsa loquitur* is applicable to the facts. There has been a great deal written as to the scope of this doctrine in recent years, much of it by the California courts. It is not necessary to review those many cases in this opinion. It is now settled that the doctrine applies (1) if it can be reasonably concluded from a basis of experience, either common to the community, or brought out in the evidence, that the accident is of a kind that does not normally occur unless someone was negligent; (2) and, if it was caused by an instrumentality in the exclusive control of the defendant; (3) and, if it was not contributed to by a voluntary action on the part of the plaintiff. See generally *Ybarra v. Spangard*, 25 Cal.2d 486, 154 P.2d 687, 162 A.L.R. 1258; *Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453,

150 P.2d 436; Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, 247 P.2d 344; Prosser on Torts, p. 295.

"The first condition is here present. The two doctors, and the Street Superintendent, testified that they had never seen, heard of or read about cement burns of the severity of those here involved. It was shown that plaintiff was not peculiarly susceptible or allergic to cement. This is all that was needed to comply with the first requirement. As was said in *Stanford v. Richmond Chase Co.*, 43 Cal.2d 287, 292, 272 P.2d 764, 766, this requirement is met 'where it appears that the accident is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and that the defendant is probably the person who is responsible.' See also, in addition to the authorities cited, *supra*, *La-Porte v. Houston*, 33 Cal.2d 167, 199 P.2d 665; Prosser, *Res Ipsa Loquitur* in California, 37 Cal.L.Rev. p. 183, at p. 195.

"It is equally clear that, for the purpose of getting by a nonsuit, the third requirement—reasonableness of use by the plaintiff—was here shown. The plaintiff, of course, assumed the normal risks of the ordinary effects of exposure to wet cement—roughening of the skin and a rash—but there is no evidence or no inference from the evidence that as a reasonable man he knew, or should have known, that there was a risk of third degree burns. In fact, the inference is quit to the contrary. The defendant knew that the cement had to be spread from inside the basement, and knew, or should have known, that exposure to the wet cement was reasonably possible. The method used to spread the cement was reasonable under the circumstances.

"On this appeal from a judgment of nonsuit we are, of course, not concerned with contributory negligence. That is an affirmative defense, and can only be involved if the evidence shows, as a matter of law, that plaintiff was contributively negligent. No such showing was here made.

"The only debatable issue is whether the defendant had 'exclusive control' of the in-

strumentality causing the injury. In this connection the courts have held that the fact the accident occurred sometime after the defendant relinquished control of the instrumentality causing the injury does not, *per se*, preclude the application of the doctrine, nor does the fact that the defendant may not be in a better position than plaintiff to explain the accident preclude its application if it appears more probable than not that the injury resulted from the acts of defendant. In *Zentz v. Coca Cola Bottling Co.*, 39 Cal.2d 436, at page 443, 247 P.2d 344, at page 347, these principles, supported by many authorities, were stated as follows:

" 'The defendant, of course, should not be liable unless it appears from all the facts and circumstances that there is a sufficient causal connection between his conduct and the plaintiff's injury, and it has been held that *res ipsa loquitur* will not apply if it is equally probable that the negligence was that of someone other than the defendant. (Citing cases.) * * * In dealing with this problem the courts have usually said that the defendant must have "management" or "control" of the agency or instrumentality which caused the injury. (Citing cases.) It has been stated that the purpose of this requirement is to eliminate the possibility that the accident was caused by someone other than the defendant. (Citing authorities.) Accordingly, its use is merely to aid the courts in determining whether, under the general rule, it is more probable than not that the injury was the result of the *defendant's* negligence.

" 'The requirement of control is not an absolute one. Although as we have seen, the doctrine will not ordinarily apply if it is equally probable that the negligence was that of someone other than the defendant, the plaintiff need not exclude all other persons who might possibly have been responsible where the defendant's negligence appears to be the more probable explanation of the accident. (Citing authorities.) Further, it is settled that the fact that the accident occurs some time after the defendant relinquishes control of the instrumentality which causes the accident does not preclude application of the doctrine provid-

ed there is evidence that the instrumentality had not been improperly handled by the plaintiff or some third person, or its condition otherwise changed, after control was relinquished by the defendant. (Citing cases.) Of course, it must appear that the defendant had sufficient control or connection with the accident that it can be said that he was more probably than not the person responsible for plaintiff's injury.

"* * * As recently held by the Supreme Court of Oregon in a well reasoned opinion, a plaintiff may properly rely upon *res ipsa loquitur* even though he has participated in the events leading to the accident if the evidence excludes his conduct as the responsible cause. *Gow v. Multnomah Hotel*, 191 Or. 45, 224 P.2d 552, 555-560, 228 P.2d 791.'

"The court also discussed what place the question of the defendant's superior knowledge of the cause of the accident has in the application of the doctrine, in the following language, 39 Cal.2d at page 445, 247 P.2d at page 348:

"Another factor which some of the cases have considered in applying the doctrine is that the defendant may have superior knowledge of what occurred and that the chief evidence of the cause of the accident may be accessible to the defendant but inaccessible to the plaintiff. (Citing authorities.) It seems clear, however, that the doctrine may be applied even though the defendant is not in a better position than plaintiff to explain what occurred if it appears more probable than not that the injury resulted from negligence on the part of defendant. (Citing authorities.)'

"The court then went on to hold that there was a duty on the part of the bottling company to inspect and test the bottles for defects, and that the fact the bottles were furnished by another did not preclude application of the doctrine.

"The problem involved in the instant case is that the cement used by defendant in its mixture was furnished by the Ideal Cement Company. Ideal is not a party to this action. We have no way of knowing, nor has the plaintiff, whether the overly dangerous qualities of the mixture were the result

of the defendant's actions, or whether it was caused solely by the cement furnished by Ideal. Either possibility is reasonable. But even if it be assumed that it is more reasonable that the burns were caused by the cement and not by anything the defendant added, this would not preclude the application of the doctrine as to defendant. When the defendant uses a material in a mixture that it sells, such defendant is under a duty to inspect reasonably that material to determine whether the material incorporated in its product is defective. This is certainly so where, as here, the defendant knows, or should know, that the plaintiff has no means of testing the product. Although the doctrine is not applicable where it is at least equally probable that the accident was caused by another, *LaPorte v. Houston*, 33 Cal.2d 167, 199 P.2d 665, this rule is not applicable where the defendant is under a duty to inspect. This was the precise holding in the *Escola* and *Zentz* cases, cited *supra*. Although it appears that defendant used the services of a testing firm, the nature and scope of such service, or its reasonableness, do not appear in the evidence. The reasonableness of such inspection, if any, is, of course, a matter of defense, and here the nonsuit was granted at the close of plaintiff's case.

"There was evidence that plaintiff added water to the cement after he received possession, but there was no evidence that this in any way was unreasonable or contributed to the injury. Whether plaintiff handled the product reasonably after receiving possession is a question of fact for the jury. *Gordon v. Aztec Brewing Co.*, 33 Cal.2d 514, 203 P.2d 522. The mere fact that water was added does not make the doctrine inapplicable as a matter of law. In the *Zentz* case the plaintiff put ice around the coke bottle. This was held not to preclude the application of the doctrine. The two situations are comparable.

"For the foregoing reasons we conclude that on the negligence cause of action the plaintiff, with the aid of the doctrine of *res ipsa loquitur*, made out a case sufficient to put the burden on defendant to show that it acted as a reasonable and prudent person would act under the circumstances.

"Thus, on both causes of action, it was error to grant the nonsuit.

"The judgment is affirmed as to defendant Aydelotte; it is reversed as to defendant Rhodes & Jamieson, Ltd. Plaintiff to recover costs from defendant Rhodes & Jamieson, Ltd."

Rehearing denied; CARTER, J., dissenting.



46 Cal.2d 164

Guy BOYD, Plaintiff and Respondent,

v.

John CRESS, Defendant and Appellant.

Sac. 6595.

Supreme Court of California.

In Bank.

Feb. 10, 1956.

Action was brought by occupant of automobile against driver for injuries. The Superior Court of Butte County, Dudley G. McGregor, J., entered judgment for the occupant of the automobile, and the driver appealed. The Supreme Court, Shenk, J., held that where driver stopped automobile during course of trip, apparently for purpose of examining tires and to stretch and relax momentarily, and guest got out of automobile and was struck by automobile door when automobile suddenly rolled backward a few feet, the guest was not injured "during such ride" within meaning of automobile guest statute and was therefore not a "guest" at time of accident.

Judgment affirmed.

Schauer, J., dissented.

Opinion, 278 P.2d 517, vacated.

1. Automobiles §181(2)

The protection of the automobile guest statute extends only to injuries suffered "during such ride" in the sense that guest remained in or upon the vehicle at the time of the accident, and after the guest steps out of the automobile, he is no longer a

"guest" within meaning of the statute. Vehicle Code, § 403.

See publication Words and Phrases, for other judicial constructions and definitions of "During Such Ride" and "Guest".

2. Automobiles §181(2)

Where driver stopped automobile during course of trip, apparently for purpose of examining tires and to stretch and relax momentarily, and guest got out of automobile and was struck by automobile door when automobile suddenly rolled backward a few feet, the guest was not injured "during such ride" within meaning of automobile guest statute and was therefore not a "guest" at time of accident. Vehicle Code, § 403.

McDougall & Fitzwilliam, Robert H. Memering and Leo Fitzwilliam, Sacramento, for appellant.

J. Oscar Goldstein, P. M. Barceloux, Burton J. Goldstein, Goldstein, Barceloux & Goldstein, San Francisco, and Reginald M. Watt, Chico, for respondent.

SHENK, Justice.

Defendant Cress appeals from a judgment awarding damages to the plaintiff for personal injuries suffered in a motor vehicle accident.

On September 2, 1951, Cress and the plaintiff Boyd left Chico, California, in Cress' automobile for the purpose of driving to Fall River, California, in order to make plans for deer hunting trips later in the year. Cress drove his car and Boyd accompanied him as a nonpaying passenger. Sometime between 2 and 3 o'clock on the morning of September 3, after driving four or five hours, Cress steered his automobile over to the side of the highway and stopped, apparently for the purpose of examining the tires and to stretch and relax momentarily. Boyd stepped out on the right side of the vehicle, leaving the right door in a "locked open" position. Standing next to the door outside of the automobile, Boyd was struck by the door when the car suddenly rolled backward a few feet. Cress was

sitting in the driver's seat at this point but he was unable to stop the car before the open door struck Boyd causing him in turn to spin around the door and to strike the right front bumper injuring his shoulder. After the accident Boyd and Cress resumed their trip, driving first to Fall River, as originally contemplated, and then returning to Chico.

Boyd commenced this action on January 7, 1952, alleging that Cress negligently failed to set the brakes on the automobile, allowing it to roll backward and to strike him while he stood on the adjacent ground. The trial court found generally for the plaintiff, awarding \$500 general and \$1,300 special damages.

Cress' sole contention is that the foregoing facts show that Boyd was a "guest" at the time of the injury within the meaning of section 403 of the Vehicle Code and for that reason has no right of recovery. It was stipulated by the parties that Boyd was a guest at the outset of their trip together. Hence the controlling question is whether Boyd remained a guest within the meaning of the statute after he stepped out of the automobile.

Section 403 provides that "No person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride, nor any other person, has any right of action for civil damages against the driver of such vehicle or against any other person legally liable for the conduct of such driver on account of personal injury to or the death of such guest during such ride, unless the plaintiff in any such action establishes that such injury or death proximately resulted from the intoxication or wilful misconduct of said driver." Unless it appears that all of the conditions of section 403 are satisfied, the plaintiff is not a guest within the meaning of the statute and the defendant is liable for injuries resulting from his negligence. In order to qualify the plaintiff as a guest it must appear 1) that the plaintiff accepted a "ride" as a guest, 2) that the ride was "in" a vehicle upon a highway, and 3) that death or injury was suffered by the guest "during such ride." The defendant is en-

titled to the protection of the statute only if all of the foregoing requirements are satisfied.

It does not appear that Boyd was a guest at the time of the accident. Boyd unquestionably accepted the ride as a guest in a vehicle upon a highway as the statute contemplates. But it does not follow that he suffered the injury "during such ride." At the time of the accident, Boyd was entirely removed from Cress' automobile.

The terms "ride" and "riding" have been the subject of judicial interpretation in a consistent line of cases in this state. In all instances it has been determined that being in or upon the vehicle at the time of the accident is a necessary element of the "ride." In *Prager v. Isreal*, 15 Cal.2d 89, at page 94, 98 P.2d 729, at page 732, which applied section 141¾ of the Vehicle Act, the predecessor of section 403, the court stated: "We are likewise of the opinion that a person alighting from an automobile, who is in a position with one foot on the ground and the other on the running board when it so moves cannot be said to be 'riding' in said automobile within the meaning of said statute." Under such circumstances the court held that the guest statute was not applicable. A similar result was reached in *Smith v. Pope*, 53 Cal.App.2d 43, 127 P.2d 292, where the plaintiff was injured at the outset of the ride when the defendant negligently permitted the car to roll backwards a few feet as the plaintiff started to enter the automobile. In that case the court stated at page 46 of 53 Cal.App.2d, at page 294 of 127 P.2d that "In order to claim the benefit of the lessened liability provided by this section the defendant must show that the 'guest' first accepted a ride *in a vehicle* and was thereafter injured *during such ride*" and held that the plaintiff was not a guest at the time of the accident. Facts generally comparable to those of the present case were passed upon in *Harrison v. Gamatero*, 52 Cal.App.2d 178, 182, 125 P.2d 904, 907, where the guest left the car after the ride began and was injured upon her return to the vehicle. In holding that the defendant was not entitled to guest statute consideration, the

court concluded that "Certainly plaintiff was not riding in the automobile within the meaning of said section 403 at the time of her injury." A similar problem was presented in *Moreas v. Ferry*, 135 Cal.App. 202, 26 P.2d 886, where, in construing former section 141 $\frac{3}{4}$, the court refused to apply the guest statute to a person injured while cranking the defendant's car in which he had been riding.

[1, 2] This consistent line of authority establishes the rule that the protection of the guest statute extends only to injuries suffered "during such ride" in the sense that the plaintiff remained in or upon the vehicle at the time of the accident. After the guest steps out of the automobile, he enters into a pedestrian or other nonguest status. He no longer occupies the host's property or enjoys his hospitality. It is not important that the parties' intentions indicate that the plaintiff's nonguest status will exist only for a momentary interlude. When he departs from the host's automobile, even momentarily, the "guest" is entitled to hold the host-driver to the same standard of conduct as a stranger.

The defendant contends that the history of the guest statute in California discloses that the Legislature intended to broaden its scope to encompass the problem of the present case by virtue of an amendment enacted in 1935. Prior to 1935 the statute provided that the guest must have accepted a ride in a vehicle "moving upon any of the public highways" and that he must have been injured "while so riding as such guest." Stats.1929, ch. 787, § 1, p. 1580. A comparison of the 1935 amendment, which embraces the present language of section 403, reveals that the Legislature removed the words "moving upon any of the public highways" and inserted "in any vehicle upon a highway" and substituted for "while so riding" the language "during such ride." The defendant construes the 1935 amend-

ment as extending the guest statute to injuries occurring during or incidental to the "journey," notwithstanding that the plaintiff is entirely outside of the automobile when the injury is sustained. But this construction would involve the reading of new and different language into the statute.

Before the statute was amended in 1935, the case of *Moreas v. Ferry*, supra, 135 Cal.App. 202, 26 P.2d 886, construed the old section to exclude the plaintiff who is injured outside of his host's vehicle from guest statute treatment. By removing certain language and entirely recasting the structure of the statute in the 1935 amendment, the Legislature intended to extend its scope to nonmoving vehicles and to make other changes not relevant here. Had the Legislature intended in 1935 to expand the application of the statute to include cases such as the *Moreas* case, it would not have used language such as a ride "in any vehicle" and "during such ride." In view of that case it is reasonable to assume that the Legislature would have adopted language of a "journey" or "trip" or found other comparatively clear language for expressing an intention to extend the scope of the statute had it entertained such an intention.

The judgment is affirmed.

GIBSON, C. J., and CARTER, TRAYNOR, SPENCE, and McCOMB, JJ., concur.

SCHAUER, Justice (dissenting).

In my view the opinion prepared for the District Court of Appeal by Justice Schottky and concurred in by Presiding Justice Van Dyke and Justice Peek (reported at 278 P.2d 517) adequately discusses and correctly resolves the issues of law presented on this appeal. Upon the grounds and for the reasons therein stated I would reverse the judgment.

46 Cal.2d 151

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Jess Joseph WINSTON, Defendant and
Appellant.

Cr. 5815.

Supreme Court of California.

In Bank.

Feb. 7, 1956.

Defendant was convicted of furnishing marijuana to minors and of illegal possession of marijuana. The Superior Court, City and County of San Francisco, Melvyn I. Cronin, J., rendered judgment, and from the judgment of conviction and orders denying new trial and probation, defendant appealed. The Supreme Court, Spence, J., held that refusal to instruct that knowledge of the narcotic character of the thing possessed was an essential ingredient of offense of illegal possession of marijuana was error but did not result in a miscarriage of justice so as to justify reversal of conviction, in view of defendant's conviction at the same time for furnishing marijuana to minors prior to time of alleged illegal possession.

Appeal from order denying probation dismissed, and judgment and order denying a new trial affirmed.

Opinion, 288 P.2d 609, vacated.

1. Criminal Law ⇨1023(12)

Appeal from order denying probation was not authorized and hence should be dismissed. West's Ann.Pen.Code, § 1237.

2. Criminal Law ⇨1186(4)

Where record disclosed no prejudicial error, judgment of conviction should be affirmed. West's Ann.Const. art. 6, § 4½.

3. Criminal Law ⇨452(1)

Minors, who had testified as to previous use of marijuana, were competent to testify that cigarettes, allegedly furnished by defendant and smoked by witnesses on specified occasions, contained marijuana, though at trial witnesses were un-

able to tell from its appearance whether a cigarette contained marijuana. West's Ann.Health & Safety Code, § 11714.

4. Poisons ⇨9

In prosecution for furnishing marijuana to minors, the weight to be given testimony of minors that cigarettes furnished by defendant contained marijuana was for jury. West's Ann.Health & Safety Code, § 11714.

5. Criminal Law ⇨452(1)

In prosecution for furnishing marijuana to minors, inability of minors at trial to tell from its appearance whether a cigarette contained marijuana went only to the weight and not to the admissibility of their testimony that cigarettes furnished by defendant contained marijuana. West's Ann. Health & Safety Code, § 11714.

6. Poisons ⇨9

In prosecution for furnishing marijuana to minors, testimony of minors, who had previous experience with marijuana, that cigarettes furnished by defendant and smoked by witnesses contained marijuana, as corroborated by testimony of expert on marijuana as to appearance, taste and effect of smoking marijuana cigarettes, was sufficient to establish corpus delicti. West's Ann.Health & Safety Code, § 11714.

7. Witnesses ⇨372(2)

In prosecution for furnishing marijuana to minors, defendant was entitled to cross-examine each minor concerning her conversation with police officer as to her testimony at trial and inquire whether she believed from such conversation that she would obtain leniency in her own case if she testified against defendant, though such conversations with police officer as a whole were not admissible. West's Ann. Health & Safety Code, § 11714.

8. Witnesses ⇨330(1), 372(1)

Extent of cross-examination as to any fact which tends to impeach the credibility of a witness rests largely in the discretion of trial court, but considerable latitude should be allowed to show state of mind and possible bias of witness.

9. Criminal Law ⇨1186(4)

In prosecution for furnishing marijuana to minors, any error in restricting cross-examination of the minors concerning conversations with police officer for purpose of showing that officer had indicated to minors that they would receive leniency in their own cases if they testified against defendant was not prejudicial to defendant, where it was disclosed to jury that both minors were in custody and their testimony was subject to distinct possibility that it was given in hope of obtaining leniency. West's Ann.Health & Safety Code, § 11714; West's Ann.Const. art. 6, § 4½.

10. Criminal Law ⇨618

Trial court's refusal to grant severance so as to have separate trials on charges of furnishing marijuana to minors and of illegal possession of marijuana was not abuse of discretion. West's Ann.Pen.Code, § 954; West's Ann.Health & Safety Code, §§ 11500, 11714.

11. Criminal Law ⇨1148

Ruling of trial court refusing to grant a severance as to trial on different charges will not be disturbed on appeal in absence of showing of abuse of discretion. West's Ann.Pen.Code, § 954.

12. Poisons ⇨9

Instruction as to what constitutes possession of a narcotic given in prosecution for illegal possession of marijuana was insufficient for failure to include essential element of knowledge of the narcotic character of the particular object possessed. West's Ann.Health & Safety Code, § 11500.

13. Poisons ⇨4

Specific intent to violate the law is immaterial to conviction for illegal possession of a narcotic, but knowledge of the narcotic character of the thing possessed is an essential ingredient of the offense. West's Ann.Health & Safety Code, § 11500.

14. Criminal Law ⇨1186(4)

In prosecution for possession of marijuana, refusal to instruct that knowledge of the narcotic character of the article possessed was an essential ingredient of offense charged was error, but did not result in a miscarriage of justice so as to jus-

tify reversal of conviction, in view of conviction of defendant at the same time for furnishing marijuana to minors prior to time of alleged illegal possession. West's Ann.Health & Safety Code, §§ 11500, 11714; West's Ann.Const. art. 6, § 4½.

15. Arrest ⇨71

Search of defendant's apartment by police officers incident to arrest of defendant therein on warrant for his arrest on narcotics charge was reasonable and lawful, regardless of the practicability of procuring a search warrant before searching apartment. West's Ann.Health & Safety Code, § 11500; West's Ann.Const. art. 1 § 19; U.S.C.A.Const. Amend. 4.

16. Searches and Seizures ⇨7(12)

In prosecution for illegal possession of marijuana, admitting in evidence marijuana cigarettes found in defendant's apartment in lawful search thereof by police officers incident to arrest of defendant in apartment on warrant for his arrest on narcotics charge did not violate constitutional guarantees against unreasonable searches and seizures. West's Ann.Health & Safety Code, § 11500; West's Ann.Const. art. 1, § 19; U.S.C.A.Const. Amend. 4.

Appeal from Superior Court, City and County of San Francisco; Melvyn I. Cronin, Judge.

Charles O. Morgan, Jr., San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Victor Griffith, Deputy Atty. Gen., for respondent.

SPENCE, Justice.

[1] Defendant was charged with the commission of four felonies. Counts one and two related to his alleged furnishing of marijuana to two minor girls on January 2, 1954; and count three related to his furnishing of marijuana to one of the girls on March 13, 1954; all in violation of section 11714 of the Health and Safety Code. Count four related to his alleged possession of marijuana on September 1, 1954, in violation of section 11500 of the Health and

Safety Code. He appeals from the judgment of conviction on all four counts and from an order denying a new trial. He also attempts to appeal from an order denying probation, but since such an appeal is not authorized, Pen.Code, § 1237; *People v. Mason*, 109 Cal.App.2d 87, 89, 240 P.2d 64, it will be dismissed.

[2] As grounds for reversal, defendant argues these points: (1) Lack of proof of the corpus delicti on counts one, two, and three—that is, lack of substantial evidence that the cigarettes smoked by the two minor girls contained marijuana; (2) curtailment of the cross-examination of the girls to show their state of mind and possible bias; (3) denial of the severance of count four from the other three counts for trial; (4) refusal to instruct, with respect to count four, that defendant must know that the cigarettes found in his apartment contained marijuana; and (5) absence of a search warrant when the officers arrested defendant and found various items of evidence in his apartment. Only point (4) raises a serious question, but a review of the record convinces us that there was no prejudicial error and that the judgment of conviction should therefore be affirmed. Const. art. VI, § 4½.

The two girls testified that on January 2, 1954, they went to defendant's apartment; that they had known defendant about two years, had previously been to his apartment about one hundred times and had smoked marijuana there at least twenty times. About half an hour after their arrival and following their affirmative response to defendant's question of whether they wanted to get "high," defendant went to the kitchen and returned with a cigarette. Both girls and defendant smoked the cigarette, passing it from one to the other; and both girls became "high." One of the girls testified that on March 13, 1954, she went alone to defendant's apartment, joining a small party there; that on this latter occasion defendant again brought a cigarette from the kitchen; that it was passed from person to person, and she, with the other smokers, became "high." Her story was corroborated by one of the group

who did not smoke the cigarette but who described its "high" effect on the others—"to the point that they were feeling very, very giddy and silly." Both prosecuting witnesses described the cigarette smoked as having tucked in ends (customary with a marijuana cigarette) and the subsequent exhilarating effects they experienced, which were followed about three hours later by a depressed feeling. In August, 1954, both girls reported to the police their experiences with defendant.

On September 1, 1954, four police officers armed with a warrant for defendant's arrest went to defendant's apartment and were admitted by him. They arrested defendant, searched the premises, and found three partially smoked marijuana cigarettes in the kitchen under a table scarf on top of a bread box. Defendant stated that he had never used marijuana, denied all knowledge of the cigarettes, and contended that they must have been left by a tenant to whom he had rented the apartment while he was out of town. He had been occupying the apartment for approximately three weeks between his return and his arrest. The officers further found a package of wheat straw paper, of the type in which, according to the narcotic expert, marijuana cigarettes are customarily wrapped. They also found a telephone directory sheet on which was written the names of both the prosecuting witnesses and their telephone numbers. At that time, defendant denied knowing either of the girls.

At the trial defendant admitted knowing both girls but denied that they had been in his apartment more than two times, neither of which was January 2, 1954. He denied selling or giving marijuana to either girl. He claimed that on January 2, when the girls testified that they smoked marijuana furnished by him in his apartment, he was not even there but was at various taverns. He further denied the visit and all the related circumstances as charged with respect to one of the girls on March 13, 1954. He said that he had the telephone numbers of the two girls in his directory list because each of the girls had telephoned asking him to give her number to the other

in the event he saw or heard from the other. Both girls denied this.

Defendant first contends that the corpus delicti was not proved for the first three counts, in that there was no proof that the substance smoked was marijuana. While conceding that the prosecution need not physically produce the narcotic, he insists that to prove a substance is a narcotic, there must be not only the testimony of the user but also that of a medical doctor or expert. *People v. Candalaria*, 121 Cal.App.2d 686, 264 P.2d 71; *People v. Tipton*, 124 Cal.App.2d 213, 268 P.2d 196. Although in the cited cases, in addition to the testimony of the users, experts testified that in their opinion, from the description given by the users and their reactions from its use, the substance was a narcotic, neither case holds that such expert evidence is required for a conviction if the users demonstrate a knowledge of the narcotic as such. But in any event, such expert evidence was present here. Both girls testified that they had frequently smoked marijuana; they described the appearance of a marijuana cigarette, having tucked in ends; they related the custom of smoking such a cigarette in chain fashion in a group, each person taking one or two puffs and inhaling, then passing it to another; and they told of their "high" feeling after about fifteen minutes, their feeling of freedom from their cares, lasting about three to four hours, then their feeling of "coming down," that is, their feeling of depression, at which time they became hungry. An inspector from the State Narcotic Bureau, after qualifying as an expert on marijuana following his many years' service as a chemist with the bureau, corroborated each of these essential points in the girls' testimony, and further testified that if a person had the feelings above described, it would be a good indication that the person had been using marijuana. It is true that he was not asked his opinion as to whether the substance smoked by the girls was marijuana, and that, on cross-examination, he admitted that without seeing the person it would be as easy to conclude from the described symptoms that such person had been drinking as to conclude that he had been smoking

marijuana. But these were matters affecting the jury's evaluation of his entire testimony, including his description of the manner of usage, sensations, and symptoms produced by such smoking, which closely corresponded with the two girls' testimony on these matters.

[3-6] The competency of the girls to testify that the cigarettes were marijuana was shown by their knowledge of it from previous use. In view of such experience, the trial court permitted the girls to identify the substance furnished them by defendant as marijuana. "The weight, of course, to be given this testimony was for the jury." *People v. Candalaria*, supra, 121 Cal.App.2d 686, 690, 264 P.2d 71, 73. Defendant cites the fact that he introduced into court a cigarette containing Bull Durham but rolled in wheat straw paper so as to resemble the marijuana cigarettes described by the girls; that each girl stated that except that the cigarette "wasn't so flat" and the ends were "not tucked in," it looked like the one each had smoked on January 2; and that neither could tell by looking at the cigarette whether it contained marijuana. But these admissions by the girls did not disqualify them from testifying that the substance they smoked was marijuana, the taste and effect of which was known to them. At most, their failure to tell whether a cigarette contained marijuana or not by merely looking at the outside wrapping went to the weight of their testimony, and not to its admissibility. In view of the foregoing evidence, we conclude that the fact that the cigarettes smoked by the girls were marijuana cigarettes was amply proved. *People v. Candalaria*, supra, 121 Cal.App.2d 686, 689, 264 P.2d 71; *People v. Rios*, 127 Cal.App.2d 620, 622, 274 P.2d 163.

[7-9] Defendant next contends that his cross-examination of the two girls to show their state of mind and possible bias was unduly curtailed. Both girls were asked when they reported to the police the incidents of their smoking marijuana in defendant's apartment; each said that it was in the course of questioning by a police officer attached to the Juvenile Bureau; and each thereafter was arrested. The

court sustained objections to questions as to the reason for their arrest and the conversations there had. Each girl, however, stated that the police officer had asked her questions pertaining to her testimony to be given at the trial. Defendant maintains that he was entitled to elicit the conversations in order for the jury to determine whether the police officer had indicated to the girls that each might receive leniency in her own case if she were to testify against defendant. While the conversations as a whole were not admissible, the court should have permitted the questions concerning the conversation between the police officer and each girl as to her testimony at the trial and also the questions whether each believed from her talk with the police officer that she would obtain such leniency. Although the extent of cross-examination on any "fact which tends to impeach the credibility of a witness * * * rests very largely in the discretion of the trial court" (27 Cal.Jur. § 96, pp. 122-123), nevertheless considerable latitude should be allowed to show the witness' state of mind and possible bias. *People v. Pantages*, 212 Cal. 237, 255, 297 P. 890; *People v. Evans*, 113 Cal.App.2d 124, 127, 247 P.2d 915. Assuming, however, that further cross-examination might well have been permitted, it does not appear that defendant was prejudiced by the trial court's rulings. Both girls had admitted using marijuana prior to defendant's furnishing it to them. Both were subject to control by the juvenile authorities, had juvenile records, and had been extensively interviewed by the police. Time and again the jury learned that both girls were in custody and that their testimony was subject to the distinct possibility that it was given in the hope of obtaining leniency. Practically everything that defendant was trying to develop through cross-examination along this line eventually got before the jury except an express agreement for leniency, but both girls specifically denied that any such promise had been made to them.

[10, 11] Nor may defendant prevail in his objection to the trial court's denial of his motion to try count four (possession) separately from the three counts charging

him with furnishing marijuana to minors. Section 954 of the Penal Code provides that crimes of this nature may be included in one accusatory pleading, subject to the right of the trial court, "in the interests of justice and for good cause shown," to order "in its discretion" that any offense or offenses be tried separately. In the absence of a showing of an abuse of such discretion in refusing a severance, the trial court's ruling will not be disturbed on appeal. *People v. Leete*, 130 Cal.App.2d 725, 727, 279 P.2d 769; see also *In re Pearson*, 30 Cal.2d 871, 873-874, 186 P.2d 401.

[12, 13] Defendant's fourth ground for reversal, in relation to the possession charge (count four), raises the most serious question. He offered an instruction informing the jury that knowledge of the narcotic character of the thing possessed is an essential ingredient of the offense charged. The court refused to give it but did give CALJIC No. 703: "Within the meaning of the law a person is in possession of a narcotic when it is under his dominion and control and, to his knowledge, either is carried on his person or is in his presence and custody, or, if not on his person or in his presence, the possession thereof is immediate, accessible and exclusive to him." This latter instruction was not sufficient for it did not include the essential element of knowledge of the narcotic character of the particular object possessed. While specific intent to violate the law is immaterial to a conviction for the unlawful possession of a narcotic, knowledge of the object's narcotic character—that is, "knowledge that the facts exist which bring the act * * * within the provisions of [the] code"—is required. *People v. Gory*, 1946, 28 Cal.2d 450, 456, 170 P.2d 433; see also *People v. Cole*, 1952, 113 Cal.App.2d 253, 258, 248 P.2d 141; *People v. Barnett*, 1953, 118 Cal.App.2d 336, 339, 257 P.2d 1041; *People v. Rice*, 1954, 123 Cal.App.2d 124, 125, 266 P.2d 200; *People v. Tennyson*, 1954, 127 Cal.App.2d 243, 245-246, 273 P.2d 593; *People v. Candiotta*, 1954, 128 Cal.App.2d 347, 351-353, 275 P.2d 500; *People v. Perez*, 1954, 128 Cal.App.2d 750, 759, 276 P.2d 72; *People v. MacCagnan*, 1954, 129 Cal.App.2d 100, 107-110, 276 P.2d 679.

Respondent contends that there is no requirement of knowledge on the defendant's part of the narcotic character of the object possessed, and argues that the case of *People v. Gory*, supra, should not be construed as requiring such knowledge. While the *Gory* case, on its particular facts, did not require such precise holding to justify reversal of the judgment, such concept of knowledge is implicit in the discussion of the basic principles involved. There defendant, a prisoner at the Los Angeles County Honor Farm, shared living quarters with a group of prisoners in a bunkhouse. Each prisoner was issued a small metal box for storage of his personal effects. There was no way of locking the boxes, and during the day a guard was left in charge of the bunkhouse. Marijuana was found in defendant's box. At the trial defendant, charged with unlawfully having marijuana in his possession, testified that he "had never seen [the material] before the officers removed it from the box." 28 Cal.2d at page 452, 170 P.2d at page 435. While there an instruction requiring the finding of a "guilty knowledge" and a "guilty intent" on the part of defendant to sustain his conviction was held to have been properly withdrawn from the jury's consideration, it was deemed erroneous to have rejected an instruction predicated a finding of guilt upon defendant's "knowingly" having "in his possession the objects charged in the information." Accordingly, it was said, 28 Cal.2d at page 456, 170 P.2d at page 437: "'The word 'knowingly' imports only a knowledge that the facts exist which bring the act or omission within the provisions of this code. It does not require any knowledge of the unlawfulness of such act or omission.' Pen.Code, § 7, subd. 5; *People v. McClenneen*, 195 Cal. 445, 469, 234 P. 91. Thus [the erroneously rejected] instruction invoked the element of knowledge in the sense of defendant's awareness of the presence of the marijuana in the box given him for the storage of his personal effects at the prison farm and so presented to the jury an issue of fact determinative of defendant's guilt or innocence of the possession prohibited by statute."

Respondent argues that mere conscious possession of an object, not knowing its true character as a narcotic but honestly believing it to be an innocuous article, nevertheless comes within the purview of the narcotic possession law. To this point this language from the *Gory* case is cited, 28 Cal.2d at pages 455-456, 170 P.2d at page 436: "The distinction which must be drawn * * * is the distinction between (1) *knowledge of the character of the object and the unlawfulness of possession thereof* as embraced within the concept of a specific intent to violate the law, and (2) *knowledge of the presence of the object* as embraced within the concept of 'physical control with the intent to exercise such control,' which constitutes the 'possession' denounced by the statute. It is 'knowledge' in the first sense which is mentioned in the authorities as being immaterial but 'knowledge' in the second sense is the essence of the offense." This distinction was meant to point out the difference between defendant's possession of marijuana with knowledge that it was in disregard of the law and therefore indicating his specific intent to violate the law, and defendant's possession of marijuana knowing its nature but innocent that its possession constituted a violation of the law. Thus, it was further said in the *Gory* case, 28 Cal.2d at page 457, 170 P.2d at page 437: "Here the principal fact relied upon by the prosecution is the finding of marijuana in defendant's unlocked box and because of the denial by defendant of knowledge of its presence there, it was the duty of the trial court, on proper instructions, to submit to the jury the question as to whether defendant had knowledge of the presence of the marijuana."

In short, in the *Gory* case the question presented by defendant's testimony was whether he had knowledge of the presence of the material later identified as marijuana; in other words, he claimed that he had no knowledge of the presence of any such material in his box. So without going into the precise question of defendant's knowledge of the nature of the material, the *Gory* case involved a situation where defendant claimed that he had no knowledge of the presence of the material in his

box, regardless of what its nature may have been. In discussing the factors to be considered, the following cases were cited in the Gory case, 28 Cal.2d 454, 170 P.2d 433, for the proposition that a specific intent to violate the law is not necessary to justify a conviction for the unlawful possession of narcotics: *People v. Le Baron*, 92 Cal. App. 550, 568, 268 P. 651, 269 P. 476; *People v. Randolph*, 133 Cal.App. 192, 196, 23 P.2d 777; *People v. Johnson*, 66 Cal.App.2d 164, 165, 152 P.2d 331; *People v. Sweeney*, 66 Cal.App.2d 855, 859, 153 P.2d 371. But insofar as those cases or the language employed may indicate that "mere possession of the narcotics" without knowledge of their narcotic nature would sustain a conviction, they are hereby disapproved. See also *People v. Charley Quong*, 5 Cal.App.2d 137, 139, 42 P.2d 386; *People v. Terrazas*, 42 Cal.App.2d 281, 282, 108 P.2d 680; *People v. Barton*, 48 Cal.App.2d 565, 567, 119 P.2d 952.

[14] Since under the Gory case, knowledge of the narcotic character of the article possessed is an essential ingredient of the offense charged, *People v. Millum*, 42 Cal.2d 524, 529, 267 P.2d 1039; *People v. Gorg*, 45 Cal.2d 776, 291 P.2d 469; also *People v. Cole*, supra, 113 Cal.App.2d 253, 258, 248 P.2d 141; *People v. Candiott*, supra, 128 Cal.App.2d 347, 350-353, 275 P.2d 500; *People v. Perez*, supra, 128 Cal.App.2d 750, 759, 276 P.2d 72; *People v. MacCagnan*, supra, 129 Cal.App.2d 100, 110-111, 276 P.2d 679, it was error to fail to so instruct. But there remains the question of whether the error was prejudicial under the circumstances of this case. Defendant was found guilty of having furnished marijuana to two minor girls on two different occasions, which antedated his arrest for unlawful possession of marijuana on September 1, 1954. As the jury found that he was in possession of the marijuana cigarettes which he gave to the girls to smoke on the two prior occasions, it is inconceivable that the jury, even if properly instructed on the possession charge, would have failed to find that defendant had knowledge that he was in possession of the marijuana cigarettes on the relevant later date, September 1, 1954. Accordingly, it cannot be said that

the error in question resulted in a miscarriage of justice so as to justify a reversal. Const. art. VI, § 4½; *People v. Candiott*, supra, 128 Cal.App.2d 347, 354-355, 275 P.2d 500; *People v. Perez*, supra, 128 Cal.App.2d 750, 759-760, 276 P.2d 72.

Before concluding the discussion relating to the required knowledge on the part of the defendant to sustain a conviction upon a charge of unlawful possession of a narcotic, it should be made clear that we have been discussing solely a question of substantive law together with the question of the refusal of the trial court to give requested instructions upon that subject. In other words, we have not been discussing the question of the nature of the evidence required to sustain a conviction of unlawful possession of a narcotic; and it should not be implied that the required knowledge on the part of the defendant may not be inferred from surrounding circumstances.

[15, 16] Defendant finally contends that his constitutional rights were violated in that evidence admitted and used against him was obtained as the result of an unlawful search and seizure. U.S. Const. Fourth Amend.; Cal. Const. art. I, § 19; *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905. The record does not sustain his claim. As above stated, the police officers had a warrant for defendant's arrest when they went to defendant's apartment and were admitted by him. After placing defendant under arrest, they searched the apartment and found the marijuana cigarettes. While the Cahan case held that evidence obtained by police officers in violation of federal and state constitutional prohibitions "against unreasonable search and seizure is inadmissible," it did "not purport to inhibit the right of law enforcement officers to conduct a reasonable search or seizure incident to a valid arrest." *People v. Coleman*, 134 Cal. App.2d 594, 599, 286 P.2d 582, 585. It is further said in the Coleman case, 134 Cal. App.2d at pages 599-600, 286 P.2d at page 586: "It is well settled that a search without a warrant is valid where it is incident to a lawful arrest, if it is reasonable and made in good faith; and that a seizure, during such a search, of evidence related to the crime is permissible, [Ex parte]

Dixon, 41 Cal.2d 756, 761-762, 264 P.2d 513; Harris v. United States, 331 U.S. 145, 151, 67 S.Ct. 1098, 91 L.Ed. 1399; United States v. Rabinowitz, 339 U.S. 56, 61, 70 S.Ct. 430, 94 L.Ed. 653; McIntire v. United States, 10 Cir., 217 F.2d 663, 665; Agnello v. United States, 269 U.S. 20, 30, 46 S.Ct. 4, 70 L.Ed. 145, 51 A.L.R. 409. In the case last cited, the court succinctly stated: "The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime, and to search the place where the arrest is made in order to find and seize things connected with the crime * * * is not to be doubted." There is nothing in the language, logic or rationale of the Cahan case, where the search and seizure was accomplished in violation of constitutional guaranties, which is in conflict with the above principle, which has prevailed not only in California and the federal courts, but in our sister states. Annotations: 32 A.L.R. 680; 51 A.L.R. 424; 74 A.L.R. 1387; and 82 A.L.R. 782."

In the Coleman case, as well as in the Dixon case cited in the above quotation, the police officers did not have a warrant of arrest but the court in both instances held that under the circumstances the arrest was valid and the accompanying search of the premises incident thereto was proper. In the present case the police had a valid warrant of arrest. Defendant unavailingly argues that here the police officers had ample time to procure a search warrant and therefore such warrant was required in order to validate the search and seizure of the incriminating evidence at the time of his arrest. Trupiano v. United States, 334 U.S. 699, 708, 68 S.Ct. 1229, 92 L.Ed. 1663. In United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653, it was held

that a search of the defendant's premises incident to his lawful arrest at those premises was not unreasonable. In so concluding, the court in the Rabinowitz case further said, 339 U.S. at page 66, 70 S.Ct. at page 435: "To the extent that Trupiano v. United States, 334 U.S. 699, 68 S.Ct. 1229, 92 L.Ed. 1663, requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest, that case is overruled. The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable."

The judgment and the order denying a new trial are affirmed. The appeal from the order denying probation is dismissed.

GIBSON, C. J., and SHENK, TRAYNOR and McCOMB, JJ., concur.

SCHAUER, Justice.

The holding herein, as I understand it, specifically construes the majority decision in *People v. Gory* (1946), 28 Cal.2d 450, 170 P.2d 433, as not standing for, but on the contrary as negating, the implication (discussed in the concurring opinion, at page 459 of 28 Cal.2d, at page 438 of 170 P.2d), "that mere conscious possession of an object, not knowing its true character (as, for example, possession of marijuana believed in good faith to be ordinary tobacco), any more than conscious possession of an object lawful in-itself but within which, unknown to the possessor, contraband is concealed, constitutes a criminal act." With such understanding, I concur in the opinion and judgment.

CARTER, J., concurs.

46 Cal.2d 213

Montle HAWK and David Hawk, by and through his guardian ad litem, Montle Hawk, Plaintiffs and Appellants,

v.

CITY OF NEWPORT BEACH, a Municipal Corporation, Defendant and Appellant.

L. A. 23913.

Supreme Court of California.

In Bank.

Feb. 14, 1956.

Action against city by father, individually and as guardian ad litem of his minor son, for injuries received when minor son dove from rock on public recreational beach owned, maintained, and supervised by city. The Superior Court, Orange County, Kenneth E. Morrison, J., entered judgment on verdict for plaintiffs and then entered order granting new trial, and plaintiffs appealed. The Supreme Court, Spence, J., held that, where evidence and inferences therefrom were such that reasonable men could differ in the determination of the several issues presented, and judgment in favor of city would have found ample support in the evidence, granting of city's motion for new trial did not constitute an abuse of trial court's discretion.

Orders denying defendant's motion for judgment notwithstanding verdict and order granting new trial affirmed.

Opinion, 286 P.2d 481, vacated.

1. Municipal Corporations ⇨847

Public agency is not an insurer and is not required to keep its property in such condition as will preclude possibility of injury, but natural condition may nevertheless, under certain circumstances, constitute a dangerous or defective condition and permit imposition of liability.

2. Municipal Corporations ⇨723

Fact that condition involves an unreasonable risk of injury to the public renders it a dangerous or defective condition within meaning of the Public Liability Act, but each case must be determined upon its own peculiar merits. West's Ann.Gov. Code, § 53051.

3. Municipal Corporations ⇨857

In action against city by father, individually and as guardian ad litem of his minor son, for injuries received when minor son dove from rock on public recreational beach owned, maintained, and supervised by city, questions whether dangerous condition existed and, if so, whether city fulfilled its duty to take action reasonably necessary to protect the public against the condition were for jury. West's Ann.Gov. Code, § 53051.

4. Negligence ⇨136(26)

Question of contributory negligence is ordinarily one of fact for jury.

5. Negligence ⇨65

Barring of plaintiff on grounds that he has been guilty of contributory negligence as matter of law is justified only under unusual circumstances.

6. Municipal Corporations ⇨857

In action against city by father, individually and as guardian ad litem of his minor son, for injuries received when minor son dove from rock on public recreational beach owned, maintained, and supervised by the city, question whether son was guilty of contributory negligence was for jury. West's Ann.Gov.Code, § 53051.

7. Negligence ⇨105

Elements of defense of assumption of risk are a person's voluntary acceptance of a risk and an appreciation of the magnitude of such risk.

8. Municipal Corporations ⇨857

In action against city by father, individually and as guardian ad litem of his minor son, for injuries received when minor son dove from rock on public recreational beach, owned, maintained and supervised by city, question whether son appreciated magnitude of danger involved and, therefore, assumed the risk was for jury. West's Ann. Gov.Code, § 53051.

9. Appeal and Error ⇨979(2)

New Trial ⇨72

In passing on motion for new trial made on ground of insufficiency of evidence, trial court weighs evidence and inferences to be drawn therefrom, and grant of such mo-

tion will not be disturbed in absence of abuse of discretion, and it cannot be held that trial court has abused its discretion where there is any evidence which would support a judgment in favor of movant.

10. New Trial ⇨70

Where, in personal injury action against city, evidence and inferences therefrom were such that reasonable men could differ in the determination of the several issues presented, and judgment in favor of city would have found ample support in the evidence, granting of city's motion for new trial after entry of judgment for plaintiffs or verdict for plaintiffs did not constitute an abuse of trial court's discretion. West's Ann.Gov.Code, § 53051.

11. Appeal and Error ⇨790(3)

Upon affirmation of order granting defendant a new trial, defendant's appeal from judgment on verdict for plaintiffs presented a moot question and, therefore, would be dismissed.

Paul T. Erskine, Alhambra, and W. J. Schall, San Diego, for plaintiffs and appellants.

Z. B. West, Santa Ana, Belcher, Kearney & Fargo and Stevens Fargo, Los Angeles, for defendant and appellant.

SPENCE, Justice.

This action was brought against the defendant city by David Hawk, a minor, through his father, Montie Hawk, acting as guardian ad litem, and also by said Montie Hawk acting for himself, for damages for injuries to the minor, and for expenses incurred by the father by reason of such injuries. Judgment for plaintiffs was entered upon a jury verdict, and the trial court granted a new trial. Plaintiffs appeal from the order granting a new trial. Defendant appeals from the judgment and from the order denying its motion for judgment notwithstanding the verdict. The principal question argued on all three appeals is whether the evidence presented would justify the imposition of liability upon the defendant city under sec-

tion 53051 of the Government Code, sometimes called the Public Liability Act.

Section 53051 of the Government Code provides: "A local agency is liable for injuries to persons and property resulting from the dangerous or defective condition of public property if the legislative body, board, or person authorized to remedy the condition: (a) Had knowledge or notice of the defective or dangerous condition. (b) For a reasonable time after acquiring knowledge or receiving notice, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition."

At the time of the accident and for many years prior thereto, the defendant city owned, maintained, and supervised a recreational beach area to which it invited the public. It also maintained signs indicating the location of a parking area in which visitors to the beach could park their cars. A fee was charged for parking, and the city participated in the revenue obtained from this parking area.

The injured plaintiff, David, a boy of 17 at the time of the injury, parked his car and went swimming at the city beach. After spending some time on the main beach, he proceeded to a cove area separated from the main beach by a large "camel-back" rock, but in fairly close proximity to the main beach and connected with it by well-defined paths. On one side of the cove were located large rocks which project out of the water at varying heights to a point about 180 to 200 feet from the shore. David had not used the cove before, but on previous occasions he had observed people diving from the rocks. He testified that when he reached the cove he saw "all the kids over there swimming and diving," and he decided to try out his diving. In wading out to the rocks the water came only to his waist, and he could not see the bottom because of the murky water. David followed an older boy to the farthest rock and watched him dive into the water and swim away unharmed. David then climbed to the top of this rock, which stood about eight feet above the level of the surrounding water, and dived into the water. He

apparently struck the bottom and severely injured himself.

For many years, with knowledge on the part of the city, some of the patrons of the beach had used this rock as a diving platform. The captain of the lifeguards, an employee of the city with authority to take precautionary measures to protect the users of the beach, testified that he himself had used the rock for diving purposes during his teen-age years, and that his lifeguards reported to him about once a week that patrons of the beach were using the rock for diving purposes. He also knew that on two prior occasions persons had been injured by diving from this rock. He had instructed his roving lifeguards to warn anyone about to dive from the rocks. However, there were no lifeguards regularly posted at the cove, and the roving lifeguards were able to observe this area only at infrequent intervals.

Plaintiffs contend that the rock from which David dived was a "dangerous or defective condition" because by its characteristics, its location and its use, it had become a part of the defendant city's recreational facilities; that the city had knowledge that it was being used for diving and that such use was dangerous; and that it thereafter failed to provide any adequate warnings or safeguards, which action was "reasonably necessary to protect the public against the condition." Gov.Code, § 53051. Defendant contends that as a matter of law the rock and its surrounding area did not constitute a "dangerous or defective condition" because they were natural conditions unaltered by any act of the defendant city; that the use of the rock as a diving platform had not been invited; that the rock was neither designed nor intended to be used as a diving platform; and that the rock was relatively inaccessible and could become dangerous to a person only through his voluntary act of using it for an obviously dangerous purpose, such as a diving platform.

[1,2] Although a public agency is not an insurer and is not required to keep its property in such condition as to preclude the possibility of injury, *Whiting v. Na-*

tional City, 9 Cal.2d 163, 166, 69 P.2d 990; *Rodkey v. City of Escondido*, 8 Cal.2d 685, 689, 67 P.2d 1053; *Electrical Products Corp. v. County of Tulare*, 116 Cal.App.2d 147, 153, 253 P.2d 111, a natural condition may nevertheless constitute, under certain circumstances, a dangerous or defective condition so as to permit the imposition of liability. See *Smith v. County of San Mateo*, 62 Cal.App.2d 122, 144 P.2d 33. It is the fact that a condition involves an unreasonable risk of injury to the public that renders it a dangerous or defective condition within the meaning of the Public Liability Act, *Jones v. City of Los Angeles*, 104 Cal. App.2d 212, 215, 231 P.2d 167, and each case must be determined upon its own peculiar facts. *Arellano v. City of Burbank*, 13 Cal.2d 248, 255, 89 P.2d 113; *George v. City of Los Angeles*, 11 Cal.2d 303, 309, 79 P.2d 723.

[3] In the present case we cannot say as a matter of law that the rock and its surrounding area did not constitute a dangerous condition. Therefore, that issue was properly submitted to the jury. With the exception of the instructions issued to the roving lifeguards, the city took no action, by way of the erection of signs or otherwise, to warn persons of the possible danger in diving from the rock. It seems clear that there may be situations in which a duty might be imposed upon a public agency to take such action, or other measures, to protect the public against the condition, Cf. *Magnuson v. City of Stockton*, 116 Cal.App. 532, 3 P.2d 30; and in the instant case reasonable men could differ on the question of what action might reasonably be necessary to protect the public under the circumstances. We therefore conclude that it was proper to submit to the jury the issues of whether a dangerous condition existed and, if so, whether the defendant fulfilled its duty to "take action reasonably necessary to protect the public against the condition."

[4-6] We now turn to the question of contributory negligence. The defendant city contends that David was guilty of contributory negligence as a matter of law, because he was fully aware of the physical

conditions of the rock and its surrounding area; he was accustomed to swimming and diving; he was cognizant of the presence of the rock in the water and the height from which he intended to dive; and he did not know the depth of the water except that the greatest depth which he had encountered in wading out to the rock was approximately up to his waistline. We cannot agree. David was a minor who was using a supervised recreational area. He had never previously used this area but had seen other persons diving from this rock, and he followed another older boy to the rock and watched him dive into the water and swim away unharmed. The issue of contributory negligence is ordinarily a question of fact for the jury. The barring of a plaintiff on the ground that he has been guilty of contributory negligence, as a matter of law, is justified only under unusual circumstances, *Anthony v. Hobbie*, 25 Cal.2d 814, 818, 155 P.2d 826; and in dealing with minors a much more lenient rule is applied. See *Ross v. San Francisco Unified School Dist.*, 120 Cal.App.2d 185, 260 P.2d 663, and cases cited therein; 107 A.L.R. 164 et seq. We find nothing in the evidence here which would justify the conclusion that the minor was guilty of contributory negligence as a matter of law; and we are of the opinion that the issue of contributory negligence was properly submitted to the jury for its determination.

[7,8] The defense of assumption of risk as a matter of law is likewise unavailing. The elements of this defense are a person's voluntary acceptance of a risk and an appreciation of the magnitude of that risk. *Prescott v. Ralphs Grocery Co.*, 42 Cal.2d 158, 161-162, 265 P.2d 904; *Hayes v. Richfield Oil Corp.*, 38 Cal.2d 375, 384-385, 240 P.2d 580. Even if David can be said to have realized that his dive was attended with some degree of danger, it cannot be said as a matter of law that he appreciated the magnitude of that danger. Cf. *Andre v. Allynn*, 84 Cal.App.2d 347, 352-353, 190 P.2d 949.

In view of our conclusion that all of the above-mentioned issues involved questions of fact to be determined by the jury upon the evidence presented, it follows that the trial court properly denied defendant's motion for a directed verdict and defendant's motion for judgment notwithstanding the verdict.

[9,10] The last point to be considered concerns the propriety of the trial court's order granting defendant's motion for a new trial. In granting that motion, the trial court "particularly" relied on the ground of insufficiency of the evidence. In passing on a motion for new trial made upon that ground, a trial court weighs the evidence and the inferences to be drawn therefrom, and when the motion is granted its action will not be disturbed unless there has been an abuse of discretion; and it cannot be held that a trial court has abused its discretion where there is any evidence which would support a judgment in favor of the moving party. *Estate of Green*, 25 Cal.2d 535, 542, 154 P.2d 692; *Hames v. Rust*, 14 Cal.2d 119, 124, 92 P.2d 1010. In the instant case the evidence and the inferences to be drawn therefrom are such that reasonable men could differ in the determination of the several issues presented, and a judgment in favor of the defendant city would find ample support in the evidence. It therefore cannot be said that the trial court abused its discretion in granting defendant's motion for a new trial.

[11] The order denying defendant's motion for judgment notwithstanding the verdict and the order granting a new trial are affirmed. Having affirmed the order granting a new trial, defendant's appeal from the judgment presents a moot question, and said appeal is therefore dismissed. The parties will bear their own costs on these appeals.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and McCOMB, JJ., concur.

46 Cal.2d 106

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

George H. MARTIN, Defendant and
Appellant.

Cr. 5758.

Supreme Court of California,
In Bank.

Feb. 3, 1956.

Prosecution for possession of marijuana. From judgment of conviction of the Superior Court, Alameda County, Donald K. Quayle, J., defendant appealed. Defendant also appealed from order denying new trial motion. The Supreme Court, Traynor, J., held that where two men who were alone in automobile parked in lovers' lane at night fled in that automobile from city police officers, officers were justified upon overtaking men in requiring them to put their hands in front of them as a precautionary measure and also were justified in taking bag, which was uncovered when men removed hands from seat, from automobile in the belief that men's possession of the bag prompted their flight and that it contained contraband, and such bag, which contained marijuana, was admissible in evidence.

Judgment affirmed; appeal from order dismissed.

Carter, J., dissented.

1. Criminal Law Ⓒ1086(13)

Where record on appeal did not disclose motion for new trial was made or that order denying it was entered, appeal therefrom was dismissed.

2. Criminal Law Ⓒ395

Searches and Seizures Ⓒ3(1)

Where two men who were alone in automobile parked in lovers' lane at night fled in that automobile upon seeing city police officers, officers were justified upon overtaking the men in requiring them to put their hands in front of them as a precautionary measure and were justified in taking small bag which was exposed to their

view when men removed their hands from seat from the automobile on the belief that possession of the bag had prompted the flight of the two men and that it contained contraband, and such bag, which contained marijuana, was admissible in evidence in subsequent prosecution for unlawful possession of marijuana. West's Ann. Health & Safety Code, § 11500.

George H. Martin, in pro. per., and Clinton W. White, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Arlo E. Smith, Dep. Atty. Gen., for respondent.

TRAYNOR, Justice.

[1] Defendant appeals from a judgment of conviction entered on a jury verdict finding him guilty of one count of possessing marijuana in violation of Health and Safety Code, § 11500. He also appeals from an order that he claims was entered denying his motion for a new trial. The record, however, does not disclose that a motion for a new trial was made or that an order denying it was entered. The latter appeal must therefore be dismissed.

Officers McCann and Price of the Oakland Police Department were on automobile patrol duty during the evening of July 21, 1954. At about eleven o'clock, while driving in a southerly direction on Poplar Street near 21st Street, they observed a car parked on the opposite side of the street headed in the opposite direction. As they passed the car, Officer McCann turned his spotlight on it and saw two men sitting in the front seat. He testified: " * * * it is a lover's lane. If it had been a female and a male I wouldn't have thought too much of it but two males in that vicinity I figured we had better check it out and as I brought the patrol car around to make a u-turn on Poplar Street the suspects' car took off. They spun their wheels taking off at a high rate of speed. They turned right onto 21st Street and proceeded up 21st Street and turned right again on Union Street which would put them heading in a southern direction again on Union

Street and they turned east on 19th Street and all this time I had the red light and siren on and I brought the patrol car on up there on their left rear and very close and stopped them in front of 1181—19th Street.” Officer McCann approached the car from the left, and Officer Price from the right, and one of them flashed his flashlight into the car. Robert Dial, who later pleaded guilty to the charge of possession of marijuana, was in the driver’s seat. Defendant was sitting on the right-hand side of the front seat. Dial’s right hand and defendant’s left hand were on the center of the seat. The officers ordered the suspects to put their hands in front of them, and when they did so Officer McCann saw a small bag in the middle of the front seat that had been covered by their hands. The officers ordered the suspects out of the car, and after searching them for weapons Officer McCann reached into the car and took the bag. He examined it and concluded that it contained marijuana. Later analysis confirmed this conclusion.

Defendant contends that the search of the automobile without a warrant was unlawful and that the evidence produced thereby was therefore inadmissible.

[2] Although the presence of two men in a parked automobile on a lover’s lane at night was itself reasonable cause for police investigation (see *People v. Simon*, 45 Cal. 2d 645, 290 P.2d 531; *Gisske v. Sanders*, 9 Cal.App. 13, 16–17, 98 P. 43), their sudden flight from the officers and the inference that could reasonably be drawn therefrom that they were guilty of some crime, *United States v. Heitner*, 2 Cir., 149 F.2d 105, 107, left no doubt not only as to the reasonableness but as to the necessity for an investigation. *Husty v. United States*, 282 U.S. 694, 700–701, 51 S.Ct. 240, 75 L.Ed. 629; *Talley v. United States*, 5 Cir., 159 F.2d 703; *Levine v. United States*, 2 Cir., 138 F.2d 627, 628–629; *Jones v. United States*, 10 Cir., 131 F.2d 539, 541. Under these circumstances the officers were justified in taking precautionary measures to assure their own safety on overtaking the suspects, and it was therefore reasonable for them to order the suspects to put their

hands in front of them and to get out of the automobile to be searched for weapons before being questioned. When Officer McCann saw the bag that was uncovered when the suspects removed their hands, he had reasonable cause to believe that their possession of it prompted the flight and that it contained contraband. He was therefore justified in taking it from the automobile. *Carroll v. United States*, 267 U.S. 132, 149, 45 S.Ct. 280, 69 L.Ed. 543; *Husty v. United States*, supra, 282 U.S. 694, 700–701, 51 S.Ct. 240; *Scher v. United States*, 305 U.S. 251, 255, 59 S.Ct. 174, 83 L.Ed. 151; *Brinegar v. United States*, 338 U.S. 160, 165–171, 69 S.Ct. 1302, 93 L.Ed. 1879; *United States v. One 1946 Plymouth Sedan Automobile*, 7 Cir., 167 F.2d 3, 7.

The judgment is affirmed, and the appeal from an alleged order denying a motion for new trial is dismissed.

GIBSON, C. J., and SHENK, SCHAUER, SPENCE and McCOMB, JJ., concur.

CARTER, Justice.

I dissent.

It appears to me that the following statement from the majority opinion is most astounding: “Although the presence of two men in a parked automobile on a lover’s lane at night was itself reasonable cause for police investigation * * *.” There are so many perfectly legitimate reasons why the car might have been parked with two men as passengers and so many logical explanations therefor, that to say the very sight of two men in a parked automobile at night warrants a police investigation reminds one of the Gestapo. Since when has there been a curfew for adults? Since when has it been illegal for two men to converse at night in a parked automobile? Since the deplorable practice of “bugging” hotel rooms, private homes and offices and tapping telephone lines has become so prevalent, almost the only place two businessmen, who wish their conversation to remain private, can be safe is in an automobile on a sparsely traveled street or other secluded place. And, if their mere presence in a parked automobile is held to warrant police

investigation, it appears that private conversations must also be held illegal and the right of privacy nonexistent.

It must be remembered that the Fourth Amendment to the Constitution of the United States was adopted for the protection of all of the people of this country, and that section 19 of article I of the Constitution of California was adopted for the protection of all of the people of this state. The object and purpose of the framers of these constitutional mandates was to guarantee and make secure the fundamental right of privacy to every person—the right to be secure against police surveillance unless the police have reasonable cause to believe that an offense is being committed. This does not mean mere suspicion as some of our courts have recently indicated. The obvious reason for the rule that evidence obtained as the result of an illegal search, cannot be used against the victim of the search, is to protect innocent people by discouraging such searches. It is a matter of common knowledge that it has been the practice of law enforcement officers of this state to make searches of the persons and property of individuals whenever they saw fit regardless of whether reasonable or any cause existed, and many innocent people have been subjected to the indignity and humiliation of having their persons, homes, offices and automobiles searched by law enforcement officers with impunity when nothing of an incriminating nature was found and no arrests or prosecutions resulted therefrom. Many of these invasions of the constitutional right of privacy received no public mention because the victims did not wish to incur the expense and endure the inconvenience and publicity incidental to seeking redress in the courts. It is probable that for every case where evidence of a crime has been found there have been numerous illegal searches which uncovered no evidence whatsoever, and we know from the reported cases that the practice of illegal searches in this state has increased many fold in recent years. The American way of life does not lend itself to such totalitarian practices. There is no place in our body politic for the Gestapo, the storm trooper or the commissar. Ours is a sys-

tem of ordered liberty which is made more secure by placing a magistrate between the citizens and the over-zealous law enforcement officer. While this system must protect the guilty as well as the innocent against an unlawful search and seizure, its effect on criminal prosecutions in this field is no different than any of the other safeguards embraced in the Bill of Rights which are designed to protect the life, liberty and property of our people against deprivation without due process of law. Each and everyone of these safeguards operates as an impediment against the conviction of the guilty as well as the innocent. Yet, this is necessary in any system of ordered liberty. If the above mentioned constitutional provisions have any meaning whatsoever, then the victim of an illegal search may assert the right of privacy guaranteed to him and resist such search. If he does so, either he or the officer may be injured or killed. If this should occur, where should the blame fall? Obviously, a prosecutor who favors such illegal conduct on the part of law enforcement officers would be disposed to prosecute the victim of the illegal search if he should injure or kill the officer in his effort to resist the search, and would not prosecute the officer who injured or killed the victim in the forcible execution of his illegal project.

From the intemperate and misleading statements appearing in the public press recently as having been made by heads of police departments and prosecuting officers of this state against the rule in the Cahan case (*People v. Cahan*), 44 Cal.2d 434, 282 P.2d 905, we are forced to assume that they feel that great credit and high praise should go to those law enforcing officers who ruthlessly violate the above mentioned constitutional guarantees, and that hatred, contempt, ridicule and obloquy should be heaped upon those who insist upon their observance and preservation. I will again repeat what I have said many times both as a private citizen and as a public official of this state, that I have a sincere devotion to the American system for the administration of justice as postulated by the Constitution of the United States and the Bill of Rights; that I can conceive of no emergency short

of a threat to our national security which would justify striking down any of the safeguards for the protection of the rights of the people embraced within that system. The impediments against law enforcement, the escape of some criminals from conviction and punishment, and the cost to the public incidental to the operation of such a system, fades into insignificance when we offset and balance against those factors the glorious feeling which stems from the consciousness that, because of this system, we live in an atmosphere where we may enjoy life, liberty and the pursuit of happiness with dignity and self-respect, secure against any invasion of our fundamental personal rights without due process of law.

The Elder Pitt, in his speech on the Excise Tax, gave expression to what later became the Fourth Amendment. What he said then is just as important today. He said that "The poorest man may in his cottage bid defiance to all the forces of the crown. It may be frail; its roof may shake; the winds may blow through it; the storms may enter; the rain may enter—but the King of England cannot enter. All his forces cannot cross the threshold of the ruined tenement." Yet, prior to the decision in the Cahan case, the police and other so-called law enforcement officers in California could ruthlessly force their way into the home of a private citizen, and *without a search warrant*, seize whatever they found and use it as evidence in our courts notwithstanding they violated the constitutional right—the right of privacy—of the citizen in obtaining it.

Another great Englishman, Lord Coke, had this to say on this same subject: "The house of everyone is to him as his castle and fortress, as well for his defense against injury and violence as for his repose."

Mr. Justice Holmes, in his great dissent in *Olmstead v. United States*, 277 U.S. 438, 469, 470, 48 S.Ct. 564, 575, 72 L.Ed. 944, had this to say: "But I think, as Mr. Justice Brandeis says, that apart from the Constitution the government ought not to use evidence obtained and only obtainable by a criminal act. * * * [W]e must consider the two objects of desire both of which we cannot have and make up our

minds which to choose. It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. If it pays its officers for having got evidence by crime I do not see why it may not as well pay them for getting it in the same way, and I can attach no importance to protestations of disapproval if it knowingly accepts and pays and announces that in future it will pay for the fruits. *We have to choose, and for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part.*" (Emphasis added.)

I am in full accord with the views expressed by Mr. Justice Traynor, in *People v. Simon*, 45 Cal.2d 645, 649, 290 P.2d 531, 534 where he said: "In the present case the officer searched first and asked questions only after his search uncovered the incriminating cigarette, and there is nothing to indicate that had he confined himself to a reasonable inquiry, he would have discovered anything to confirm his suspicion that defendant had no lawful right to be where he was.

"Under these circumstances, to permit an officer to justify a search on the ground that he 'didn't feel' that a person on the street at night had any lawful business there would expose anyone to having his person searched by any suspicious officer no matter how unfounded the suspicions were. *Innocent people, going to or from evening jobs or entertainment, or walking for exercise or enjoyment, would suffer along with the occasional criminal who would be turned up.* As pointed out by Mr. Justice Jackson in a similar case, 'We meet in this case, as in many, the appeal to necessity. It is said that if such arrests and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from

punishment. Taking the law as it has been given to us, this arrest and search were beyond the lawful authority of those who executed them.' *United States v. Di Re*, supra, 332 U.S. 581, 595, 68 S.Ct. 222, 229 [92 L. Ed. 210]." (Emphasis added.) In *Gisske v. Sanders*, 9 Cal.App. 13, 16, 17, 98 P. 43, 45, the court said: "A police officer has a right to make inquiry in a *proper manner* of any one upon the public streets at a late hour as to his identity and the occasion of his presence, *if the surroundings are such as to indicate to a reasonable man that the public safety demands such identification*. The fact that crimes had recently been committed in that neighborhood, that plaintiff at a late hour was found in the locality; that he refused to answer proper questions establishing his identity, were circumstances which should lead a reasonable officer to require his presence at the station, where the sergeant in charge might make more minute and careful inquiry." (Emphasis added.) Here, even after the chase, the suspects were not questioned—they were *ordered* to put their hands in front of them, and *ordered* to get out of the car.

To bolster its theory that the very sight of the two men in a parked car justified a police investigation, the majority relies on their flight from the officers. In *United States v. Heitner*, 2 Cir., 149 F.2d 105, 106, the officers involved had been ordered by police headquarters to watch a certain building where it was suspected a still was being operated. Two men came out of the building and were followed by the officers who lost them. They went back to the building and the chase, or flight, ensued when the two men returned there. It is obvious from a reading of the case that the facts there showed more than the presence of two men in a car to warrant the search. In *Husty v. United States*, 282 U.S. 694, 700, 51 S.Ct. 240, 241, 75 L.Ed. 629, the facts showed that on the day of petitioner's arrest, the officer had received information that Husty had two loads of liquor in cer-

tain described automobiles which were parked in "particular places on named streets." The court held that the information received prior to the arrest was sufficient to show probable cause for the arrest. In the instant case, we have only the fact that two men were parked in an automobile at night and their flight from the investigating officers to establish probable cause. In *Talley v. United States*, 5 Cir., 159 F.2d 703, the court noted that "there was advance information sufficient in itself to justify the search, but, more than that, there was actual evidence of conduct, including flight, transpiring in the presence of the officers" to justify their search. In *Levine v. United States*, 2 Cir., 138 F.2d 627, there was also advance, reliable information that the appellant had illegal possession of alcohol prior to the search by the officers. In *Jones v. United States*, 10 Cir., 131 F.2d 539, probable cause for the search was found to exist because the officers had kept the accused premises under surveillance for about three months prior thereto.

From the summary set forth above of the cases relied on by the majority it appears that they are readily distinguishable. In all of them there was advance information that a crime was being committed together with flight from law enforcement officers. In the instant case there was only the sight of two men in a parked car and their flight after the police started their investigation. In *People v. Brown*, 45 Cal.2d 640, 290 P.2d 528, we held that a search incident to an arrest could not be justified in the absence of reasonable cause under section 836 of the Penal Code merely because it revealed that defendant was in fact guilty of a felony. *People v. Simon*, 45 Cal.2d 645, 290 P.2d 531. There was, therefore, under the facts here present no reasonable cause to justify the search and the evidence was inadmissible. *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905.

I would therefore reverse the judgment.

46 Cal.2d 114

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Ernest BLODGETT, true name Donn Williams,
Defendant and Appellant.

Cr. 5759.

Supreme Court of California.
In Bank.

Feb. 3, 1956.

Prosecution for possession of marijuana. From a judgment of conviction of the Superior Court, Alameda County, Charles Wade Snook, J., and order denying motion for new trial, defendant appealed. The Supreme Court, Traynor, J., held that where police officers, who had observed cab double parked in front of hotel at 3 a. m. with two passengers therein, one of whom had walked over to cab and got in when cab pulled up in front of hotel, ordered passengers out of cab for questioning such action was not unreasonable and subsequent search of cab by officer upon noticing furtive action of one of passengers in withdrawing left hand from seat at juncture of seat and back cushion, was justified and consequently three marijuana cigarettes discovered in such search were admissible in evidence in subsequent prosecution.

Judgment and order affirmed.

Carter, J., dissented.

whom had walked up to cab and got in when cab pulled up to hotel, ordered passengers out of cab for questioning, such action was not unreasonable and subsequent search of cab by officer upon noticing furtive action of one of passengers in withdrawing his hand from seat at juncture of seat with back cushion was also reasonable and consequently three marijuana cigarettes discovered in back seat were admissible in evidence in subsequent prosecution for unlawful possession of marijuana. West's Ann. Health & Safety Code, § 11500.

4. Criminal Law ⇨382

In prosecution for possession of marijuana, objection to statements of witnesses in regard to whether or not defendant had taken heroin the evening preceding his arrest was properly sustained as such statements were immaterial. West's Ann. Health & Safety Code, § 11500.

5. Criminal Law ⇨706, 1186(4)

In prosecution for possession of marijuana, continual references to rest room and conduct therein, which referred to opening statement of prosecuting attorney that defendant had gone into rest room and "talked about purchasing some heroin," which statement could not properly be proved, was improper but record disclosed such misconduct did not result in miscarriage of justice. West's Ann. Health & Safety Code, § 11500; West's Ann. Const. art. 6, § 4½.

1. Searches and Seizures ⇨3(1)

Although cab driver could have been arrested for double parking, search made without warrant could not be justified on that ground for it had no relation to traffic violation and would not have been incidental to an arrest therefor.

2. Arrest ⇨63(4)

There is nothing unreasonable in officers' questioning persons out of doors at night.

3. Criminal Law ⇨395

Searches and Seizures ⇨3(1)

Where police officers, who had observed cab double parked in front of hotel at 3 a. m. with two passengers therein, one of

Benjamin F. Marlowe, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., and Victor Griffith, Deputy Atty. Gen., for respondent.

TRAYNOR, Justice.

Defendant was found guilty by a jury of one count of possessing marijuana in violation of Health and Safety Code, § 11500. His motions for probation and for a new trial were denied, and he was sentenced to serve three months in the county jail. He appeals from the judgment and the order denying his motion for a new trial.

At approximately 8 p. m. on August 4, 1954, Nowlin Sanders and Mrs. Jacqueline

Grundy met defendant on the street near the Willow Hotel at 7th and Willow in Oakland. Sanders had known defendant for about three months. The three went into the restroom of the hotel where they stayed for five or ten minutes. Defendant gave Sanders \$10 to make some kind of purchase. Sanders left the hotel, made the purchase, and returned, and the three spent another ten minutes in the restroom. They then visited a friend in another hotel, and after they left and were walking on the street defendant told Mrs. Grundy and Sanders that he had bought five "joints of pot" i. e., marijuana. Defendant and Sanders shared a marijuana cigarette, and the parties separated. At approximately 3 a. m. the following morning Mrs. Grundy and Sanders were together at the Willow Hotel. Sanders left to get a cab, found one at a taxi stand a block away, got in the front seat and asked the driver to drive to the hotel. The cab double parked in front of the hotel and Sanders went in. Shortly thereafter Mrs. Grundy came out of the hotel, got in the cab, and sat on the right side of the rear seat. At about the same time defendant approached the cab and told the driver that he wished to go to 12th and Broadway. The driver told him that if his other fare was going in the same direction, he could go along. Defendant then entered the cab and sat on the left side of the rear seat. In the meantime, Officers Barker and Tarabochia of the Oakland Police Department had been observing the cab as it stood in front of the hotel and decided to investigate it. They approached and ordered the occupants to get out. As Officer Barker opened the left rear door he saw defendant withdraw his left hand from behind the seat at the juncture of the seat and back cushion. After defendant and Mrs. Grundy got out, the officer removed the rear seat and found three marijuana cigarettes where defendant had withdrawn his hand. The driver testified that earlier in the evening he had to clean out the back of his cab because a passenger had been ill. He had taken the seat out and at that time there were no cigarettes in the back of the cab. No one had been in the back seat thereafter until Mrs. Grundy and defendant sat there. After the officers

had ordered Mrs. Grundy and defendant out of the cab, Sanders came out of the hotel. The officers then asked the cab driver to take all of them to the police station. Sanders asked defendant why they were being arrested and defendant replied that the police had found some "pot." Defendant told the interviewing officer at the police station that at the time he was ordered out of the cab he had his left hand in his pocket and took it out to push back on the seat to raise himself. He stated that he had not smoked marijuana for about a year. At the trial he denied having smoked marijuana with Sanders and denied placing the marijuana cigarettes in the cab. Mrs. Grundy, Sanders, and the driver also denied placing the cigarettes in the cab.

[1-3] Defendant contends that the search of the cab was unlawful and that the evidence obtained thereby was therefore inadmissible. The search was made without a warrant. Although the cab driver could have been arrested for double parking, the search of his cab cannot be justified on that ground, for it had no relation to the traffic violation and would not have been incidental to an arrest therefor. Cf. *People v. Gorg*, Cal.Sup., 291 P.2d 469; *Elliott v. State*, 173 Tenn. 203, 116 S.W.2d 1009, 1012-1013; *United States v. Lefkowitz*, 285 U.S. 452, 52 S.Ct. 420, 76 L.Ed. 877. It was justified, however, on another ground. There is nothing unreasonable in an officer's questioning persons outdoors at night. *People v. Simon*, 45 Cal.2d 645, 290 P.2d 531; *Gisske v. Sanders*, 9 Cal.App. 13, 16-17, 98 P. 43, and in view of the hour and the unusual conduct of the occupants of the cab it was not unreasonable for the officers to order them to get out of the cab for questioning. Since Officer Barker saw defendant's furtive action in getting out, he had reasonable grounds to believe that he was hiding contraband and the search of the cab was therefore reasonable. *Carroll v. United States*, 267 U.S. 132, 149, 45 S.Ct. 280, 69 L.Ed. 543; *Husty v. United States*, 282 U.S. 694, 701, 51 S.Ct. 240, 75 L.Ed. 629; *Scher v. United States*, 305 U.S. 251, 255, 59 S.Ct. 174, 83 L.Ed. 151; *Brinegar v. United States*, 338 U.S. 160, 165-171, 69 S.Ct. 1302, 93 L.Ed. 1879; *United States v. One 1946*

Plymouth Sedan Automobile, 7 Cir., 167 F.2d 3, 7.

• Defendant also contends that he did not have a fair trial because of misconduct of the prosecuting attorney in attempting to suggest to the jury that defendant had taken heroin the evening before his arrest.

During his opening statement the prosecuting attorney told the jury that defendant, Sanders and Mrs. Grundy had gone into the restroom of the Willow Hotel, and that while there had "talked about the purchasing of some heroin." Upon defendant's objection the prosecuting attorney told the court that he was merely stating what he expected to prove and that he would not prove it if the court ruled the matter out. He was instructed to proceed. He then stated that defendant had given Sanders a ten dollar bill, that Sanders departed and returned a few minutes later with something in his hand, and that the three had "stayed in there for fifteen or twenty minutes and then departed."

[4] Mrs. Grundy testified as a witness for the People. On direct examination, in answer to the question "And what did you do while you were in the restroom at the Willow Hotel," she said, "He [Sanders] put a paper which was believed to be heroin—" Defendant objected and the matter was taken up in chambers. The court ruled that testimony concerning the conduct of the parties in the restroom was admissible solely to show their relationship, but struck from the record the reference to heroin as "immaterial and as a volunteer statement and not responsive." A later objection was also sustained when, upon cross-examination, defendant was asked, "And you know the effects [of heroin] because you yourself have been the recipient of a shot?" It was immaterial to the one-count charge of possession of marijuana whether or not defendant had taken heroin the evening preceding his arrest (See *People v. Perez*, 128 Cal.App.2d 750, 756, 276 P.2d 72; cf. *People v. Le Beau*, 39 Cal.2d 146, 148, 245 P.2d 302), and the trial court therefore properly sustained these objections.

[5] No further direct reference was made to heroin, but Mrs. Grundy and

Sanders were questioned in detail concerning the activities of the three in the restroom. During the questioning it was brought out that they had partaken of Sanders' purchase. It is apparent from the repeated references to the restroom and the conduct therein that the purpose of the questions was to keep constantly before the jury the suggestion in the opening statement that could not properly be proved. Cf. *People v. Mullings*, 83 Cal. 138, 145-146, 23 P. 229. A careful review of the entire record convinces us, however, that this misconduct did not result in a miscarriage of justice. Cal.Const. art. VI, § 4½.

The judgment and order are affirmed.

GIBSON, C. J., and SHENK, SCHAUER, SPENCE and McCOMB, JJ., concur.

CARTER, Justice.

I dissent.

I cannot agree that the sight of a cab parked in front of a hotel in the early hours of the morning is sufficient to constitute reasonable cause for a police investigation. The law, as set forth in *People v. Simon*, 45 Cal.2d 645, 648, 290 P.2d 531, 533, is that " * * * the search of defendant's person may be justified only if he was committing or attempting to commit an offense in the officer's presence, Penal Code, § 836, subd. 1, or the officer had reasonable cause to believe he had committed a felony. Penal Code, § 836, subd. 5." Just how it can be said that two people getting into a cab early in the morning is "unusual conduct" is not entirely clear to me. I had thought that it was a frequent occurrence.

"Under these circumstances, to permit an officer to justify a search on the ground that he 'didn't feel' that a person on the street at night had any lawful business there would expose anyone to having his person searched by any suspicious officer no matter how unfounded the suspicions were. Innocent, people, going to or from evening jobs or entertainment, or walking for exercise or enjoyment, would suffer along with the occasional criminal who would be turned up." Mr. Justice Traynor, speaking for the court, in *People v. Simon*, supra, 45 Cal.

2d at page 650, 290 P.2d at page 534. If the sight of two people getting into a taxicab in front of a hotel early in the morning constitutes reasonable cause to believe that a felony is being committed, then any couple out for an evening of entertainment may be subjected to police surveillance and search. This, in the words of Mr. Justice Jackson, *United States v. Di Re*, 332 U.S. 581, 595, 68 S.Ct. 222, 229, 92 L.Ed. 210, is a "greater danger to a free people than the escape of some criminals from punishment."

It would appear that the salutary rule of *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905, is to be circumscribed by an unlimited and unwarranted extension of the concept of what constitutes reasonable cause. In *People v. Martin*, Cal.Sup., 293 P.2d 52, the sight of two men parked in an automobile at night was held to constitute reasonable cause for a police investigation and warrant a search of their persons and automobile; here, the sight of a man and woman getting in a cab in front of a hotel in the early hours of the morning is held to constitute reasonable cause for police investigation and a search of their persons and the taxicab. It is no answer that the search showed illegal possession of narcotics since the search may not be justified because it, in fact, shows that the defendant was guilty of a felony. *People v. Brown*, 45 Cal.2d 640, 290 P.2d 528; *People v. Simon*, 45 Cal.2d 645, 290 P.2d 531.

In the majority opinion it is stated that Officer Barker had reasonable grounds to believe that defendant was hiding contraband because of his "furtive action" in getting out of the cab for questioning. In *Carroll v. United States*, 267 U.S. 132, 160, 45 S.Ct. 280, 69 L.Ed. 543, the court very carefully and at length set forth the evidence and noted that the officers had known

of the bootlegging activities of the defendants for two months prior to the search and seizure; in *Husty v. United States*, 282 U.S. 694, 51 S.Ct. 240, 75 L.Ed. 629, the officer had received prior, reliable information that Husty was carrying contraband; in *Brinegar v. United States*, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879, the officer conducting the search had arrested the defendant some five months prior to the search for carrying liquor and had seen him on at least two occasions in the six months preceding the search loading liquor in his car which, on the day in question, appeared to be heavily loaded with what the defendant admitted to be liquor; in *United States v. One 1946 Plymouth Sedan Automobile*, 7 Cir., 167 F.2d 3, the officer had received advance reliable information that the defendant would make delivery of tax unpaid alcohol in a certain vicinity. It may therefore be seen that all of the cases relied upon by the majority are easily distinguishable from the one here under consideration in that in all of them the facts showed *some basis* for suspecting that a crime was being committed.

I also disagree vehemently with the statement in the majority opinion that "There is nothing unreasonable in an officer's questioning persons outdoors at night." Cited in support of this statement are *People v. Simon*, 45 Cal.2d 645, 290 P.2d 531, and *Gisske v. Sanders*, 9 Cal.App. 13, 98 P. 43, neither of which supports the statement as it is here set forth.

Because the search was conducted without reasonable cause to believe on the part of the officers that a felony was being committed, the evidence procured thereby was illegally obtained and inadmissible under the rule set forth in *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905.

I would therefore reverse the judgment.

139 Cal.App.2d 73

Herbert F. HASS, Willard A. McKinney, David W. Dunsworth, Plaintiffs and Appellants,

v.

The CITY COUNCIL OF the CITY OF PALM SPRINGS et al., Defendants and Respondents.

Civ. 5252.

District Court of Appeal, Fourth District,
California.

Feb. 6, 1956.

Hearing Denied March 28, 1956.

Proceeding for a writ of mandamus ordering city council to disregard provision of a redistricting ordinance requiring a three-fourths vote by qualified electors for its adoption, and directing city council to declare that the ordinance had been duly adopted. The Superior Court, Riverside County, Russell S. Waite, J., entered judgment for city council and petitioners appealed. The District Court of Appeal, Barnard, J., held, *inter alia*, that where ordinance submitted to voters stated, *inter alia*, that it would be adopted if voted for by three-fourths of the voters who voted, and such ordinance received only a majority vote, court could not order the city council to consider the ordinance adopted even if the provision of the ordinance requiring a three-fourths rather than a majority vote for adoption was unconstitutional and was separable from the remainder of the ordinance.

Judgment affirmed.

1. Mandamus ☞176

Where ordinance submitted to voters stated, *inter alia*, that it would be adopted if voted for by three-fourths of the voters who voted, and such ordinance received only a majority vote, court could not order the city council to consider it adopted even if the provision of the ordinance requiring a three-fourths rather than a majority vote for adoption was unconstitutional and was separable from the remainder of the ordinance.

2. Action ☞36

Where petitioners for a writ of mandamus sought to set up a cause of action for

declaratory relief, after judgment dismissing their petition was entered, and such amendment if allowed would not have altered the situation with which the court was faced in the mandamus proceeding, court's refusal to permit such amendment was proper.

Leonard A. Bock, Palm Springs, for appellants.

Jerome J. Bunker, Palm Springs, for respondents.

BARNARD, Presiding Justice.

Early in 1952 an initiative petition was presented to the city council of Palm Springs calling for a special election for the purpose of adopting a proposed ordinance changing the boundary lines of the Councilmanic districts. The council refused to call an election for that purpose, and an application was made for a writ of mandate compelling the council to submit the proposed ordinance to a vote of the electors. Judgment was rendered for the defendants. On appeal, that judgment was reversed, the Supreme Court holding that the city council was under a duty "to either pass the proposed ordinance immediately or to call a special election for that purpose." *Blotter v. Farrell*, 42 Cal.2d 804, 270 P.2d 481, 486.

After the remittitur came down a stipulation was filed suspending further proceedings for a time, because certain annexation proceedings were then pending which might affect the boundaries as described in the redistricting ordinance. Thereafter an ordinance was prepared which, except for changes in the described boundaries, was to the same effect as the "proposed ordinance" which was set forth in the "Notice of Intention to Circulate an Initiative Petition," and which was before the Supreme Court in the *Blotter* case. This new ordinance, like the original proposed ordinance, contained the provision that if $\frac{3}{4}$ ths of the qualified electors voted in favor of the ordinance it was to become effective, and the further provision that if any part thereof was held to be unconstitutional this should not affect the validity of the remainder.

This new ordinance was submitted to a special election held on February 10, 1955, at which the ballots stated, among other things, that "if three-fourths of the qualified electors, who vote, vote in favor of said Ordinance No. 293 it will provide for the redistricting of the presently existing councilmanic districts of the city of Palm Springs," in the manner described. On February 15, 1955, the city council canvassed the election returns and determined that 785 votes had been cast in favor of the adoption of the ordinance and 602 votes against the proposition. It thus appears that the proposed ordinance received a majority vote but less than the $\frac{3}{4}$ ths approval set forth as a requirement both on the ballot and in the proposed ordinance. The city council adopted a resolution declaring that the ordinance had been rejected because of a failure to obtain a $\frac{3}{4}$ ths vote.

Thereafter these appellants applied for a writ of mandate seeking to compel the city council to declare the ordinance adopted, which was denied by this court on March 17, 1955. *Hass et al. v. City Council, et al.*, 4 Civil No. 5099.* They then filed a petition in the superior court for a writ of mandate commanding the city council to disregard, as null and void, the provision in the ordinance requiring a $\frac{3}{4}$ ths vote; and directing the city council to declare that the said ordinance had been duly adopted by a majority vote of the electors. After a hearing, the court refused to grant this relief and entered judgment for these respondents. These appellants then moved for a new trial, and for permission to amend their complaint by setting forth a cause of action for declaratory relief. Both of these motions were denied, and this appeal followed.

Appellants' main contentions are that the only code provision requiring a $\frac{3}{4}$ ths vote is contained in Section 34874 of the Government Code; that this provision was held in *Blotter v. Farrell*, supra, to be inapplicable with respect to redistricting; that Sections 1715 and 1719 of the Elections Code, providing for a majority vote, are

controlling; that the provision in this ordinance requiring a $\frac{3}{4}$ ths vote is unconstitutional, since Article IV, Section 1 of the State Constitution provides for a majority vote on any initiative or referendum measure; that the invalidity of this provision does not affect the remainder of the ordinance; and that it follows that the ordinance was legally adopted by a majority vote.

[1] In the case of *Blotter v. Farrell*, supra, the question as to whether a $\frac{3}{4}$ ths vote or a majority vote was required in such an election was not directly passed upon, although the discrepancies between the two possible lines of procedure were pointed out in one of the dissenting opinions. On the record before us, we deem it unnecessary to decide that question. Whichever line of procedure is properly applicable, it would seem to follow logically and legally that the matter should be submitted to the voters on that basis, or at least that the voters should not be deceived or misled in that respect. After the election has been decided by the voters on the basis of the proposed ordinance submitted to them, the result should not be declared void by the body charged with the duty of canvassing the votes on the ground that a different rule should have been followed and a different proposition submitted.

While the Supreme Court in the *Blotter* case did not directly pass on the question as to the size of the vote required in such an election, it held that it was the duty of the city council to either pass "the proposed ordinance" or to submit it to a vote of the People. The city council complied by submitting to the voters an ordinance which was exactly the same, insofar as any question here is concerned, as the "proposed ordinance" which was then before the Supreme Court. It was then the duty of the city council to declare the result of that election and this it did. The respondents have already acted in the matter, and the purpose of this proceeding was to obtain an order requiring them to change an act already done, to disregard the vote as cast at the election and announce a different re-

* No written opinion.

sult, and to act in a different manner than that authorized by the vote of the electors. The provision in the ordinance submitted at the election and stated in the ballots, that a $\frac{3}{4}$ ths majority was required, is one which directly affects the adoption of the entire ordinance. Since the entire ordinance was rejected, the provision that the unconstitutionality of one part should not affect the remainder was not adopted. It would be a fraud on the voters to rule otherwise, after they have voted upon an ordinance submitted to them upon a definite condition. It may well be that many voters who were not entirely convinced as to the wisdom of adopting that ordinance were willing to agree to it in the event that $\frac{3}{4}$ ths of the voters desired to make that change.

If it be assumed that it will be eventually decided that in such an election only a majority vote is required to put the ordinance into effect, the fact remains that the proposition was not submitted to the voters on that basis. On the other hand, they were asked to vote on the basis that a $\frac{3}{4}$ ths vote was required, and the result of the election did not meet the requirement set forth in both the proposed ordinance and the ballot. Moreover, the matter was submitted to the voters in the form and subject to the condition requested by the signers of the initiative petition.

We are here concerned with what was actually done and the trial court's action on the facts before it. Under those facts it does not appear that the trial court did not properly exercise its discretion in denying the relief asked for. *Stracke v. Farquar*, 20 Cal.2d 82, 124 P.2d 9; *Ertman v. Municipal Court, etc.*, 68 Cal.App.2d 143, 155 P.2d 908, 156 P.2d 940.

[2] No reversible error appears in the court's refusal to permit an amendment to the petition, after judgment was entered, setting up a cause of action for declaratory relief. Aside from the time element this amendment, if allowed, would not have altered the situation with which the court was faced. We are not impressed with the argument that to have permitted this amendment would have avoided another equitable suit. As a practical matter, in view of

the changed conditions during the last four years, with the greatly increased population and the annexation of other territory, any redistricting proposition should be based upon a new initiative proceeding signed by the required number of voters who now are involved and directly interested.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

Hearing denied; SHENK, J., dissenting.



139 Cal.App.2d 7

Cecelia M. OLIVIA and Rudolph L. Olivia,
Plaintiffs and Appellants,

v.

Vio SUGLIO, doing business under the fictitious firm name of S & R Motor Lines, and Vio Suglio, and John Doe, Jane Doe, and S & R Motor Lines, a fictitious firm name, copartnership, and Bradford M. Shear, Defendants and Respondents.

Civ. 16642.

District Court of Appeal, First District,
Division 2, California.

Feb. 2, 1956.

Plaintiffs failed to appear at the time set for trial. The Superior Court, County of Santa Clara, Leonard R. Avilla, J., entered judgment of dismissal and order denying plaintiffs' motion to vacate such judgment, and plaintiffs appealed. The District Court of Appeal, Devine, J., Pro tem., held that under the circumstances the appeal from the judgment was not timely and that the motion to vacate the judgment was not timely.

Appeal dismissed; order affirmed.

I. Appeal and Error $\S$ 356

Plaintiffs' appeal filed some 11 months after judgment of dismissal was rendered against plaintiffs when they failed to ap-

pear at time set for trial would be dismissed.

2. Judgment ⇨153(1)

Where plaintiffs failed to appear at time set for trial and judgment of dismissal was rendered and motion to vacate such judgment was made almost 11 months thereafter, such motion was not timely made insofar as motion was based on grounds of surprise, inadvertence or excusable neglect. West's Ann.Code Civ.Proc. § 473.

3. Judgment ⇨485, 495(1)

Where it does not appear affirmatively that a jurisdictional defect was present, the absence of recital that jurisdictional requisites were met does not produce a judgment void on its face; to the contrary all presumptions favor the judgment and if invalidity does not appear on face of record it will be presumed that what ought to have been done was not only done but rightly done. West's Ann.Code Civ.Proc. § 473.

4. Judgment ⇨386(3), 415

A judgment which is void on its face may be set aside on motion at any time after its entry by court which rendered judgment, but judgment which, even though it be in fact void, is not so by facts affirmatively appearing on judgment roll but by facts set forth outside record may be set aside by independent action in equity or on motion made within reasonable time not exceeding six month period prescribed by statute for application for relief from judgment taken by mistake. West's Ann. Code Civ.Proc. § 473.

5. Judgment ⇨153(1)

Where memorandum to set time of trial was filed in behalf of plaintiffs and judgment roll did not affirmatively show lack of notice of time of trial and judgment did not state whether proof of notice of time of trial was made, judgment of dismissal rendered against plaintiffs when they failed to appear was not void on its face within rule that such a judgment may be set aside on motion at any time after entry, and hence plaintiffs' motion to vacate

judgment for alleged lack of such notice must be made within reasonable time not exceeding six months and could not be made 11 months after judgment. West's Ann.Code Civ.Proc. §§ 473, 594, subd. 1.

Lyle W. Rucker, Los Angeles, for appellants.

Campbell, Custer, Warburton & Britton, Alfred B. Britton, Jr., San Jose, W. R. Dunn, Burlingame, of counsel, for respondents.

DEVINE, Justice pro tem.

This is an appeal from a judgment of dismissal which was rendered against plaintiffs when they failed to appear at the time set for trial, and from an order denying their motion to vacate the judgment of dismissal.

[1] The appeal from the judgment having been filed some eleven months after the rendition of the judgment, it must be dismissed.

[2] The motion to vacate the judgment was made almost eleven months after judgment was rendered, and, therefore, so far as the motion was based on the grounds of surprise, inadvertence, or excusable neglect, it was not timely made. § 473, Code of Civil Procedure.

[3] The motion was also based on the contention that the judgment was void because notice of time of trial was not given to plaintiffs' counsel, who alleges that after filing of a memorandum to set, he expected to be informed by the county clerk of the trial date, but was not so informed, nor was he served with notice by counsel for defendants. These facts, together with a long history of the cause, are set forth in an affidavit of counsel which accompanied the notice of motion to vacate the judgment; but the judgment roll itself does not contain any affirmative showing of lack of notice of time of trial. The judgment does not state whether or not the proof of notice of time of trial was or was not made, which proof is a requisite

for dismissal by the terms of section 594, subdivision 1, of the Code of Civil Procedure. That section does not describe the kind of proof necessary, nor require that the proof be recited in the judgment. Where it does not appear affirmatively that a jurisdictional defect was present, the absence of a recital that jurisdictional requisites were met does not produce a judgment void on its face. *Hahn v. Kelly*, 34 Cal. 391; *Fletcher v. Superior Court*, 79 Cal.App. 468, 250 P. 195. To the contrary, all presumptions favor the judgment. *Wells Fargo & Co. v. City & County of San Francisco*, 25 Cal.2d 37, 152 P.2d 625; *Henderson v. Henderson*, 85 Cal.App.2d 476, 193 P.2d 135. If the invalidity does not appear on the face of the record, it will be presumed that what ought to have been done was not only done but rightly done. *Rico v. Nasser Bros. Realty Co.*, 58 Cal.App.2d 878, 882, 137 P.2d 861.

[4,5] A judgment which is void on its face may be set aside on motion at any time after its entry, by the court which rendered the judgment, *People v. Greene*, 74 Cal. 400, 16 P. 197; *In re Estate of Estrem*, 16 Cal.2d 563, 571, 107 P.2d 36, but a judgment which, even though it be in fact void, is not so by facts affirmatively appearing on the judgment roll but by facts set forth dehors the record, as by the affidavit herein, may be set aside by an independent action in equity or on motion made within a reasonable time, not exceeding the time prescribed by section 473 of the Code of Civil Procedure. *Smith v. Jones*, 174 Cal. 513, 163 P. 890; *Penland v. Goodman*, 44 Cal.App.2d 14, 111 P.2d 913.

The cases cited relate to the necessity for making the motion within the time prescribed by section 473 where a default judgment was rendered and the affidavit of a defendant alleges non-service of summons; but the rule should apply with even greater force where, as here, plaintiffs' counsel had ample opportunity to follow the course of the proceedings, he having filed the memorandum to set.

The motion to vacate in this case was not made within the required time.

The appeal from the judgment is dismissed and the order denying the motion to set aside the judgment of dismissal is affirmed.

NOURSE, P. J., and DOOLING, J., concur.



139 Cal.App.2d 119

Ralph E. HARTSIF, Plaintiff and Respondent,

v.

Katherine S. WANN, Defendant and Appellant.

Civ. 5254.

District Court of Appeal, Fourth District, California.

Feb. 8, 1956.

Action to restrain obstruction of easement. From an order of the Superior Court of San Bernardino County, Archie D. Mitchell, J., granting a preliminary injunction, defendant appealed. The District Court of Appeal, Griffin, J., held that there had been no abuse of discretion.

Affirmed.

**1. Easements ⇨61(6)
Nuisance ⇨31**

Preliminary injunction may lie to protect enjoyment of easement, or against obstruction of it, or for abatement of nuisance constituted by such obstruction. *West's Ann.Civ.Code*, § 809.

2. Injunction ⇨132

General purpose of preliminary injunction is to preserve status quo until merits of action can be determined.

**3. Appeal and Error ⇨954(1, 2)
Injunction ⇨135**

Granting or refusing of preliminary injunction generally rests in trial court's

discretion and will not be disturbed on appeal except on showing of an abuse of discretion.

4. Easements $\Rightarrow$ 61(6)

In injunction action against defendant who had constructed a fence across road allegedly used by general public, including plaintiff, for more than 35 years, it was not an abuse of discretion to grant a preliminary injunction. West's Ann.Civ.Code, § 809.

Hyer & Graeber, San Bernardino, for appellant.

Ralph E. Hartsif, in pro. per.

GRIFFIN, Justice.

Plaintiff and respondent brought this action against defendant alleging that plaintiff was possessed of a certain mining claim and defendant owned a certain quarter section of land contiguous to it; that a certain road to plaintiff's mine traversed defendant's property and was used by the general public, including plaintiff, for more than 35 years; and that defendant constructed a fence across it to the detriment of plaintiff. An injunction is sought, and a temporary restraining order was issued on March 25, 1955, restraining defendant from interfering with plaintiff's access to his mining property over said road.

Defendant answered and by way of cross-complaint seeks to quiet her title as against plaintiff to her real property. After a hearing on the temporary restraining order and an order to show cause for contempt, the court, on May 2, 1955, issued a preliminary injunction, fixed bond at \$200, and ordered the contempt proceedings off calendar. Later, after a hearing on the contempt order, defendant was found guilty of contempt and allowed one week in which to purge herself. The case is now at issue and untied. She appeals from the order granting a preliminary injunction which, during the pendency of the action, enjoined and restrained her from "obstructing or interfering with the use by the general public" including plaintiff, of the road in question.

[1-4] At the hearing plaintiff filed about eight affidavits alleging use of the disputed right-of-way in excess of the statutory period and that it was the only access to a spring of water on the mining claim. Defendant, by affidavits, alleged that there was another road to plaintiff's mining claim, across other property of an adjoining owner; that no roads were in evidence across defendant's property when she purchased it in 1945; that the road in question was bulldozed in 1952 by plaintiff; and that the alleged roadway was obstructed by a fence erected across it by the defendant prior to the filing of this action. She argues that no injunction should issue to prevent an act already completed, to wit, erection of the fence, citing *Snelling v. Civil Service Board*, 90 Cal.App.2d 865, 204 P.2d 358. She also claims that if the injunction could be construed to be mandatory, there is no sufficient showing authorizing its issuance, citing *Gardner v. Stroever*, 81 Cal. 148, 150, 22 P. 483, 6 L.R.A. 90, and that since there is another means of access there is no sufficient showing of irreparable injury.

Plaintiff, appearing in propria persona, merely argues that the affidavits filed by defendant are "unproved", and claims that there is sufficient authority authorizing the issuance of the preliminary injunction, without citing any cases.

Matters controllable by preliminary injunction are sufficiently discussed in 14 Cal.Jur. p. 188, sec. 12. It has been held that such an injunction may lie to protect the enjoyment of an easement, or against the obstruction of it. *Danielson v. Sykes*, 157 Cal. 686, 109 P. 87, 28 L.R.A., N.S., 1024; *Vestal v. Young*, 147 Cal. 715, 82 P. 381, or for the abatement of the nuisance constituted by such obstruction. *Hardin v. Sin Claire*, 115 Cal. 460, 47 P. 363; 9 Cal.Jur. p. 962, § 14; Civ.Code, § 809.

The general purpose of such an injunction is to preserve the status quo until the merits of the action can be determined. If plaintiff had such easement rights for the period claimed, the purpose of the injunction was to preserve those rights, without obstruction by defendant, pending the hearing on the merits. The granting or refus-

ing of a preliminary injunction generally rests in the trial court's discretion and will not be disturbed on appeal except on a showing of an abuse of discretion. *Nyman v. Desert Club*, 109 Cal.App.2d 63, 240 P.2d 37. No abuse of discretion here appears.

Order affirmed.

BARNARD, P. J., and MUSSELL, J.,
concur.



**BANK OF AMERICA NATIONAL TRUST
and SAVINGS ASSOCIATION**, a national
banking association, Plaintiff and Re-
spondent,

v.

COLE'S CHECK SERVICE, Inc., a California
corporation; **H. R. Cole**, also known
as **H. Rawland Cole**, Defendants.

Cole's Check Service, Inc., a California
corporation, Appellant.*

Civ. 21348.

District Court of Appeal, Second District,

Division 1, California.

Feb. 9, 1958.

Rehearing Denied Feb. 21, 1958.

Hearing Granted April 3, 1958.

Action on ten checks issued by defendant check selling and cashing corporation and deposited by payee's indorsee in its account with plaintiff bank, which attached trust funds, consisting of two accounts of such corporation in another bank, after corporation stopped payment on and refused to pay checks. From an order of the Superior Court of Los Angeles County, Bayard Rhone, J., denying defendant corporation's motion to release trust funds from attachment, it appealed. The District Court of Appeal, Doran, J., held that all checks issued by check seller and casher are in same category as checks sold thereby as such seller and casher, so that trust funds were subject to levies of all holders

* Opinion vacated 300 P.2d 10.

in due course of all checks issued by defendant corporation and plaintiff, as holder in due course of checks sued on, was entitled to levy attachment on such funds, though checks were drawn on corporation's general bank account and not sold in usual course of its business.

Order affirmed.

Banks and Banking §224

All checks issued by a check seller and casher are in same category as checks sold thereby as seller and casher, so as to subject trust funds thereof to levies of all holders of checks in due course, thus entitling bank, as holder in due course of check selling and cashing corporation's checks, deposited in indorsee's account with such bank, to attach trust funds, consisting of two accounts of such corporation in another bank, after corporation stopped payment on checks, though they were drawn on corporation's general bank account and were not sold in usual course of its business. *West's Ann. Financial Code*, § 12300.3.

Nathan Newby, Jr., Los Angeles, for appellant.

Samuel B. Stewart, San Francisco, Hugo A. Steinmeyer, Robert H. Fabian, Richard G. Rypinski, Los Angeles, for respondent.

DORAN, Justice.

As recited in appellant's brief, "Involved in this appeal is the right of the respondent to attach trust funds in the possession of Cole's Check Service, Inc., appellant herein. Said trust funds consisted of two bank accounts in The Bank of Los Angeles at Westwood in appellant's name and designated as follows:

"1. Trust No. 1 in which there was on deposit April 1, 1955	\$19,055.00
"2. Trust No. 2 in which there was on deposit April 1, 1955	\$ 2,500.00
"Total	\$21,555.00

"Said trust funds were attached in the above entitled action by respondent through service of a writ of garnishment or attach-

ment on The Bank of Los Angeles at Westwood on April 1, 1955.

"Respondent's Statement to Clerk on Attachment contained the following statement: 'It is the intention of the plaintiff to instruct said Sheriff to attach the following described property belonging to the defendants Cole's Check Service, Inc.: monies, debts, credits, bank accounts, safe deposit boxes, and other debts due and credits belonging to the defendant Cole's Check Service, Inc.'"

"It was proved by the appellant and not denied by respondent that the funds in said Trust Account No. 1 and Trust Account No. 2 were deposited by appellant as trust funds pursuant to Section 12300.3 of the California Financial Code.

* * * * *

"The gravamen of respondent's action is based on the claim that it is a holder in due course of ten (10) checks issued by appellant to Al Lichtman, agent, in the aggregate sum of \$50,000.00 and endorsed by Al Lichtman to Pipermart who in turn deposited the checks in its bank account with respondent.

"Respondent claims it gave credit to Pipermart to the extent of \$50,000.00 in reliance on the deposit of said ten (10) checks in the bank account of Pipermart in respondent's bank.

"Appellant stopped payment on said ten (10) checks and refused to pay the same, alleging no consideration and respondent attached the trust funds to recoup in part its losses. The ten (10) checks were not drawn on trust funds but were drawn on the general account of appellant and appellant claims that said checks were not sold in the usual course of business of check selling and cashing.

"Respondent claims that the ten (10) checks were sold in the usual course of business by appellant and hence respondent was entitled to attach the trust funds as a holder in due course under the section."

It is argued by appellant that two questions are involved, viz.:

"(a) Are all checks issued by a check seller and cashier deemed to be in the same category as checks and drafts and money orders sold by appellant as a check seller and cashier under the Act?

"(b) If the above question is answered in the affirmative, the trust funds would be subject to the levies of all purchasers, holders in due course, and payees of all checks issued by appellant whether drawn on trust funds or the general funds of appellant.

"(c) If the answer to (a) above is in the negative, then only purchasers, holders in due course and payees of checks sold by appellant in its business as a check seller and cashier would have the right to levy on trust funds.

"From the above considerations it must be decided whether or not the trial court erred in refusing to grant the motion of appellant to release from the attachment the trust funds deposited pursuant to Section 12300.3 of the Financial Code."

Section 12300.3 of the Financial Code provides that,

"Nothing in this law shall be construed to prevent a purchaser, a holder in due course, the payee of a check, draft, or money order sold by the licensee in the usual course of his business, or an obligor for whom the licensee is acting as an agent in paying bills of the obligor, from taking any legal action necessary to enforce any claims which said purchaser, holder in due course, payee, or obligor may desire to take including the right to levy attachment or execution."

Appellant's argument is highly technical whereas the above provision is general and comprehensive.

From a review of the record it is obvious that appellant's contentions lack support in the facts and the law.

The order appealed from is affirmed.

WHITE, P. J., and FOURT, J., concur.

139 Cal.App.2d 49

Melvin Gerald ALWOOD, Plaintiff and Respondent,

v.

CITY OF LOS ANGELES, a municipal corporation, et al., Defendants and Appellants.

Civ. 21155.

**District Court of Appeal, Second District,
Division 2, California.**

Feb. 6, 1956.

Hearing Denied March 28, 1956.

Motorist brought action against city for injuries sustained in collision allegedly caused by chuckholes and rut in shoulder of street, which caused motorist to lose control of his automobile. The Superior Court of Los Angeles County, Newcomb Condee, J., entered judgment for motorist, and city appealed. The District Court of Appeal, Ashburn, J., held that evidence sustained findings that motorist was not contributorily negligent and that condition of shoulder was a proximate cause of the accident.

Judgment affirmed.

1. Negligence $\Rightarrow$ 136(25)

Proximate cause is ordinarily a question of fact.

2. Negligence $\Rightarrow$ 136(26)

Contributory negligence is ordinarily a question of fact.

3. Automobiles $\Rightarrow$ 308(11)

In action by motorist against city for injuries sustained in collision allegedly caused by chuckholes and rut in shoulder of street, which caused motorist to lose control of his automobile, question of contributory negligence was for jury. West's Ann.Gov.Code, §§ 53050, 53051.

4. Automobiles $\Rightarrow$ 308(10)

In action by motorist against city for injuries sustained in collision allegedly caused by chuckholes and rut in shoulder of street, which caused motorist to lose control of his automobile, question of proximate cause was for jury. West's Ann.Gov. Code, §§ 53050, 53051.

5. Automobiles $\Rightarrow$ 306(8)

In action by motorist against city for injuries sustained in collision allegedly

caused by chuckholes and rut in shoulder of street, which caused motorist to lose control of his automobile, evidence sustained finding that motorist was not contributorily negligent. West's Ann.Gov. Code, §§ 53050, 53051.

6. Automobiles $\Rightarrow$ 306(7)

In action by motorist against city for injuries sustained in collision allegedly caused by chuckholes and rut in shoulder of street, which caused motorist to lose control of his automobile, evidence sustained finding that condition of shoulder was a proximate cause of the accident. West's Ann.Gov.Code, §§ 53050, 53051.

7. Automobiles $\Rightarrow$ 285

Fact that motorist knew that there were chuckholes and rut in shoulder of city street did not require finding, in injury action by motorist against city, that motorist was negligent in getting off the paving and into the rut, since momentary forgetfulness of a known danger is not necessarily negligence. West's Ann.Gov.Code, §§ 53050, 53051.

8. Automobiles $\Rightarrow$ 254

A municipality is liable for accidents caused by dangerous conditions outside traveled portion of highway if circumstances show that motorist was not negligent in departing from the traveled portion, and if defects or obstructions outside traveled portion of highway are in close proximity to the traveled area and are hidden from ordinary view.

9. Automobiles $\Rightarrow$ 308(4)

In action by motorist against city for injuries sustained in collision allegedly caused by chuckholes and rut in shoulder of street, which caused motorist to lose control of his automobile, question whether city had obligation to maintain shoulder of street in traversable condition was for jury. West's Ann.Gov.Code, §§ 53050, 53051.

10. Automobiles $\Rightarrow$ 308(4, 10)

In action by motorist against city for injuries sustained in collision allegedly caused by chuckholes and rut in shoulder of street, which caused motorist to lose control of his automobile, question whether

failure of city to maintain shoulder of street in traversable condition was negligence which was the proximate cause of the accident was for jury. West's Ann. Gov. Code, §§ 53050, 53051.

11. Negligence ⇨125

General similarity of conditions justifies the admission of evidence of similar prior accidents for purpose of showing dangerous condition of property.

12. Negligence ⇨125

Where dangerous condition of property is involved, there must be proof that there was no substantial change during interval between prior accidents and accident involved in the action, in order to justify admission of evidence concerning the prior accidents.

13. Automobiles ⇨305(6)

In action by motorist against city for injuries sustained in collision allegedly caused by chuckholes and rut in shoulder of street, which caused motorist to lose control of his automobile, evidence concerning prior similar accidents was properly admitted under circumstances. West's Ann. Gov. Code, §§ 53050, 53051.

14. Witnesses ⇨291

In action by motorist against city for injuries sustained in collision allegedly caused by chuckholes and rut in shoulder of street, which caused motorist to lose control of his automobile, wherein counsel for city brought out in recross-examination of witness, who lived near scene of accident, that he had previously seen many automobiles drive along the street with their wheels on shoulder of street without any accident, court properly permitted motorist's counsel to question witness concerning automobiles which were involved in accidents when they were driven on shoulder of street. West's Ann. Gov. Code, §§ 53050, 53051.

1. Sec. 53051. "A local agency is liable for injuries to persons and property resulting from the dangerous or defective condition of public property if the legislative body, board, or person authorized to remedy the condition:

"(a) Had knowledge or notice of the de-

15. Appeal and Error ⇨1046(5)

Trial judge's remark, "You played with dynamite", was not prejudicial to defendant under the circumstances.

16. Trial ⇨255(1)

Trial court, in charging jury, may of its own motion instruct jury as to all matters of law which court thinks necessary for jury's information in giving its verdict.

17. Trial ⇨193(3)

In action by motorist against city for injuries sustained in collision allegedly caused by chuckholes and rut in shoulder of street, which caused motorist to lose control of his automobile, trial court, after giving instruction defining and quoting the basic speed law covered by the Vehicle Code, properly stated that he heard no evidence submitted on either side that area where accident occurred was a zone restricted to any limit of speed. Vehicle Code, § 510.

Roger Arnebergh, City Atty., Bourke Jones, Asst. City Atty., Victor P. Spero and Weldon L. Weber, Deputy City Attys., Los Angeles, for appellant City of Los Angeles.

Reed & Kirtland, Robert C. Packard, Henry E. Kappler, Los Angeles, for respondent.

ASHBURN, Justice.

Defendant City of Los Angeles appeals from a judgment rendered upon verdict for plaintiff in a personal injury action. Plaintiff's case is based upon the Public Liability Act, now found in §§ 53050-53051, Government Code.¹ Defendant does not directly attack the sufficiency of the evidence to support the verdict (except as to the issue of contributory negligence) and does not claim an excessive award of damages.

fective or dangerous condition.

"(b) For a reasonable time after acquiring knowledge or receiving notice, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition."

Counsel do argue that the evidence establishes contributory negligence on plaintiff's part and that it was the sole proximate cause of the accident; but the major contention is that there was prejudicial error in the admission of evidence of other accidents considered by the court to be similar; counsel also assert error in a certain instruction and claim prejudicial conduct of the judge who is alleged to have shown favoritism toward the plaintiff. Careful examination reveals that these claims are not meritorious and the judgment must be affirmed.

Though the trial was an elaborate one, the evidence is in conflict at only a few points. It appears that the accident occurred on Centinela Avenue, in the city of Los Angeles, about 185 feet south of Culver Boulevard. Centinela runs north and south and Culver intersects in an easterly and westerly direction. Immediately south of Culver on the east side of Centinela is Westerly Sanitarium, which is bounded on the south by an alley extending easterly from Centinela; a sign is there posted designating the alley as "The Westerly Ambulance Entrance." Leading off from the west side of Centinela and opposite the alley is a street known as Wagner Street. The alley and Wagner Street are some 240 feet south of Culver Boulevard. A bridge over Ballona Creek is about a tenth of a mile farther south. Between the bridge and the alley Centinela is 60 feet wide and divided into four lanes of 15 feet each, two on either side of a center line. The lanes next to that line had a cement surface and the outer or shoulder lanes were of asphalt and were bounded by ordinary curbs. On the east side the asphalt ended at about the north line of the alley and opposite the ambulance entrance sign. From that point northward to Culver Boulevard there was a dirt shoulder about four feet wide which was bounded on the east by a ditch. Beginning just north of the asphalt the dirt shoulder had a series of "chuck holes" immediately adjoining the 15-foot concrete roadway, they extended for about 50 feet, forming a rut, and varied in depth from one to eight inches. Estimates of depth varied, but these figures represent the extremes.

Shortly after 7:00 a. m. on September 18, 1952, plaintiff was driving his Lincoln car northerly on Centinela, traveling some 30 feet behind another car, and upon the cement roadway with his right wheels just over the dividing line between the cement and asphalt lanes. It was a foggy morning but plaintiff testified that he had visibility of about 250 feet in that immediate area. Other witnesses said it was there wispy or misty; some said the fog was heavy. Plaintiff had driven or been driven over this same route on some 25 previous occasions, but had not noticed the end of the asphalt, the existence of the dirt shoulder, the series of holes or the rut, and had not driven on the dirt shoulder. He testified that there was no noticeable change in color from asphalt to dirt and that the road seemed level; numerous other witnesses swore to the same effect; also that there was nothing to call attention to the fact that the asphalt ended and dirt began. It is undisputed that there was no official sign or warning of any kind at or near the ending of the asphalt. As plaintiff was traveling along at 25 to 30 miles an hour his right front wheel, and probably the rear one, went into the chuck hole and he drove about 30 feet in the rut with the inside of his wheels rubbing the side of the concrete roadway. He then saw he was on the dirt shoulder and tried to make a gradual left turn. Finally he did make it and that movement threw his car out of control, it swerved over to the west side of the highway and by the time he could right it the car collided with a southbound vehicle, the collision being on the west side of the dividing line. Plaintiff was seriously injured. The condition of the shoulder was such that the trial judge (outside the presence of the jury) described it as a trap. Those holes and that rut had existed for years and no repairs had been made. The city clearly had constructive notice, does not deny it, and failed to remedy the situation as required by law.

[1-6] Appellant argues first that the condition of Centinela Avenue was not the proximate cause of plaintiff's injuries; that plaintiff's own negligence was "the sole proximate cause thereof." This argument

is predicated upon the view that conditions were plainly visible to plaintiff and "so apparent as to itself constitute adequate warning of such change and to render one who ignores such warning guilty of contributory negligence." Proximate cause, like contributory negligence, is ordinarily a question of fact, as is that of whether a given agency was a sole proximate cause. *Van Cise v. Lencioni*, 106 Cal.App.2d 341, 346, 235 P.2d 236, 239; "Contributory negligence and proximate cause are normally questions of fact, and only in most unusual cases, of which this is not one, do they become questions of law." See also, *Dennis v. Gonzales*, 91 Cal.App.2d 203, 207, 205 P.2d 55; *Abney v. City and County of San Francisco*, 115 Cal.App.2d 506, 509, 252 P.2d 654. The question was treated as factual by appellant's counsel at the trial, for defendant requested and the trial court gave an instruction to the effect that the burden was upon plaintiff to prove by a preponderance of the evidence that the alleged defective or dangerous condition of the highway was a proximate cause of plaintiff's alleged injuries. This case undoubtedly falls within the general rule and the jury decided both the questions of contributory negligence and of proximate cause in favor of plaintiff. The trial judge did likewise in denying a new trial. The evidence supports these findings.

[7] It is a fair inference that the difference between asphalt and dirt shoulder in color and texture and elevation was not enough to attract the attention of an ordinary driver, and that it was not negligence for plaintiff to get into the rut adjoining the concrete strip. This is true whether the visibility was good, as he said, or whether the fog was heavy, as some of the defense witnesses testified. In the latter event there would be more likelihood of a prudent driver getting off the road. The holes extended along the cement for about 50 feet. They varied in depth and plaintiff, as he traveled about 30 feet, was in a rut of varying depths. He explained that he first realized when at a point about 12 feet north of the alley that his front wheel was rubbing on the surface of the road and that the

shoulder was not level with the road, whereupon he began to turn his wheels gradually until he perceived that his car was dropping down; that he did not have any realization of the depth it was dropping, but assumed a two-inch space, or some reasonable amount, and thought that the car would come back and nothing violent occur; when the car did come back onto the concrete the front end swung violently to the left and the car struck an oncoming southbound vehicle. The jurors well could have concluded, on the basis of their knowledge of the common facts of life, that it was reasonable and prudent for plaintiff to try to get back on the pavement. The shoulder was only four feet wide and had a ditch at its easterly border. There was nothing to be gained by trying to ride the dirt. A left pull on the wheel did not release the car when in the deeper holes, but when the wheels came close to a level with the paving the restraining force was released enough to cause the car to swerve rapidly to the west and go out of control. These things the jury and the trial judge may have considered as accounting for the accident and as being wholly consistent with ordinary care on plaintiff's part. If it be true, as appellant argues, that plaintiff knew the condition of the road and the rut it does not necessarily follow that it was negligence on his part to get off the paving and into the rut. Momentary forgetfulness of a known danger is not necessarily negligence. *Hall v. Barber Door Co.*, 218 Cal. 412, 420, 23 P.2d 279; *Neel v. Mannings, Inc.*, 19 Cal.2d 647, 655, 656, 122 P.2d 576; *Bickham v. Southern California Edison Co.*, 120 Cal.App.2d 815, 823, 263 P.2d 32. It presents a question of fact for the jurors to solve.

Appellant makes this contention concerning notice: "The Westerly Ambulance Entrance sign, white post, power poles, vegetation, ditch, cement pavement, and the replacing of the 15 foot wide asphalt strip and curb by a narrow dirt shoulder (shown on picture exhibits)—all served to notify respondent of the condition of Centinela at that point just as much as did the pavement, curb, parkway and sidewalk in the City of

Alhambra case [Waldorf v. City of Alhambra], supra, 6 Cal.App.2d 522 [45 P.2d 207].” This again does no more than raise a factual question for the jury’s determination. See discussion of *Rose v. County of Orange*, infra, 94 Cal.App.2d 688, 691, 211 P.2d 45.

Appellant next contends that “a city is not required by law to improve or make passable the whole width of a street, but has the right (as in the case at bar) to set aside certain portions thereof for vehicular traffic and to leave unimproved other portions thereof.” Reliance is placed upon *Waldorf v. City of Alhambra*, 6 Cal.App.2d 522, 526-527, 45 P.2d 207, *Williams v. San Francisco, etc., Ry. Co.*, 6 Cal.App. 715, 721, 93 P. 122, and cases from other states.

The Waldorf case passed upon the sufficiency of the complaint to state a cause of action under the Public Liability Act. The accident occurred at the intersection of Fremont Avenue (running north and south) with Alhambra Road (east and west); the automobile in which decedent was riding collided with a pole in the parkway on the south side of Alhambra Road. The only defect alleged was that at that intersection the portion of Fremont which was south of the south curb line of Alhambra Road was approximately 14 feet narrower than the portion which extended northerly from Alhambra and the concrete curbing on the westerly side of Fremont south of Alhambra was about 14 feet easterly of the concrete curbing on the westerly side of Fremont north of Alhambra; there were no lights, barriers, signs, notices, watchman or warnings of any kind or character to give notice to or warn travelers of the narrowness of Fremont Avenue south of Alhambra Road. The court held that no cause of action was stated, but it was careful to limit the ruling to the facts of the particular case and disclaimed any intent to state a rule which would have general application, 6 Cal.App. 2d at page 526, 45 P.2d at pages 208, 209. The specific ruling is found at page 526 of 6 Cal.App.2d, at page 209 of 45 P.2d: “Under the law, the city of Alhambra, in the exercise of its governmental function and

discretion, was not required to widen Fremont avenue south of Alhambra road to correspond with the width of that avenue north of such road, and is not actionably liable for its failure so to do. Nor do we think that the city is chargeable with liability in failing to maintain barriers, lights or warning signs or notices at the point of ‘offset’ or ‘jog’ in the street.” The case involved no defect other than design, no holes or ruts or the like. A similar ruling was made in *Robertson v. City of Long Beach*, 19 Cal.App.2d 676, 66 P.2d 167. Those cases were reviewed in *George v. City of Los Angeles*, 11 Cal.2d 303, 79 P.2d 723, and *Arellano v. City of Burbank*, 13 Cal.2d 248, 89 P.2d 113.

The George opinion, 11 Cal.2d at page 309, 79 P.2d at page 726, distinguishes Waldorf and Robertson, saying: “The factual situation in each of these two cases differs materially from that existing in the present action. It is well settled in this state that when dealing with cases falling under the provisions of the Public Liability Act of 1923, each of such cases must depend upon its own state of facts and that no hard and fast rule can be applied in the great majority of cases. [Citations.]”

The Arellano case, supra [13 Cal.2d 248, 89 P.2d 118], was taken over by the Supreme Court for the specific purpose of considering the effect of the Waldorf and Robertson decisions upon the facts of that case. It there appeared that plaintiff drove easterly upon Glenoaks Boulevard across Providencia Avenue and onto the private right-of-way of the Pacific Electric Railway Company which extended from the east side of Providencia and in a direct line with Glenoaks as it existed west of Providencia; in other words, at the east side of the intersection Glenoaks divided and abutted the right-of-way on the north and on the south, but as previously indicated the right-of-way itself was in effect a prolongation of the Glenoaks which existed west of the intersection. It will be noted that the accident occurred outside the confines of the public streets, and that the plaintiff was hurt when he ran off the public street onto the railroad’s private right-

of-way. Judgment in favor of plaintiff was affirmed and the Waldorf holding was distinguished upon the factual basis that the curb, sidewalk and parkway in front of the property included within the jog or offset in the street constituted a barrier or warning readily visible to an alert driver, while the situation involved in the Arellano case presented no such warning, no elimination of the hazardous condition and no steps taken " "to protect the public against such dangerous and defective condition." "

Williams v. San Francisco, etc., Ry. Co., supra, 6 Cal.App. 715, 721, 93 P. 122, holds that a railway company cannot obstruct a public highway adjoining its right-of-way without being liable for foreseeable untoward consequences, even if the obstruction is placed outside the improved or traveled portion of the highway. The court assumed arguendo that the municipality would not be liable for accidents occurring outside the traveled roadway because the traveler goes upon the unimproved portion at his own risk, but it did not have to decide that question. The case seems not to have been cited on this point.

[8] Later cases have established as the law of this state the rule that the municipality is liable for accidents caused by dangerous conditions "outside the traveled portion of the highway if the circumstances show that the driver was not negligent in departing from the traveled area, and if the defects or obstructions are in close proximity to the traveled area and are hidden from ordinary view." *Alderson v. County of Santa Clara*, 124 Cal.App.2d 334, 338, 268 P.2d 792, 795. It was charged in the *Alderson* case that the defendant county maintained a public highway in a dangerous and defective condition in that it permitted rocks and boulders to stand on the north shoulder hidden in a growth of tall weeds, and permitted the shoulder to become hollowed by deep depressions and to become improperly graded, constituting a hazard to vehicles using it. Because the plaintiff, while traveling at a reasonable rate of speed struck rocks about 10 inches from the east edge of the pavement with such force that the car bounced and struck a

tree about 20 feet from the edge of the highway, it was held that the facts constituted a defective condition contemplated by Government Code, §§ 53051 and 53052, "if the county is under any duty concerning the area outside the improved portion of the highway." The court said, in reversing a judgment of nonsuit: "* * * a county may be liable for the dangerous or defective condition even though that condition exists off the traveled portion of the highway. Whether the situation requires the application of that rule is a question for the jury. [124 Cal.App.2d at page 340, 268 P.2d at page 796.] * * * As to cities, 'The obligation to exercise reasonable care to keep streets and sidewalks in proper repair is not confined to defects existing within the limits of the public way. Dangerous or unsafe ditches, excavations, walls or obstructions by the side thereof are included within the rule of fixing municipal liability. A city "must not create or suffer any pitfall within the traveled portion, or so near to it that a traveler upon the portion customarily used for travel may, although in the exercise of due care, fall therein." ' " 124 Cal.App.2d at page 341, 268 P.2d at page 796.

Rose v. County of Orange, supra, 94 Cal. App.2d 688, 211 P.2d 45. In this instance the plaintiff at a "T" intersection of two county roads ran across the street and into an open ditch. Judgment in her favor was affirmed, the court saying at page 691 of 94 Cal.App.2d, at page 47 of 211 P.2d: "Not only does the general situation involve questions of fact, but it is rather well established that such a county or public agency has a duty to warn persons lawfully using its streets of a dangerous condition which exists, even if that condition was not created by it or consisted of something which was not within its control. [Citing cases.] It cannot be held as a matter of law that no duty rested on the appellant to give some warning of the condition which here existed. Whether any warning was here given and whether an ordinary stop sign, if it was there, was sufficient under the circumstances presented questions of fact rather than of law." At page 693

of 94 Cal.App.2d, at page 48 of 211 P.2d: "As hereinbefore stated, a duty rested upon the appellant to give some warning of the dangerous condition which here existed."

[9, 10] It cannot be held as a matter of law that appellant had no obligation to maintain the dirt shoulder of Centinela Avenue in traversable condition, or that its failure so to do was not negligence which was the proximate cause of the accident in question.

[11-13] Appellant stoutly asserts there was error in receiving evidence of similar prior accidents which, as the reply brief states, "were placed at the precise spot of this accident." Appellant's counsel assert that the other accidents did not occur under similar conditions and rely upon *Wilkerson v. City of El Monte*, 17 Cal.App.2d 615, 62 P.2d 790 and *Martindale v. Atchison, T. & S. F. Ry. Co.*, 89 Cal.App.2d 400, 201 P.2d 48. It is well established, and appellant does not contend otherwise, that general similarity of conditions is enough to satisfy the rule, identity being impossible and unnecessary. See *Gilbert v. Pessin Grocery Co.*, 132 Cal.App.2d 212, 218, 282 P.2d 148. Where a dangerous condition of property is involved, there must be proof that there was no substantial change during the interval between the accidents under consideration. In the case at bar this latter requirement was abundantly established; the proof was that the condition existing on the day of the accident had prevailed for years prior to that date; that there had been no changes therein. The similar accidents proved at bar were evidentiary of the fact of danger in the existing highway condition and of the manner in which it affected the operation of cars exposed to its hazards,—in other words, existence of a dangerous condition and cause of the instant accident.

The cases concerning evidence of prior accidents fall into two classes, those whose similarity depends upon the conduct of the participants in the accident, and those whose similarity depends upon the continued existence of a defective property condition. This distinction is drawn in the

Gilbert case, *supra*, 132 Cal.App.2d at page 221, 282 P.2d at page 156: "In other words, when the similarity depends upon the conduct of the actors in the accident, rather than the condition of the locale, the general similarity rule requires a matching of those elements (such as was the *Martindale* case, *supra*, which involved a railroad crossing accident), but that is not necessary when the sole fact of dangerous condition of the premises is in issue." It is there shown that *Wilkerson* and *Martindale* fall in the first category. The distinction is emphasized by the ruling in *Dyas v. Southern Pacific Co.*, 140 Cal. 296, 304, 73 P. 972, which is discussed at pages 219 and 155 respectively of the *Gilbert* opinion.

It is pertinent to observe that in the *Wilkerson* case plaintiff sought recovery for injuries received when the automobile in which she was riding struck a dip in an intersection, she being thereby thrown to the top of the car, and the question was one of dangerous and defective condition. The trial judge received evidence of previous accidents and in some instances this was without regard to the speed of the respective cars. Speed was held to be the vital factor in the inquiry, and the receipt of evidence without reference thereto was held to be reversible error, but the court said at page 617 of 17 Cal.App.2d, at page 792 of 62 P.2d: "In some cases where the cars had been actually seen by the witnesses as they crossed the intersection, testimony was given as to the approximate speeds of the cars which were not high speeds, and as to the action of the cars when they struck the depression. This testimony was properly admitted."

The *Martindale* case, *supra*, did not involve any question of defective or dangerous condition of property and hence the basis for similarity of accidents could be found, if at all, in the conduct of actors. It will be observed as the discussion proceeds that the trial judge at bar held the proof of other accidents within narrow limits, requiring similarity of conduct of respective drivers, as well as the obvious similarity of the rut and its holes and the effect upon a car caught in their embrace

and struggling to get back onto the traveled roadway.

One of the accidents of which appellant complains was that of Mrs. Freda Hartwick. On July 29, 1950, she was driving north on Centinela; she had been over the route many times but had never observed the drop-off north of the alley; she was going 30 to 35 miles an hour (the speed defendant claims plaintiff at bar was traveling); she was under the impression that the road was level all the way across; a southbound car forced her to the right; she went into the chuck holes, tried to get back onto the cement, lost control of her car and hit another vehicle.

Mrs. Mary L. Merrill, who owned and lived at the Westerly Sanitarium, was driving north on Centinela in May, 1952. She was familiar with the highway condition in front of her property (which extended from the alley to Culver); she knew the asphalt paving ended at the alley and that the dirt shoulder was north of it; something, she knows not what, caused her to slide off the concrete and into the holes; she was traveling 20 to 25 miles an hour; she tried to turn back onto the cement and when she made it the car got out of control, went over onto the west side of the highway and when it stopped was headed south. She told her son about the accident; he testified he went at once to look and saw that at the alley the pavement was one to six inches above the dirt.

Charles C. Brock, who lived on Centinela opposite the rut, saw an accident about 1½ months before the subject accident. A northbound car going 25 to 30 miles an hour got off the concrete with the wheels rubbing it for 10 to 15 feet; the driver pulled the car out of the rut and when he did so his car went almost to the fence on the west side of the highway and then back to his own side of the road. This evidence had a tendency to prove the effect of the rut upon a northbound car which happened to drop its right wheels in one of the holes, whose driver attempted to get back onto the paving and thereby lost control of his car. It bore upon the dangerous condition of the street and the prox-

imate result of the application of that condition to a moving car. On defendant's motion this evidence was stricken, the court holding that there was not sufficient foundation to show similarity of conditions. Admonition to disregard the evidence was given immediately to the jury. No complaint is made with respect to this ruling, but it is claimed that error was committed in overruling defendant's objection when the following occurred on direct examination: "Q. * * * You stated that prior to September 18, 1952, had you seen any cars traveling in a northerly direction swerve across, off of the shoulder and across the dividing line of Centinela? Mr. Owen: May it please the Court, I will object to that, unless there is a foundation laid." The time of the incident having been fixed as required by the court, there was no further objection until the close of the direct examination and it took the form of a motion to strike which, as stated, was granted. If there was any error in this episode it was favorable to defendant and affords no ground for complaint on appeal. The trial judge gave defendant a most favorable construction of the prior accident rule, made full application of the Wilkerson and Martindale cases, *supra*, without regard to the distinction later drawn in *Gilbert v. Pessin Grocery Co.*, *supra*, 132 Cal. App.2d 212, 282 P.2d 148.

Appellant's counsel emphasize unimportant differences between the instant accident and the similar previous ones. They say, in effect, that the speed should be the same, that all accidents under comparison should be in the daytime or at night, or in fog or bright sunshine; they insist that the drivers must be identified and the cause of dropping into the rut must be the same. This process of comparison was pursued in the *Gilbert* case, *supra*, and held to be merely an effort to "inject a false quantity into the problem now before us." 132 Cal. App.2d at page 219, 282 P.2d at page 155. The probative value of similar accidents in the case at bar lies in the existence of the rut and its holes, their effect upon a car which happened to get into the rut, the effect of endeavoring to get back onto the

paved highway, the sudden release of pressure which throws the car out of control. The manner or cause of dropping into the rut is wholly immaterial, as is the state of the weather or the time of day. There was no error in the receipt of the evidence of the Hartwick and Merrill accidents, or in the ruling upon the objection to the Brock evidence.

[14] Prejudicial error is claimed to inhere in the court's handling of objections and motions directed at the testimony of Maurice Gerard. He lived at the southwest corner of the intersection for 24 years; described the holes as running one to five or six inches in depth; said they had always been that way (as shown in exhibits 11 and 19), and that no work had ever been done on that stretch of road. No mention of the ditch on the east side of the shoulder was made until Mr. Gerard was examined on redirect by plaintiff's attorney. The witness was then asked: "And have you seen cars in the ditch next to that?" He replied in the affirmative; motion to strike that answer was made and granted. That ended the redirect examination and the matter should have terminated there but defense counsel was not content. Immediately upon recross-examination he went into the same subject; there was no objection on the ground that the inquiries were not proper recross or upon any other ground; and counsel's approach was unobjectionable (albeit ill advised). On such recross-examination the witness testified:

"Q. And you say you have seen a lot of cars drive along with their wheels just off the pavement and on the dirt, that is, the right wheels? A. That's right. * * *

"Q. And the ones you have seen drive for some distance that way, do they? A. Lots of times they drive all along that way.

"Q. Drive all the way to Culver Boulevard and nothing happens to them? A. Sometimes they go in the ditch.

"Q. Sometimes they go in the ditch. The cars you saw, a lot of them go along right up to Culver Boulevard? A. A lot of them went in the ditch.

"Q. And did you see them go in the ditch?

"Mr. Spero: Just a moment.

"Mr. Packard: Are you objecting to Mr. Owen's questions?

"Mr. Spero: No.

"Mr. Owen: I want the facts; that is all I am interested in."

No objection or motion to strike was directed to this testimony. Thereupon, defendant's counsel abandoned the subject for the nonce. Upon re-redirect examination the following occurred:

"Q. Now, in connection with the cars in the ditch, have you gone over and made any assistance to them? A. I dragged a few of them out.

"Mr. Spero: Just a moment. Your Honor, we object to that.

"The Court: You opened it up.

"Q. By Mr. Packard: And how many cars would you say, how many cars would you say you had pulled out of the ditch in the 24 years that you have lived there?

"Mr. Owen: May it please the Court, despite the fact—

"The Court: No, I will overrule that. You played with dynamite.

"Mr. Owen: I am going to cite that remark of the Court—

"The Court: The jury will disregard that.

"Mr. Owen: —as prejudicial."

Immediately the trial judge gave an appropriate admonition to the jury which ended with these words: "I will overrule any objections to any further questions along those lines, because you have opened the question and the jury now has the right to hear all the witness' testimony on that subject." Defense attorney agreed that that was a correct statement of the law, but the question was raised as to who had actually opened the subject and the reporter's notes were read in the absence of the jury, followed by this:

"The Court: Doesn't that open it up?

"Mr. Spero: No.

"The Court: Of course it does. You can't leave it with the impression that cars went along there with one wheel in the ditch and all went through safely. * * * You would leave the implication with the jury in that case that the cars could drive along there with their wheels there. Maybe they can, but if there were any disasters that the witness knows about, you are going to have to hear them, if the witness knows about it, after that question."

These remarks of the judge show the soundness of the ruling. It was proper for defendant to develop, if it could, that cars would travel in the rut all the way to Culver Boulevard without disaster and that plaintiff, in the exercise of ordinary care, should have done that very thing. There was no objection by plaintiff's counsel to that examination and the subject being a legitimate one, and having been opened by defendant, plaintiff had a right to further canvass the matter. There was no error in these rulings, certainly no prejudicial error.

[15] Appellant makes much of the judge's remark, "You played with dynamite," claiming that it evinced prejudice in plaintiff's favor and conveyed that impression to the jury. A careful examination of the transcript fails to sustain this contention. On the contrary, it discloses that the trial judge throughout the 735 pages of testimony displayed a penchant for commenting on the evidence, its meaning and effect, to such an extent that the small "dynamite" exchange could have little effect upon the jurors. So far as the matter of prejudice is concerned, there is no substantial support for that claim in the record. The trial judge repeatedly interrupted plaintiff's attorney in his examination of witnesses, required him to reform legitimate questions, forestalled his pursuing correct objectives, all to such an extent that he had difficulty in proving his case. It may be readily conceded that this did not emanate from any desire or intention to impede counsel's progress; these matters are cited merely to show that there is no substantial basis for claiming that the

judge was prejudiced against the defendant or that his conduct could instill any such thought in the jurors' minds.

[16, 17] Appellant further complains of what appears to have been an oral interpolation in the formal jury instructions,—reading as follows: "I heard no evidence submitted on either side in this case that this was a zone restricted to any limit of speed." This followed immediately after the giving of BAJI² instruction number 144, defining and quoting the basic speed law covered by § 510, Vehicle Code. No instructions were given or asked on prima facie speed limits, and the court's remark doubtless was intended to guide the jurors upon that subject, for it had been raised from time to time during the trial. In his opening statement plaintiff's attorney had said that the accident was in an area of 55 mile speed limit. Defendant's attorney in his opening statement said: "that on the day of this accident he was driving, by his own admission, between 35 and 40 miles an hour in an area where there were stores and residences, where he should have been driving only 25 miles an hour on a good, bright day, and on a day when there was fog he should have been driving even less than that." The transcript does not contain the arguments to the jury and hence we do not know what claims were then made with respect to speed or speed limits. On cross-examination plaintiff was asked his impression of the speed limit as he drove along just before the accident, and he stated he had no impression as to the exact limit, that he had seen no signs indicating the speed limit. He was then asked whether he took that to be a 55-mile zone because there were no speed signs there. Objection to that question was sustained. Upon redirect he testified that he had no recollection of seeing any speed signs and that there were no houses on his right as he drove the block just prior to the accident. Police Officer Boardman was asked about the matter of speed signs south of the alley on the east side of the street; he said that he did not know whether there were any or whether that was a 55-mile

2. Book of Approved Jury Instructions, Superior Court, Los Angeles County.

zone. The court interrupted this line of examination and pointed out to counsel for plaintiff that "unless there is evidence to the contrary you can suppose it is open territory," and, "why prove it when you don't have to prove it? If anybody wants to prove it they can prove it." Thereupon counsel for plaintiff abandoned that line of inquiry. The court's statement of the law was correct, *Reynolds v. Filomeo*, 38 Cal.2d 5, 11-13, 236 P.2d 801; *Daniels v. City and County of San Francisco*, 40 Cal.2d 614, 624, 255 P.2d 785, and it included no misstatement of fact. The subject not having been otherwise covered by the instructions the court had discretion to clarify the matter if he saw fit. "In charging the jury the court may of its own motion instruct them as to all matters of law which it thinks necessary for their information in giving their verdict." *Jennings v. Arata*, 83 Cal.App.2d 143, 146, 188 P.2d 298, 300. There is no merit in this claim of error.

The judgment is affirmed.

MOORE, P. J., and FOX, J., concur.



139 Cal.App.2d 165

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Malcolm R. SCHLETTE, Defendant an
Appellant.

Cr. 3173.

District Court of Appeal, First District,
Division 1, California.

Feb. 10, 1956.

Defendant was convicted of burning dwelling and shop, which was owned by defendant's wife, and which constituted community property acquired after 1927. The Superior Court, Marin County, Thomas F. Keating, J., entered judgment, and defendant appealed. The District Court of

Appeals, Fred B. Wood, J., held that wife was eligible to testify against husband.

Judgment and order denying new trial affirmed.

1. Husband and Wife ⇨265

Civil Code provisions pertaining to management and control and disposition of community property are specific limitations imposed on husband as manager of the common property and were not intended to and do not extinguish duties and responsibilities which are inherent in any such relationship. West's Ann.Civ.Code. §§ 172, 172a.

2. Husband and Wife ⇨265

As party to confidential relationship of marriage, husband must, for some purposes at least, be deemed a trustee for his wife in respect to their common property. West's Ann.Civ.Code, §§ 161a, 172, 172a.

3. Witnesses ⇨61(1)

In prosecution of husband for burning dwelling and shop, which was owned by wife, and which constituted community property acquired after 1927, wife was eligible to testify against husband. West's Ann.Civ.Code, §§ 161a, 172, 172a; West's Ann.Pen.Code, §§ 447a, 1322.

Cornish & Cornish, Berkeley, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

FRED B. WOOD, Justice.

Defendant, convicted of a violation of section 447a, Penal Code, setting fire to and burning "the dwelling house and shop of Frances M. Schlette," has appealed. Frances was his wife at the time. The house and shop constituted community property acquired since 1927.

Over his objection, predicated upon section 1322 of the Penal Code, the wife was allowed to testify against him. This is assigned as prejudicial error.

Defendant claims this could not be a "crime committed by one [the husband, in this case] against the * * * property of the other [the wife, in this case]" (§ 1322) because, although she had an ownership interest in, he had the management of, the community property and the power to destroy it by burning, chopping or other physical means, with impunity insofar as she was concerned. He predicates this element of control upon the provisions of sections 172 and 172a of the Civil Code. He claims that his control of real property is limited only by the requirement that the wife join him when it is "leased for a longer period than one year, or is sold, conveyed, or encumbered", § 172a, and that his control of personal property is limited only by the restriction that "he cannot make a gift of" it "or dispose of the same without a valuable consideration, or sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the wife or minor children that is community, without the written consent of the wife." § 172.

[1, 2] This reflects too narrow a view of these statutory limitations. They are specific limitations imposed upon the husband as manager of the common property. They were not intended to and do not extinguish duties and responsibilities which are inherent in any such relationship. "The position of the husband, in whom the management and control of the entire community estate is vested by statute * * *, has been frequently analogized to that of a partner, agent, or fiduciary. * * * It is clear that, being a party to the confidential relationship of marriage, the husband must, for some purposes at least, be deemed a trustee for his wife in respect to their common property." *Fields v. Michael*, 91 Cal. App.2d 443, 447, 205 P.2d 402, 405. Even before the 1927 addition of section 161a to the Civil Code, declaring that the respec-

tive interests of the husband and wife in community property are "present, existing and equal interests" under the management and control of the husband, it was held that "during the continuance of the marriage relation, the wife may resort to appropriate judicial remedies to protect and safeguard the community property against the inconsiderate and fraudulent acts of the husband. *McKay v. Lauriston*, 204 Cal. 557, 564, 269 P. 519." *Johnson v. National Surety Co.*, 118 Cal.App. 227, 230, 5 P.2d 39, 40.

[3] We are convinced that the wife, as an owner of property against which the crime was committed, was eligible to testify.

Persuasive of this view is the rationale of the decision in *In re Kellogg*, 41 Cal. App.2d 833, 107 P.2d 964, holding the husband of the defendant eligible to testify against her in an action charging her with theft of funds from their joint tenancy bank account. Also, the court in the *Kellogg* case appropriately distinguished *State v. Kephart*, 56 Wash. 561, 106 P. 165, 26 L.R. A., N.S., 1123, a case heavily relied upon by the defendant in this case.

Defendant relies also upon a statement in *United States v. Robbins*, 269 U.S. 315, 327, 46 S.Ct. 148, 149, 70 L.Ed. 285, that the husband, as owner and manager of the community property may spend it substantially as he chooses, "and if he wastes it in debauchery the wife has no redress. See *Garrozi v. Dastas*, 204 U.S. 64, 27 S.Ct. 224, 51 L.Ed. 369." That statement was uttered in respect to community property acquired before 1917; the quoted portion was obiturn dictum; and the case cited was interpretive of the community property law of Puerto Rico. It has no application to the facts or the law of the instant case.

The judgment and the order denying a new trial are affirmed.

PETERS, P. J., and BRAY, J., concur.

139 Cal.App.2d 168

C. E. GLIDDEN and Marle L. Glidden,
Plaintiffs and Appellants,

v.

H. E. WILLS et al., Defendants,
Garlan Epley, individually and doing busi-
ness as Retailers Credit Association, and
Wilbur Smith, Defendants and Respond-
ents.

Civ. 8715.

District Court of Appeal, Third District,
 California.

Feb. 10, 1956.

Action against levying creditor, constable, and purchaser at execution sale to recover on account of all defendants having exercised dominion over plaintiffs' property in hands of third person. The Superior Court, Yuba County, Warren Steel, J., sustained demurrers, and plaintiffs appealed. The District Court of Appeal, Peek, J., held that where plaintiffs' property was in hands of third person as bailee, and execution was levied on such property without plaintiffs' knowledge, and property was sold by constable to purchaser at execution sale, plaintiffs had a cause of action in conversion against all persons who exercised dominion over the property, and were not required to resort to summary remedy for asserting third party claims.

Judgment reversed.

1. Pleading ☞4, 48, 72

In considering sufficiency of a complaint, questions of proper designation of action or prayer for relief are not matters of serious concern, and question is whether complaint states any cause of action entitling plaintiff to any relief at law or in equity.

2. Bailment ☞35

Where plaintiffs' property was in hands of third person as bailee, and execution was levied on such property without plaintiffs' knowledge, and property was sold by constable to purchaser at execution sale, plaintiffs had a cause of action in conversion against all persons who exercised dominion over the property, and were not re-

quired to resort to summary remedy for asserting third party claims.

William H. Penaat, San Francisco, for appellants.

Heenan & Arnoldy, Marysville, for respondents.

PEEK, Justice.

This is an appeal by plaintiffs from a judgment of dismissal entered pursuant to the court's order sustaining defendants' (Epley, individually and doing business as Retailers Credit Association, and Smith) general demurrer to plaintiffs' second amended complaint without leave to amend.

[1] The sole question on appeal is whether or not plaintiffs' complaint states a cause of action as against the defendants. In determining this proposition we are controlled by the well-established rule that, "In considering the sufficiency of a complaint, the questions of proper designation of the action or the prayer for relief are not matters of serious concern. The important question is, does the complaint state any cause of action entitling plaintiff to any relief at law or in equity?" *Estergren v. Sager*, 39 Cal.App.2d 401, 404, 103 P.2d 177, 178.

Here the pertinent allegations of the complaint which was entitled, "Second Amended Complaint in Claim and Delivery and for Damages," are that the plaintiffs are the owners and entitled to the possession of certain property in the possession of the defendant Wills as plaintiffs' bailee; that the defendant Epley, acting under the fictitious name of Retailers Credit Association, filed an action in the justice court and caused a writ of attachment to issue upon plaintiffs' property whereby the defendant Drewes, as constable, took the same into his possession. Thereafter Epley caused a writ of execution to issue and the property to be sold by Drewes to the defendant Smith. All of such acts are alleged to have been without the knowledge of plaintiffs; and it is also alleged that demand was made upon defendants for the return of the property but they refused. The prayer was for

the return of the same or, in the alternative, damages for its conversion.

[2] It is readily apparent from the complaint as summarized that plaintiffs charged the defendants "with exercising dominion" over property inconsistent with plaintiffs' ownership. This, said the court in *Haigler v. Donnelly*, 18 Cal.2d 674, 681, 117 P.2d 331, 335, "sets forth a good cause of action for conversion" in the absence of a special demurrer for uncertainty. This would be true as against a plaintiff causing an attachment to be levied and sale to be made under execution of personal property not owned by the person against whom the process runs, *Mission Fixture Co. v. Potter*, 26 Cal.App. 691, 148 P. 223, as well as against the buyer at such a sale. *Jackins v. Bacon*, 63 Cal.App. 463, 218 P. 1027. It should be noted that contrary to the sole argument of respondents in support of the judgment, the summary remedy for asserting third party claims "is not exclusive." 19 Cal. Jur.2d, Sec. 128, p. 524.

The judgment is reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



139 Cal.App.2d 140

Virginia THOMPSON and A. A. Thompson,
Plaintiffs and Appellants,
v.

BLUM'S, Inc., a corporation, and American
Building Maintenance Co., a corporation,
Defendants.

Blum's, Inc., a corporation, Respondent.
Civ. 21109.

District Court of Appeal, Second District,
Division 3, California.

Feb. 9, 1956.

Action by husband and wife against store corporation for injuries received by wife when she slipped and fell on floor in

store. The Superior Court of Los Angeles County, Caryl M. Sheldon, J., granted store corporation's motion for new trial on all issues, but with particular reference to issue of condition of floor, on ground of insufficiency of evidence to justify verdict, and husband and wife appealed. The District Court of Appeal, Parker Wood, J., held that granting of motion was not abuse of discretion.

Order affirmed.

1. Appeal and Error ⇨1015(3)

In passing upon motion for new trial based upon insufficiency of evidence, it is exclusive province of trial court to judge credibility of witnesses, determine probative force of testimony, and weigh evidence.

2. Appeal and Error ⇨979(2)

Granting of motion for new trial based upon insufficiency of evidence rests within discretion of trial judge to such an extent that appellate court will not interfere unless an abuse of discretion clearly appears.

3. Appeal and Error ⇨1015(1)

Even where there may not appear to be conflict in evidence, and where all proofs seem to be favorable to one or other of parties litigant, question as to probative force, or evidentiary value of testimony, is one the determination of which is with trial court in proceeding on motion for new trial, where one of grounds is insufficiency of evidence.

4. Appeal and Error ⇨854(6), 933(1)

All presumptions favor order granting new trial as against verdict, and order will be affirmed if it may be sustained on any ground.

5. New Trial ⇨70

In action by husband and wife against store corporation for injuries received by wife when she slipped and fell on floor in store, wherein jury returned verdict for plaintiffs, granting of motion for new trial on all issues, but with particular reference to condition of floor, on ground of insufficiency of evidence to justify verdict, was not abuse of discretion. West's Ann.Code Civ.Proc. § 657.

Martin S. Ryan and Toxey H. Smith, Los Angeles, for appellants.

Spray, Gould & Bowers, and Frank J. Breslin, Jr., Los Angeles, for respondent.

PARKER WOOD, Justice.

Action by husband and wife for damages for personal injuries received by the wife when she slipped and fell on the floor of defendant Blum's store. Judgment, pursuant to verdict, was against defendant Blum's for \$55,000 in favor of the wife and for \$500 in favor of the husband; and was in favor of defendant American Building Maintenance Company. Defendant Blum's motion for a new trial, made upon all the grounds stated in section 657 of the Code of Civil Procedure, was granted on all the issues on the ground that the evidence was insufficient to justify the verdict. Plaintiffs appeal from the order granting defendant Blum's motion for a new trial.

On October 20, 1951, about 4 p. m., plaintiff Mrs. Thompson entered Blum's candy, ice cream, and pastry store for the purpose of buying an ice cream soda at the soda counter. When she was at a place in the store about 15 feet from the entrance and about 5 feet from the counter she slipped and fell upon the floor. As a result of the fall her right hip—the neck of the femur—was fractured. The floor was asphalt tile upon concrete. Mrs. Thompson testified that while she was sitting or lying on the floor and trying to raise herself, during a period of 4 or 5 minutes after she had fallen, she felt the floor with her hand, and the floor was uneven, waxed, highly polished and slippery; the unevenness at the place where she fell consisted of several rises which were round and larger than a half dollar; as she slipped there was a sensation of falling on ice—her foot hit a lump that was slippery like ice; the manager of the store, who picked her up and carried her to a nearby davenport, told her that several people had fallen on the floor; she was wearing "platform sole" shoes with high heels.

Mrs. Thompson was taken by ambulance to a hospital where an operation (open reduction) was performed on her hip, and a nail was driven through the neck of the

femur, across the fracture line, and into the head of the femur. She was in the hospital two weeks; in a rest home two weeks; in bed at home three weeks; in a wheel chair three months; used crutches about two months; and used a cane about two months. Her right leg is a half inch shorter than it was before the accident. She remained away from her employment, as a milliner, until June 1952, a period of approximately eight months. Her salary was \$130 a week. (The salary was paid to her during the first five months that she was away.) After returning to work, she worked part time for seven months. She was discharged from her employment in August, 1954, because she was highly nervous and her work was not satisfactory. She has not been employed since that time. She was 54 years of age when the accident occurred.

Mr. Goldstone, a witness (by deposition) on behalf of plaintiffs, testified that he was manager and vice-president of Blum's at the time of the accident; he saw Mrs. Thompson enter the store and he saw her when she slipped and fell; he "helped her onto a divan" which was in the vestibule; the floor is asphalt tile on a concrete slab; the tile was waxed approximately once a week, and was mopped with water and soap two or three times a week; there were irregularities in the surface of the floor—the slab (under the tile) was not a true flat surface but there were knobs or round spots in the slab; the irregularities were round humps on the flooring (tile) with curved edges—the deviation from the lowest to the highest spot might be from three eighths to one half inch, with an approximate diameter of two to four feet; there were irregularities in the area in which Mrs. Thompson fell, and the condition as to irregularities was more or less general throughout the establishment; there was no foreign substance on the floor or on her shoes; on the day of the accident approximately 500 persons had been in the store; during the time he had been manager (about one and one-half years), and prior to the accident herein, there were two or three occasions when persons had slipped

and fallen on the floor; he has not been associated with Blum's since February, 1952; he is now residing in Denver.

Mr. Thompson testified that he went to Blum's on the third day after the accident; the manager, Mr. Goldstone, showed him the place on the floor where Mrs. Thompson fell; the floor was glossy, slippery looking, and there was a rise in the floor by the partition; the manager said that others had fallen there; there are little swells and rims on the floor; he (witness) felt the lumps by sliding his feet on the floor.

Mr. Silverstein, a witness on behalf of plaintiffs, testified that at the time of the accident he was a salesman for the millinery company where Mrs. Thompson was an employee; in response to a telephone call he went to Blum's about an hour and a half after the accident and assisted in obtaining a physician for Mrs. Thompson; he (witness) examined the floor at the place where the manager, Mr. Goldstone, said she had fallen; the place, which was about three feet from the soda fountain, was uneven; the manager said that they had had trouble there before.

Mr. Rowland, a witness on behalf of plaintiffs, testified that he was an employee of defendant American Building Maintenance Company (which had a contract with Blum's for cleaning and maintaining the floor); for approximately three months before the accident, he did the cleaning and maintaining of the floor; he swept and mopped the floor six nights each week; every other night he waxed the floor, and polished it with a machine; once a month he stripped or removed the wax from the floor, and then rewaxed and polished it; he started his work at midnight; he waxed the floor the morning before the accident; the floor was uneven at the archway (the area where plaintiff fell).

An architect, called as a witness by plaintiffs, testified that the life of asphalt tile is less than the life of rubber tile; that asphalt tile, under heavy traffic, will last six or seven or eight years. The architect, who was also called as a witness by defendant Maintenance Company, testified further that he had been measuring friction resistance of surfaces for approximately ten

years; there is a coefficient of friction that is the accepted standard of the architectural profession for public floors; the minimum safety coefficient of friction is .320; if a surface measures that coefficient or higher it would conform to the accepted standard of the architectural profession for public use; on November 15, 1951, he made a series of tests of an area of Blum's floor (area where Mrs. Thompson fell); one of the tests was made just after Mr. Rowland had waxed the floor and buffed it with an electrical rotary buffer; the coefficient of friction shown by that test was .368; in all of those tests he found that the friction resistance conformed to the accepted standard in this community for floors "having retail use."

Mrs. Moore, a witness on behalf of Blum's, testified that she had been a waitress at Blum's since 1950 and that she was there on the day of the accident; she did not see Mrs. Thompson fall; since the day of the accident the floor surface has not been changed in any way; insofar as she could observe the floor is now in the same condition it was in when the accident occurred.

The jury and judge, accompanied by the attorneys and attaches of the court, viewed the area of the floor where Mrs. Thompson fell. Pursuant to direction of the judge, none of the viewers walked upon that area.

[1-5] As above stated, the motion for a new trial was granted on all the issues on the ground of insufficiency of the evidence. "In passing upon a motion for a new trial based upon the insufficiency of the evidence, it is the exclusive province of the trial court to judge the credibility of the witnesses, determine the probative force of testimony, and weigh the evidence." *Brooks v. Metropolitan Life Ins. Co.*, 27 Cal.2d 305, 307, 163 P.2d 689, 690. The granting of a motion for a new trial based upon insufficiency of the evidence "rests within the discretion of the trial judge to such an extent that an appellate court will not interfere unless an abuse of discretion clearly appears." *Gilbert v. Yellow Cab Co.*, 123 Cal.App.2d 782, 785, 267 P.2d 392, 394. "Even in those cases where there may not appear to be a conflict in the evidence, and where all the

proofs seem to be favorable to one or the other of the parties litigant, the question as to the probative force, or evidentiary value of the testimony, is one the determination of which is with the trial court in a proceeding on a motion for a new trial, where * * * one of the grounds is the insufficiency of the evidence * * *.” Parks v. Dexter, 100 Cal.App.2d 521, 523, 224 P.2d 121, 123. In the present case, at the time of the hearing of the motion for a new trial, one of the attorneys for plaintiffs argued there was no question but that there was unevenness of the floor. Thereupon the trial judge said: “There is a big question about it in the Court’s mind because I stood within three feet, I saw women and children walk over it. I absolutely looked at it at different angles. I couldn’t see any irregularity, defect in it at all.” The judge also said: “I looked very, very carefully.” In ruling upon the motion, the judge said: “[I]n this case the Court, having viewed the premises himself and stood within three feet of the place where the plaintiff is supposed to have fallen, being unable to see any defective condition or dangerous condition in the floor, I am going to have to grant the motion on the grounds the evidence is insufficient to justify the verdict of the jury. Motion granted.” Appellant argues, however, that at the time the judge saw the floor in November, 1954, which was more than three years after the accident, the condition of the floor was not the same as it was when the accident occurred; that over that long period of time the surface of the asphalt tile would necessarily be changed by the heavy traffic thereon; that the 11 jurors who returned the verdict in favor of plaintiffs were as capable as the judge in the matter of observing the floor; that, in view of the testimony at the trial, the casual view of the floor by the judge, more than three years after the accident, was not an adequate reason for granting a new trial; and that the judge abused his discretion. It is to be assumed that the judge considered the probative force and evidentiary value of all the testimony—that he gave due consideration to the testimony regarding the life of asphalt tile and to the effect that lapse of time and use of the floor would

have upon the surface. “[A]ll presumptions favor the order [granting new trial] as against the verdict [Citations.] and the order will be affirmed if it may be sustained on any ground.” Mazzotta v. Los Angeles Ry. Corp., 25 Cal.2d 165, 169, 153 P.2d 338, 340. Although the judge, at the time he orally granted the motion, referred only to his observation of the floor, it is to be noted that his written order granting the motion stated that he granted the motion on all the issues on the ground of insufficiency of the evidence. It therefore appears that the motion was granted not only on the issue as to the condition of the floor, but also on the issue as to amount of damages. Since it does not appear that the court abused its discretion with reference to the issue as to the condition of the floor, it is not necessary to discuss the issue as to excessive damages.

The order granting the motion for a new trial is affirmed.

SHINN, P. J., and NOURSE, Justice pro tem., concur.



139 Cal.App.2d 206

Edythe Marrenner BARKER, Plaintiff,
Respondent and Appellant,

v.

Jesse T. BARKER, Defendant, Appellant
and Respondent.

Civ. 20929, 21096.

District Court of Appeal, Second District,
Division 1, California.

Feb. 15, 1956.

Rehearing Denied March 12, 1956.

Hearing Denied April 11, 1956.

Divorce proceeding. The Superior Court, Los Angeles County, Herbert V. Walker, J., granted a divorce to the wife and decreed that certain property was her separate property and not community. The husband appealed, and the wife appealed from that part of an order directing her to pay husband’s attorneys’ fees on appeal in

the sum of \$7,500. The District Court of Appeal, on the husband's appeal, held, *inter alia*, that evidence sustained the trial court's finding that certain property was the separate property of the wife and the implied finding that there was no transmutation notwithstanding that the parties filed split income tax returns. On the wife's appeal, the Court held that the award to the husband for attorneys' fees was excessive.

Judgment appealed from affirmed; order appealed from reversed with direction to determine whether appeal was taken in good faith and to grant such fees, if any, as court may find attorneys for defendant are entitled to.

See also 133 Cal.App.2d 741, 284 P.2d 900.

1. Divorce ⇨249(3)

In a divorce proceeding, trial court does not have jurisdiction to award separate property of one party to the other.

2. Divorce ⇨249(1)

In a divorce proceeding the court must, if issue is tendered by the pleading, try issue of title to property between the parties, i. e., decide whether certain property is separate property of one party or joint or common property of both or community property.

3. Divorce ⇨249(1)

Where complaint in divorce proceeding alleged that all real and personal property in plaintiff's possession was her sole and separate property, and answer denied such allegation and affirmatively alleged existence of specified and unspecified community property, trial court had jurisdiction and duty to determine issue and quiet title of parties accordingly.

4. Divorce ⇨249(1)

When pleadings in divorce action tender issue as to whether certain property is separate property of one party or community property, they present a cause of action to quiet title and thus invoke court's equitable powers.

5. Equity ⇨38

A court of equity, when its powers are invoked, will dispose of all issues with re-

spect to property as to which powers are invoked, and make such orders as are necessary to make its decree effective.

6. Divorce ⇨249(1)

In divorce proceeding wherein pleadings tendered issue as to whether property was separate or community, and wherein court held that tax refunds would be separate property of wife, court had, and properly exercised, jurisdiction to compel husband to sign refund claims presented to him by wife and caused them to be filed.

7. Husband and Wife ⇨29(9)

Parties contemplating marriage may validly contract as to their property rights, both as to property then owned by them and as to property, including earnings, which may be acquired by them after marriage. West's Ann.Civ.Code, §§ 177-181: Probate Code, § 70.

8. Husband and Wife ⇨264

In divorce proceeding, evidence sustained trial court's finding that property in question was separate property of wife and trial court's implied finding that there was no transmutation notwithstanding the filing of split income tax returns by the parties.

9. Divorce ⇨286

Where husband in his affidavit in support of application for attorneys' fees stated that he had no property, any error on part of trial court in including in decree an omnibus clause that all property standing in wife's name or in her possession or under her control and not described in finding or decree was her separate property, was harmless.

10. Appeal and Error ⇨1026

Party appealing to District Court of Appeal was not entitled to complain of an error which did not adversely affect him.

11. Divorce ⇨184(6, 10)

Husband's contention on appeal, that wife was not entitled to a divorce because of false testimony she had produced, was matter of weight of evidence or credibility of witnesses and was for determination of trial court and not for District Court of Appeal.

12. Divorce ⇨315

Interlocutory decree of divorce terminated personal relations between parties and made it lawful for plaintiff wife to live separately and apart from defendant husband.

13. Divorce ⇨87

In aid of its decree terminating personal relations of husband and wife, court had power to protect plaintiff wife in enjoyment of her right to live separately and apart from, and free from interference by, defendant husband.

14. Divorce ⇨87

Where home was separate property of wife, husband had no right to enter therein after rendition of interlocutory divorce decree and had no standing to complain that decree enjoined him from so entering. West's Ann.Code Civ.Proc. § 526, subds. 1, 3.

15. Divorce ⇨87

In divorce decree, provision which enjoined husband from entering home which was separate property of the wife was authorized by statute. West's Ann.Code Civ. Proc. § 526, subds. 1, 3.

16. Divorce ⇨286**Husband and Wife** ⇨266

Where ante-nuptial agreement provided that property earned or purchased should be separate property of person who earned it and where property in question was purchased with earnings of wife, trial court erred in finding such property to be community property, but error was harmless as to appealing husband who thereby received more than that to which he was entitled. West's Ann.Civ.Code, §§ 177-181.

17. Appeal and Error ⇨1149

Where effect of judgment rendered pursuant to incorrect findings was no different than it would have been had findings been correct, amendment to findings and modification of judgment could serve no useful purpose.

18. Appeal and Error ⇨1010(1)

Where there was substantial evidence to uphold trial court's finding of fact, District Court of Appeal was without power to change it.

19. Divorce ⇨225

In divorce proceeding, no counsel fees could properly be allowed for services rendered in presenting points on appeal which, under established law, were not open for decision by the reviewing court. West's Ann.Civ.Code, § 137.3.

20. Divorce ⇨225

In divorce proceeding, counsel fees could not properly be awarded against successful party for services rendered in presenting to reviewing court errors which were not prejudicial to appealing party. West's Ann.Civ.Code, § 137.3.

21. Divorce ⇨225

Services performed in divorce case in raising questions which are not of real substance should not be basis for award of attorneys' fees. West's Ann.Civ.Code, § 137.3.

22. Divorce ⇨225

It is only when appeal in divorce case is taken in good faith, i. e., with reasonable belief that it has merit, that attorneys' fees or costs may be awarded. West's Ann.Civ. Code, § 137.3.

23. Divorce ⇨227(2), 287

Under circumstances shown by record in divorce case, trial court erred in awarding attorneys' fees to husband on appeal in amount of \$7,500, and order would be reversed with direction to determine whether appeal was taken in good faith and to grant such fees, if any, as court might find attorneys for husband were entitled to. West's Ann.Civ.Code, § 137.3.

Hahn, Ross & Saunders, Los Angeles, for defendant-respondent.

Gang, Kopp & Tyre, Los Angeles, for appellant-appellant.

PER CURIAM.

Defendant appeals from a judgment decreeing that plaintiff is entitled to a divorce, and further decreeing that certain property is her separate property and not property of the community.

Plaintiff appeals from that part of an order made in the court below directing plain-

tiff to pay to defendant as attorney's fees on this appeal the sum of \$7,500.

Responsive to issues tendered by the complaint and answer, the trial court made findings of fact which, insofar as pertinent to this appeal may be summarized as follows:

Plaintiff and defendant were married on July 23, 1944, and separated on July 17, 1953; that there were two children born of the marriage; that the defendant was guilty of extreme cruelty and had caused plaintiff grievous mental and physical suffering without fault on her part. The court made detailed findings as to these acts of cruelty. Included in these acts were instances of physical attack upon, and resultant injury to the plaintiff, these instances occurring both before and after their separation. The court further found that it was not true that the plaintiff had treated the defendant in a cruel and inhuman manner or caused him grievous mental or physical suffering; that the plaintiff was a fit and proper person to have custody of the minor children and that they should be awarded to her with the right of reasonable visitation in the defendant, the extent of these rights being set forth in detail; that immediately prior to the marriage plaintiff and defendant entered into a written ante-nuptial agreement; that it is not true that plaintiff procured defendant's execution of said ante-nuptial agreement by duress, undue influence or fraud, and it was not true that said agreement had been cancelled or abrogated; that it is true that said agreement had remained in full force and effect during the marriage of plaintiff and defendant; that certain real and personal property, which is specifically described, was the separate property of the plaintiff and that certain personal property, specifically described, was the separate property of the defendant; that all property, real or personal, standing in the name of plaintiff or under the possession or control of plaintiff, including the items of property real and personal which were specifically described as heretofore mentioned, were the separate property of plaintiff, and that all personal property standing in the name of defendant, or in his possession or under his control, including but not limited to that spe-

cifically described, was the separate property of the defendant; that the household furniture and furnishings located in the residence of plaintiff and the Ford Station Wagon registered in the name of the defendant were community property, and that the household furniture and furnishings should be awarded to the plaintiff and the station wagon to the defendant; that all of the property of the plaintiff had been acquired from her earnings prior to or subsequent to marriage, and that the defendant had relinquished control to plaintiff of her earnings during the marriage, and that all of her earnings were her separate property; that for the calendar years 1945 to 1952 inclusive, income tax returns were prepared on behalf of plaintiff and defendant, and that said tax returns included the earnings of plaintiff and the earnings of defendant, and that such earnings were reported in joint income tax returns; that plaintiff paid all taxes payable under said income tax returns, except such portion of said tax as had been withheld from the earnings of defendant by his employer, and that such payments were made by plaintiff out of her earnings; that in filing such income tax returns and in making payment of said taxes, the plaintiff did not intend to transmute her separate property into community property, and that the making of said returns and the payment of said taxes did not transmute the separate property of plaintiff into community property; that said income tax returns were prepared by plaintiff's business manager without direction from plaintiff and without any knowledge on the part of plaintiff as to any significance between filing joint income tax returns and filing separate income tax returns.

By the interlocutory decree entered, the court decreed that the plaintiff was entitled to a divorce; that the defendant was enjoined from entering plaintiff's residence except pursuant to his rights of visitation upon the minor children, as granted by the decree. The custody of the minor children was awarded to the plaintiff, with rights of visitation in the defendant, which were fixed in detail. It was further decreed that all real and personal property standing in,

the name of or in the possession or in the control of plaintiff, including but not limited to certain property specifically described in the decree, was the sole and separate property of the plaintiff, and that all personal property standing in the name of or in the possession of or under the control of the defendant, including but not limited to said property therein described, was the separate property of the defendant. The decree awarded the household furniture and furnishings to plaintiff, and the Ford automobile to the defendant. It decreed that the ante-nuptial agreement was a fair and equitable agreement and was a valid and existing agreement between plaintiff and defendant and not void as against public policy. It was further decreed that the plaintiff was entitled to retain, as her sole and separate property, refunds, if any, of income taxes paid by plaintiff for the calendar years 1945 to 1952, both inclusive, and defendant was directed, at the request of plaintiff, to "transfer to plaintiff as her sole and separate property, all his interest in claims for refunds of such income taxes, and to take such further action, execute and file all documents and other instruments which may be necessary, proper or expedient to evidence said transfer and to make such claim or claims for refund of such income taxes." Plaintiff was ordered to pay any assessment of additional taxes with respect to the income of plaintiff and defendant for said years, except such portion thereof as might be due to the failure of defendant to report income for those years.

We have carefully examined the record in this matter and find that all of the findings, with the exception of one hereinafter mentioned, are fully supported by the evidence.

Defendant makes nine assignments of error. Seven of them are without merit, and the remaining two do not demonstrate any prejudicial error.

Appellant asserts that the trial court was without jurisdiction to order the defendant to sign and file claims for refund of income taxes, which refunds the court had found were plaintiff's separate property.

[1] In a divorce proceeding the trial court does not have jurisdiction to award the separate property of one party to the other. *Allen v. Allen*, 159 Cal. 197, 113 P. 160; *Fox v. Fox*, 18 Cal.2d 645, 117 P.2d 325; *Conard v. Conard*, 5 Cal.App.2d 91, 41 P.2d 968.

[2, 3] In a divorce proceeding, however, the court must, if the issue is tendered by the pleadings, try the issue of title to property between the parties, that is, decide whether certain property is the separate property of one of the parties or the joint or common property of the parties or community property. Here the complaint alleged that there was no community property and that all property, both real and personal, in plaintiff's possession was her sole and separate property. The answer denied this allegation and affirmatively alleged that certain specified property in the possession of the plaintiff was community property and that other additional community property in plaintiff's possession, the nature and extent of which was unknown to the defendant, was community property. The parties thus tendered to the court the issue of the title to the property in question and the court had jurisdiction, and it was its duty, to determine that issue and to quiet the title of the parties accordingly. *Huber v. Huber*, 27 Cal.2d 784, 793, 167 P.2d 708; *Hopkins v. Detrick*, 97 Cal.App.2d 50, 217 P.2d 78; *Citizens Nat. Trust & Savings Bank of Los Angeles v. Hawkins*, 87 Cal.App.2d 535, 541, 197 P.2d 385; *Mergenthaler v. Mergenthaler*, 69 Cal.App.2d 525, 528, 160 P.2d 121.

[4, 5] When the pleadings in an action for divorce tender the issue as to whether certain property is the separate property of one of the parties, or community property, they present to the court a cause of action to quiet title, *Huber v. Huber*, supra, 27 Cal.2d 793, 167 P.2d 708, and thus invoke the equity powers of the court. A court of equity will, when its powers are invoked, dispose of all issues with respect to the property as to which they are invoked, and make such orders as are necessary to make its decree effective. *Mergenthaler v. Mergenthaler*, 69 Cal.App.2d supra, 528, 160

P.2d 121¹; *Rolapp v. Federal Building & Loan Ass'n*, 11 Cal.App.2d 337, 342, 53 P.2d 974.

[6] In the case at bar the court had held that the taxes on account of which refunds might be made had been paid by the plaintiff out of her separate property and that such refunds were her separate property. Certainly a court of equity should not leave the plaintiff to some other proceeding to enforce her rights to these refunds. It having been adjudged that the plaintiff was the owner of the refunds, defendant is not injured by being compelled to sign and cause to be filed claims for refund presented to him by the plaintiff in order that she may reduce her property to her possession.

Appellant's second point is that the ante-nuptial agreement between the parties is against public policy and therefore void. Appellant asserts that the purpose of this agreement was to relieve him of the responsibility of supporting plaintiff and therefore relieve him of that marital obligation. He bases this upon the testimony of the plaintiff that that was one of the purposes of the agreement. The court found, however, that the agreement was voluntarily entered into and that it was a valid and existing agreement. As we have heretofore said, this finding is supported by substantial evidence: The agreement itself does not in any wise affect the marital obligations of either party to support the other, either during marriage or by way of alimony in the event of divorce. It does not deal with the subject of support, or with divorce or alimony, costs, or attorney's fees in event of separation and an action for divorce; it deals solely with property rights. There is substantial evidence that the defendant fully understood the purposes and the effect of the agreement at the time he signed it, and the evidence shows that the parties, during the entire period of their marriage, meticulously observed the terms of the agreement.

[7] Parties contemplating marriage may validly contract as to their property rights, both as to property then owned by them and

as to property, including earnings, which may be acquired by them after marriage. In *re Estate of Wahlefeld*, 105 Cal.App. 770, 775, 288 P. 870; *Thorpe v. Thorpe*, 75 Cal.App.2d 605, 171 P.2d 126; *La Liberty v. La Liberty*, 127 Cal.App. 669, 16 P.2d 681; *Snyder v. Webb*, 3 Cal. 83; 13 Cal. Jur.Title, Husband and Wife, sec. 17, and cases cited, and the Codes provide for such agreements (see Civ.Code, §§ 177-181; see, also, Probate Code, § 70).

Appellant relies on *Barham v. Barham*, 33 Cal.2d 416, 202 P.2d 289, and *Whiting v. Whiting*, 62 Cal.App. 157, 216 P. 92. Neither of these cases is in point. In neither are ante-nuptial agreements held invalid. In both cases, only those portions of ante-nuptial agreements which purported to relieve the husband from the obligation to support the wife, or to pay alimony in the event his own wrong doing terminated the marriage and entitled the wife to alimony, were held against public policy. Clearly, these cases have no application to the contract here.

[8] Appellant asserts that inasmuch as plaintiff and defendant made income tax returns for the years 1945 to 1952 on the basis that their earnings were community property, they thereby transmuted the separate property of the plaintiff into community property.

For the years 1945 to 1951, both inclusive, the parties filed split income tax returns in relation to both their state and federal income taxes. This they were not entitled to do as to federal taxes, except insofar as the income was community property, prior to 1948, nor as to their state income tax prior to 1951. Defendant argues that plaintiff, by declaring her earnings to be community property in the returns during the year in which she was only entitled to the benefit of a split return if her earnings were community property, transmuted them into community property. He cites, to uphold this proposition, the following cases: In *re Estate of Raphael*, 91 Cal.App.2d 931, 206 P.2d 391; *Stice v. Stice*, 81 Cal.App.2d 792, 185 P.2d 402; *Heck v. Heck*, 63 Cal. App.2d 470, 147 P.2d 110; *Frymire v.*

1. It is of interest to note that counsel for appellant here successfully advanced this proposition in the cited case.

Brown, 94 Cal.App.2d 334, 210 P.2d 707; Handley v. Handley, 113 Cal.App.2d 280, 248 P.2d 59; In re Estate of Cummins, 130 Cal.App.2d 821, 280 P.2d 128. None of these cases hold that the return of separate property as community property in an income tax return establishes a transmutation of the property. They only hold that the act of making such tax returns is evidence of transmutation. There is nothing in any of the opinions in these cases that could lead anyone to the conscientious belief that they held anything further than what we have stated, or that they uphold defendant's contentions that the filing of a community income tax return transmuted separate property into community property. Counsel for the defendant, in their brief, did not direct this court's attention to the cases of Balkema v. Deiches, 90 Cal.App.2d 427, 202 P.2d 1068, or to Hopkins v. Detrick, supra, 97 Cal.App.2d 50, 217 P.2d 78, although both of them had been called to their attention by briefs filed in the trial court. Both of these cases hold that the filing of income tax returns stating that certain property is community property does not establish transmutation, and in each of them the appellate court upheld a judgment that there was no transmutation, although the evidence established the filing of returns such as the ones in question here. In the case at bar there was ample evidence to sustain the finding of the trial court that the property in question was the separate property of the plaintiff and its implied finding that there had been no transmutation.

Appellant argues that the ante-nuptial agreement was cancelled by oral agreement of the parties. The trial court found to the contrary, and while there was a conflict in the evidence, there was substantial evidence to support the finding of the trial court. There is no merit in this contention of appellant, and it would serve no useful purpose to here discuss the conflicting evidence.

[9,10] Appellant attacks the omnibus clauses of the findings and judgment that all property standing in plaintiff's name, or in her possession or under her control, and which is not described in either the findings or the decree, is her separate prop-

erty. It is probably true, as appellant contends, that it was error for the court to enter a decree as to the title to property concerning which there had been no pleading or proof and which is unidentified in the findings or judgment, although it may be said that this portion of the findings and judgment merely declares that which is, undoubtedly, the effect of the ante-nuptial agreement between the parties.

But assuming the error, we cannot see how the defendant has been injured by this omnibus clause in the findings and decree, nor has he attempted to point out how he is injured. He does not assert that plaintiff is in the possession or control of any property that he is the owner of or in which he has an interest, other than his unfounded claim to an interest in plaintiff's property which is specifically described in the decree. In fact, in his affidavit in support of his application for attorney's fees upon this appeal, he states he has no property. The finding in question and the decree, insofar as it follows that finding, could not, therefore, adversely affect defendant. Appellant is not entitled to complain of an error which does not adversely affect him.

[11] Defendant further asserts that plaintiff is not entitled to a divorce because of false testimony produced by her. What defendant really is arguing is the weight of the evidence upon the issue of his cruelty. While the evidence was conflicting, the matter of the credibility of the witnesses was one for the determination of the trial court and not for this court. Appellant's contention is devoid of merit.

[12-15] Appellant complains because the interlocutory decree restrains him from entering plaintiff's residence except under certain defined conditions. The interlocutory decree of divorce terminated the personal relations between the parties and made it lawful for plaintiff to live separately and apart from defendant. In re Estate of Walker, 180 Cal. 478, 479, 181 P. 792; Stauter v. Carithers, 185 Cal. 160, 163, 196 P. 37. In the aid of its decree terminating the personal relations of the parties, the court had the power to protect plaintiff in the enjoyment of the right to live separately and apart from and free from interfer-

ence by defendant. The evidence showed that both immediately prior to and after the separation of the parties, the defendant had subjected the plaintiff to physical violence, and the court had the power to protect the plaintiff against a repetition of such acts. Further than this, plaintiff's home was her own property, in which defendant had no interest, and after the entry of the interlocutory decree defendant had no right to enter it and cannot be injured by a decree which prevents him from doing something he has no right to do, and the doing of which would be in violation of the rights of the plaintiff. The injunction granted falls clearly within the provisions of both paragraphs 1 and 3 of section 526 of the Code of Civil Procedure.

[16, 17] Appellant asserts that the trial court erred in finding that two pieces of property were community property. The tenor of his argument is that the trial court found the ante-nuptial agreement to be in full force and effect and under the provisions of the ante-nuptial agreement, all property earned, acquired, purchased or received should be the separate property of the person who earned it, and that as two pieces of property which were found to be community were purchased with the earnings of the plaintiff, it was inconsistent to find them to be community property. Our examination of the record convinces us that the court erred in finding that the property in question was community property. The evidence shows, without conflict, that the property was purchased with the separate funds of the plaintiff and was her separate property. But certainly defendant is not injured, and is in no position to assert error, inasmuch as the error resulted in his getting that to which, under the evidence, he was not entitled. Plaintiff here concedes, however, that while there was no evidence of a gift, it was her intent to make a gift of the Ford Station Wagon to the defendant. Without this concession, this court would be justified in correcting the finding and modifying the judgment in accordance with the unconflicting evidence that both pieces of property were plaintiff's separate property. But, as the effect of the judgment is no different than it would have

been had the court found in accordance with the evidence and plaintiff's concession, an amendment to the findings and a modification of the judgment would serve no useful purpose.

Plaintiff's Appeal

Plaintiff appeals from the order of the trial court awarding to defendant's counsel \$7,500 for services upon this appeal. Plaintiff does not question the inability of the defendant to pay these fees, nor her ability to pay them.

Although plaintiff states but two points in her brief, her attack upon the order is in reality threefold: First, that the defendant's appeal was not meritorious and therefore not in good faith; second, that the trial court was obligated, in fixing the fees, to determine whether the appeal was meritorious, and that it failed to consider that question in making its order; and third, that the fees awarded were excessive.

We will discuss these three points in reverse order.

We have come to the conclusion that the fees awarded by the trial court were excessive. The questions involved upon this appeal were not complicated. Of the nine assignments of error made by the defendant three of them involved, in reality, only questions as to the weight of the evidence or the credibility of witnesses. These assignments of error are stated by the defendant in his opening brief as follows:

"III.

"The filing by plaintiff wife and defendant husband of income tax returns from 1945 to 1952 on a community property basis did transmute separate property of the parties into community property.

"IV.

"The parties orally agreed that all earnings and property should be community property and performed the agreement by signing community property income tax returns."

"VII.

"The plaintiff was not entitled to divorce because of false testimony produced by her."

As to assignment three, it is clear that the question as to whether there had been transmutation of plaintiff's separate property into community property was a matter to be determined by the trial court in the light of all of the evidence, not simply in the light of the income tax returns.

[18] The question raised by assignment of error number four likewise presents solely a question of fact which under conflicting evidence was determined adversely to defendant. There being substantial evidence to uphold this finding, this court is without power to change it. What we have said as to assignments three and four is equally true of assignment of error number seven.

[19] The services for which fees may be allowed in a matter such as this are fees for services that are necessary in prosecuting the appeal. Certainly no fees should be allowed for services rendered in presenting points on appeal which, under the established law, are not open for decision by the appellate court.

[20] Points five and six² concern errors in the findings and decree, but these are errors which, as we have pointed out, do not adversely affect the defendant. Certainly the successful party in litigation should not be required to pay the attorney for his adversary for calling to the attention of an appellate court errors as to which the adversary is not entitled to redress.

This leaves as the only assignments of error which can possibly be said to involve matters of substance, assignments one, two, eight and nine.³ We have discussed all of these assignments, except assignment nine, in the portion of this opin-

ion which disposes of defendant's appeal, and what we have there said demonstrates how little merit there was in any of the three points discussed.

Point nine is, in reality, without substance. So far as separate property is concerned, the interlocutory decree quieting the plaintiff's title to her separate property was a final decree, and the only decree by which the trial court could dispose of the issue. As to that issue, the decree is not interlocutory, as it is insofar as the issues of the dissolution of the marriage, alimony, custody of the children and community property are concerned. It is true that the trial court did, by the wording of its decree, make a present disposition of two items of property which it found to be community, but as we have heretofore pointed out, its finding that this property was community was contrary to all of the evidence and the defendant was the gainer by the form of the decree entered. Certainly, the services rendered and the research necessary to present this point to the appellate court, and the writing of two paragraphs by which it is presented in the brief, do not justify any large fee.

[21] We do not want to be understood as holding that it is the success of an appeal which is determinative of the reasonableness of the fees fixed by the trial court. The majority of records on appeal present questions upon which counsel of equal competence might reasonably hold opposite views, but we reiterate that services performed in raising questions which are not of real substance should not be the basis for compensation. To make them such invites not meritorious appeals, but appeals to secure the benefit of the fees granted.

2. "V. The trial court erred in finding that all property in the plaintiff's name, or used by the plaintiff or in her possession or control including but not limited by particular items, is the separate property of plaintiff.

"VI. It is reversible error for the court to find valid an ante-nuptial agreement making all property separate property and also find two pieces of property as community property."

3. "I. The court cannot order the defendant to execute documents and file claims

for refund of separate property income taxes for plaintiff.

"II. The purported ante-nuptial agreement is against public policy and thus it is not a valid or a binding agreement."

"VIII. It was error for the court to permanently restrain defendant from entering plaintiff's residence.

"IX. The trial court may not make a present disposition of property in the interlocutory decree but must make the assignment at the time of the final decree."

The excessiveness of the fees granted here is further emphasized by the fact that the opening brief on appeal is very apparently but a condensation of the very full brief filed by counsel for the defendant in the trial court, so that there need have been but a comparatively small amount of time given to research or review of the record.

We think this case demonstrates the wisdom of the Legislature in amending section 137.3 of the Civil Code so as to permit fees such as this to be allowed and the amount thereof fixed, in whole or in part, after the services have been performed. When the trial court exercises its discretion and postpones the fixing of fees, it can act on evidence of the services actually performed, the necessity for the services, and the benefit accruing to the client; if, as in the case at bar, it acts before the performance of the service, its order must, of necessity, be largely based on speculation.

Our study of the transcript of the oral proceedings convinces us that the trial court did not take into consideration, in making the order appealed from, the question as to whether defendant's appeal was meritorious.

When defendant's application first came on for hearing, the question arose as to defendant's refusal to make joint income tax returns with the plaintiff as to the taxable years 1953 and 1954, and any other years in which income tax returns might be filed prior to the entry of the final decree. Plaintiff had at that time filed returns for the years 1953 and 1954, but it was the position of counsel for the plaintiff that amended joint returns could be filed which would result in refunds in excess of \$10,000, and during the colloquy between court and counsel the court stated, in part, as follows:

"The Court: Let me clarify your mind and my thinking. I'm not *going to concern myself too much about the merits of the appeal, because I feel a man has a right to appeal*. While I feel very strongly the case

has been decided right, or I wouldn't have decided it that way, I still *don't think a person should be denied the right of appeal*. I do not believe I will deny him the right on account of it not being a meritorious appeal, because I feel that probably in his mind, and Mr. Hahn's mind it is a meritorious appeal; it's not frivolous; I'm pretty sure of that. [Emphasis added.]

"The only thing I'm thinking about is whether or not he can have funds, other funds, available for that purpose.

"Now, I have indicated to you my thinking. I think that the man is being stubborn, and that is what it amounts to, and if he weren't so stubborn, he could have the money.

* * * * *

"I won't deny it because the appeal is not meritorious. I haven't said I'm going to grant him anything either.

* * * * *

"Of course, as I said, and as I have told you, I don't think I would deny the man the right to take an appeal. I can't deny that. All I can say is that *the lady is not going to pay for it*. * * * In other words, I wouldn't deny the award on the fact that *the appeal was not meritorious, because I don't think it should be*. The question in my mind is whether or not he has available funds, or could, if he got away from that stubbornness, have available funds." (Emphasis added.)

At the conclusion of the hearing of the application, the matter was continued for two weeks in order to enable the parties to arrive at some agreement. The parties did arrive at a stipulation, the details of which are set forth in the opinion of Mr. Justice Doran, wherein he denied defendant's motion to dismiss the appeal.⁴ Briefly stated, the parties agreed that defendant would join with plaintiff in executing amended tax returns for the years 1953 and 1954, and for such future years as the parties should be entitled to file such returns; that plaintiff

that the questions of whether or not defendant's appeal was meritorious, or the fees awarded excessive, were to be determined on their merits.

4. *Barker v. Barker*, 133 Cal.App.2d 741, 284 P.2d 900. It was there held that this stipulation did not constitute a promise on plaintiff's part to pay any fees that the court might thereafter order, but

would deposit the amount of any refunds obtained through the filing of the amended tax returns in a special fund, and would likewise deposit in that fund any savings made by her in future tax years for which joint returns were filed; that she would advance to the defendant all costs on the appeal, the balance of the attorney's fees awarded him by the interlocutory decree, and would pay, when due, from her own assets, any other fees ordered paid; that she should have a right to the repayment of the amount so advanced out of that fund, or the right to offset against future deposits in the fund, and that any amounts remaining in the fund after the payment of defendant's costs on appeal and attorney's fees, and her repayment of plaintiff's advances, should be held by her and invested in government bonds for the benefit of the children. When the hearing upon the application was resumed and the stipulation of the parties was presented, the court made the following comments relevant to the question we are now considering (after statement by counsel for defendant as to the defendant's earnings during the year 1954, the court said):

"The Court: Well, of course, that wasn't what is concerning the Court. He has a possibility of getting a considerable amount of money if he wasn't so stubborn. That's the point the Court tried to make to you the last time, Mr. Hahn. It seems to me he has a perfectly good, legal process, by which he could get plenty of money to take care of your fee."

Later, during the proceedings, the court said:

"The Court: To be very candid, Mr. Hahn, I don't particularly relish a wife having to pay for her husband's freight. That's the reason I asked the question. Is this dependent on her paying what she gets back on income tax, or does she have to pay it anyhow? That's why I asked the question."

[22] It seems apparent to use that the trial court, in making the order appealed from, was acting under two misapprehensions; first, that the defendant was entitled to attorney's fees as a matter of right on the appeal, irrespective of the merits of his

appeal, and that therefore the court need not consider the question of merit. That this view was erroneous is firmly established. An appeal may be a matter of right, but an appeal at the expense of one's adversary is not a matter of right. It is only when the appeal is taken in good faith, that is, with a reasonable belief that it has merit, that attorney's fees or costs may be awarded. *Stewart v. Stewart*, 156 Cal. 651, 105 P. 955; *Kellett v. Kellett*, 2 Cal. 2d 45, 49, 39 P.2d 203.

The second matter as to which the court, we believe, was under a misapprehension is that the fees that the court ordered paid were payable out of a fund in which the defendant had a vested interest. It is true that the fund created by the stipulation of the parties would not have come into being had defendant insisted on playing "dog in the manger", but the fact that he consented to joint income tax returns would not make the refunds, or the savings created by such returns, his property. All taxes paid came from plaintiff's separate funds and the refunds were payable to her and not to the defendant, and were her property and not defendant's. The fund, except so far as expendable for defendant's costs on appeal and attorney's fees, was, by the terms of the stipulation, applicable in discharge of an obligation which the interlocutory decree had placed upon the plaintiff—that is, the entire support of the parties' children.

[23] The order appealed from compels the payment of the fees in question by plaintiff, and that is what the trial court emphatically declared that it would not do.

While it is difficult to believe that counsel as experienced in litigation of this kind as are counsel for defendant could entertain a reasonable belief that this appeal is meritorious, yet inasmuch as the trial court has not passed upon that question we leave the question an open one to be decided by it.

The judgment appealed from is affirmed. The order appealed from is reversed, with direction to the trial court to re-hear defendant's petition for attorney's fees on appeal and to grant such fees, if any, as it may find attorneys for defendant are entitled.

139 Cal.App.2d 161

E. C. LIVINGSTON COMPANY, Inc., a corporation, Plaintiff, Cross-Defendant and Respondent,

v.

BLYTHE ALFALFA GROWERS ASSOCIATION, a corporation, Defendant, Cross-Complainant and Respondent,

Fidelity and Deposit Company of Maryland, a corporation, Cross-Defendant and Respondent,

Wheeler and Reeder, a partnership, Cross-Defendant and Appellant.

Civ. 5253.

District Court of Appeal, Fourth District,
California.

Feb. 9, 1956

Action wherein the Superior Court, Riverside County, Hilton H. McCabe, J., entered an order denying a motion to change place of trial, and an appeal was taken. The District Court of Appeal, Griffin, J., held that order denying motion for change of venue could not be upheld where there was a total lack of evidentiary support, but directed trial court to reconsider motion since it appeared from offer of proof that convenience of witnesses and ends of justice might be better served by retention of action and that a proper showing could have been made in that respect if trial judge had not declined to hear oral testimony.

Reversed with directions.

1. Venue ⇨68

Party moving for change of venue, upon ground that convenience of witnesses and ends of justice will be promoted thereby, has burden of proof.

2. Venue ⇨72

Verified complaint and pleadings could be considered in opposition to affidavits in support of motion for change of venue. West's Ann.Code Civ.Proc. §§ 395, 396b, 397.

3. Appeal and Error ⇨1024(3), 1178(1)

Order denying motion for change of venue could not be upheld where there was

a total lack of evidentiary support; but reviewing court, reversing such order, would direct trial court to reconsider motion when it appeared from offer of proof that convenience of witnesses and ends of justice might be better served by retention of action and that a proper showing could have been made in that respect if trial judge had not declined to hear oral testimony.

Silverberg & Fahrney, Long Beach, for appellant.

Robert A. Brockmeier, Blythe, for respondent Blythe Alfalfa Growers Association.

GRIFFIN, Justice.

Plaintiff, cross-defendant and respondent E. C. Livingston Company, Inc., a general building contractor with its principal place of business in Paso Robles, brought this action in Riverside County against the defendant, cross-complainant and respondent Blythe Alfalfa Growers Association, which has its principal place of business in Blythe. The complaint alleges that plaintiff entered into an agreement in writing in Riverside County with defendant company whereby plaintiff agreed to furnish labor and material to erect for defendant, in Blythe, a certain grain storage building; that it completed it on May 14, 1954, and defendant refused to pay a balance of \$4,841 due thereon.

Defendant association filed an answer and cross-complaint against plaintiff and made Wheeler and Reeder, a partnership, of Los Angeles, and Fidelity and Deposit Company of Maryland, a corporation, parties defendant to the cross-complaint, alleging that on April 7, 1954, in Riverside County, Wheeler and Reeder entered into a written agreement with cross-complainant to furnish all materials and labor for the foundation and slabs for the grain storage building, and failed to properly perform said work; that the Fidelity and Deposit Company furnished cross-complainant a faithful performance bond for such work and refused to indemnify cross-complainant for damages by reason of the abandonment

by Wheeler and Reeder and E. C. Livingston Company, Inc. of said contract. Damages and a declaration of rights were sought.

An answer to the cross-complaint was filed by Wheeler and Reeder on January 12, 1955, and the court set March 30, 1955, as the time of trial. On April 11, 1955, a motion for change of place of trial on account of convenience of witnesses and to promote the ends of justice was filed by Wheeler and Reeder. On May 20, 1955, they filed an amended answer and counterclaim. Demurrers and motions to strike were directed toward them. On May 31, 1955, the demurrer to the amended answer and counterclaim was ruled upon. The motion for change of place of trial was heard and submitted on May 6, 1955, and denied on May 10th.

The main question here presented is whether the trial court erred in denying the motion for change of place of trial at the time and upon the showing made. Defendant Wheeler and Reeder, on April 11, 1955, gave notice of motion that on May 6th it would move for an order transferring the matter to Los Angeles County on the ground that Riverside County was not the proper county because they were residents of Los Angeles County, and further for the convenience of witnesses and to promote the ends of justice. It was noticed that the motion would be based "upon the records, papers and files of this action, and the affidavit of Ray Wheeler attached hereto and upon such other evidence that *may be produced before the court.*" (Italics ours.)

The affidavit of Wheeler recites that he was a resident of Los Angeles; that it would be necessary to produce certain witnesses on his behalf, all residents of Los Angeles, naming them; that they were familiar with the work performed and would testify to certain facts; and that it would be a great inconvenience for them to go to Indio to so testify. Apparently other cross-defendants and the cross-complainant filed no counteraffidavits. At the hearing on May 6th, counsel for Wheeler and Reeder made a similar motion on be-

half of counsel for the Livingston Company, which was that the action be transferred to Los Angeles County on account of convenience of witnesses. An affidavit was filed in support of the motion. Counsel for Blythe Alfalfa Growers Association, after moving to strike the respective affidavits, then stated to the court that he desired to call witnesses in opposition to the motion for change of place of trial. Opposing counsel objected to such procedure because he had been served with no opposing affidavits and claimed such opposition should be presented only by counteraffidavits. In opposition to the objection the court's attention was called to Vol. 1 of California Procedure, by Witkin, p. 781, to the effect that such a motion may be determined upon affidavits or oral testimony, and counsel stated to the court just what he intended to prove by the witnesses, which facts, if properly set forth, might well have justified the denial of the motion on the grounds indicated. The judge then remarked that he was not going to hear oral testimony. A request was then made for further time to file counteraffidavits and the request was denied. The motions were taken under submission and denied. Only cross-defendant Wheeler and Reeder appealed.

It affirmatively appears from the verified pleadings and the contract set forth therein that the contract was to be performed in Riverside County. It also appears that the motion for change of place of trial on the ground that Riverside County was not a proper county was not made at the time of the filing of the answer and demurrer. This motion was properly denied. Secs. 395 and 396b, Code Civ.Proc. Appellant does not complain in this respect but relies on its claimed uncontroverted affidavit of convenience of witnesses to support the motion.

[1-3] It is the rule that the movant, upon the ground that convenience of witnesses and ends of justice will be promoted, as provided in Code of Civil Procedure, § 397, has the burden of proof. *Dick v. La Madrid*, 82 Cal.App.2d 450, 186 P.2d 149. However, it was said in *First-Trust Joint Stock Land Bank of Chicago v. Meredith*,

16 Cal.App.2d 504, 508, 60 P.2d 1023, 1025, 62 P.2d 369:

"The rule is well settled, of course, that a motion for a change of venue grounded upon the convenience of witnesses rests largely in the discretion of the trial court, the exercise of which will not be disturbed on appeal in the absence of a showing of its abuse. * *

But, where there is a showing that the convenience of witnesses and the ends of justice will be promoted by the change and there is absolutely no showing whatever to the contrary and a change has been denied, then there has been an abuse of discretion and there is no conflict of evidence to sustain the decision of the trial court."

(Citing cases.) See also *Churchill v. White*, 119 Cal.App.2d 503, 259 P.2d 974.

It is true that the verified complaint and pleadings may be considered in opposition to the affidavits in support of the motion. However, in the instant case, they do not create any conflict in the showing made by movant in respect to the convenience of witnesses or that the ends of justice will not be promoted by the change. Contrary to respondent's contention the issues of fact were sufficiently joined at the time of the motion. *Carruthers v. Crown Products Co.*, 89 Cal.App.2d 326, 200 P.2d 819. On March 17, the time of trial was continued to October 5, 1955.

Although the order denying the change of venue as to this appellant is lacking in evidentiary support, it does appear from the offer of proof of respondent's counsel that the convenience of witnesses and the ends of justice might better be served by the retention of the action in Riverside County, and that a proper showing could be made in this respect.

Accordingly, the order denying the motion to change the place of trial on the grounds of convenience of witnesses and the promotion of the ends of justice is reversed with directions to the trial court to reconsider the motion in this respect, grant respondent Blythe Alfalfa Growers

Association reasonable opportunity to make the necessary showing and to further consider its ruling upon the motion.

BARNARD, P. J., and MUSSELL, J., concur.



139 Cal.App.2d 170

John H. HARRISON, Sarah Ann Harrison, also known as Sarah P. Raxten, and Minnie Harrison McComb, also known as Mary McComb, Plaintiffs and Respondents,

v.

George BOURIS and Sam Bouris, Defendants and Appellants.

Civ. 5095.

District Court of Appeal, Fourth District, California.

Feb. 10, 1956.

Action to establish prescriptive easement to use of roadway across defendants' land. The Superior Court of Riverside County, Eugene Best, Judge pro tem., rendered judgment for plaintiffs, and defendants appealed. The District Court of Appeal, Griffin, J., held that though defendants had for ten years kept posted sign at road entrance stating that revocable permission was given to pass, evidence was sufficient to warrant finding that plaintiffs, and plaintiffs' predecessors in title, had used roadway openly, notoriously, with claim of right, and hostile to defendants, continuously during statutory period, prior to filing action, but that though judgment establishing prescriptive easement to use of roadway would be affirmed, evidence was insufficient to identify and locate roadway on ground, and court would remand proceedings for further appropriate action.

Remanded.

I. Easements ⇐36(3)

A prescriptive right to an easement in a roadway over property of another may

be acquired only by clear evidence of adverse use, openly, notoriously, under claim of title, and continuously asserted for statutory period.

2. Easements ⇨36(1)

Burden is ordinarily on one who claims prescriptive easement right to prove affirmatively the elements essential to creation of such right.

3. Easements ⇨36(1)

Where owner has posted sign which grants permissive use of way over his land, such sign tends strongly to negative any possible presumption that use by adjoining landowner, or public generally, is adverse to owner, or under communicated claim of right; such sign clearly imports permission to use roadway.

4. Easements ⇨37

Questions whether use of way is adverse, under claim of title, permissive, and with owner's consent, and whether nature of use is sufficient to put owner on notice, are ordinarily questions of fact.

5. Appeal and Error ⇨931(1)

Upon appeal from judgment establishing perpetual prescriptive easement to use of roadway across defendants' land, all conflicts in evidence would be resolved in favor of plaintiffs, and evidence would be viewed in light most favorable to plaintiffs.

6. Easements ⇨36(3)

In action to establish perpetual prescriptive right and easement to uninterrupted use of roadway across defendants' land to highway, though defendants had for ten years kept posted sign at road entrance stating that revocable permission was given to pass, evidence was sufficient to warrant finding that plaintiffs, and plaintiffs' predecessors in title, had used roadway openly, notoriously, with claim of right, and hostile to defendants, continuously during statutory period, prior to filing action. West's Ann.Civ.Code, § 811.

7. Easements ⇨26(1)

An easement by prescription in use of roadway over another's land, once acquired, is not necessarily lost by method of owner of servient estate subsequently posting sign

to effect that property is private property. West's Ann.Civ.Code, § 811.

8. Easements ⇨61(12)

Judgment establishing prescriptive easement to use of roadway across a person's land should identify and locate roadway with such certainty as to enable landowner to know exactly what portion of his property is so claimed, the extent and description of it, so that easement could not be shifted, and whether such right is limited to ingress and egress of parties served thereby for road purposes only, or whether it is open to public in general.

9. Easements ⇨43

Easements acquired by adverse user are limited to uses made during prescriptive period; and thereafter no different or greater use may be made of them except by grant or by further adverse user for the prescriptive period.

10. Appeal and Error ⇨1172(1)

Though that part of judgment which established prescriptive easement to use of roadway across defendants' land would be affirmed, in action brought for such purpose, where evidence was insufficient to identify and locate roadway on ground, District Court of Appeal would reverse remaining part of judgment, and remand proceeding for further evidence. West's Ann. Civ.Code, § 3538.

Welch & McFarland, Riverside, for appellants.

Charles H. Carter, Corona, for respondents.

GRIFFIN, Justice.

Plaintiffs and respondents were the owners of 160 acres of land in the northwest quarter of section 34, township 6 south, range 3 west, S. B. M., since 1906. It adjoins section 27 to the north, owned by defendants and appellants and their predecessors. Since 1906, Antelope Road, a public road bordering and lying to the east of defendants' property, was reached by plaintiffs by means of a roadway from section 34 across section 27 to Antelope Road. Plaintiffs claim title to it by prescription

and maintain that it was used by them and their predecessors openly, notoriously and adversely for over 35 years until it was blocked by defendants.

In November, 1952, Antelope Road became U. S. Highway 395, and was widened to the west and was fenced for the first time on the westerly boundary of the right of way of the highway. A gate was placed in the fence across the roadway in dispute by the State Highway Department. Defendants then locked the gate which made it impossible for plaintiffs and the public to use the roadway to their property, and plowed up a great portion of the land over which it ran. Plaintiffs claim they demanded use of the easement thereafter but that defendants refused. Defendants deny generally these allegations, and allege they were the sole owners of section 27 since 1947; that theirs and the adjoining property were open fields and brush land and any use by plaintiffs or their predecessors was only by consent and neighborly accommodation and not adversely; that the roadway or pathway in dispute had been posted by a sign at the entrance on Antelope Road for over ten years, which read: "Notice—Not a Public Highway—Permission to Pass Revocable at Any Time—Property of Bouris Bros."; and this was not the most accessible or only means of egress and ingress to plaintiffs' property.

The court found generally in accordance with the allegations of the complaint, found the road was posted as indicated for over ten years, but concluded that plaintiffs were entitled to a perpetual prescriptive right and easement to the uninterrupted use of the roadway running from the lands of plaintiffs (described in the complaint) across the lands of the defendants, which right of way connected with Antelope Road. A map showing the property of the plaintiffs and defendants and Antelope Road and a general course of the claimed right of way was attached to the complaint and designated Exhibit A. The judgment decreed that "plaintiffs be adjudged the owners of a prescriptive right and easement to the uninterrupted use of the roadway running from the lands of plaintiffs (the northwest quarter of section 34) across the lands of

the defendants (Section 27) to the westerly boundary of the United States Highway 395; that plaintiffs' title to said roadway be quieted; that plaintiffs have a perpetual easement in and to said roadway and that it be appurtenant to the land of plaintiffs aforescribed", and that "defendants be enjoined and restrained from locking or in any way * * * closing any gateway or other obstruction across said roadway or in any other way obstructing or obliterating the roadway and from in any way preventing plaintiffs from using the same * *."

The principal question on appeal is the sufficiency of the evidence to support the findings. It appears that Richard and Delia Harrison homesteaded a portion of section 34 prior to 1897. Plaintiff John H. Harrison, the son, aged 58, was born on the property, and lived there until 1914. During this period the road in question was used by them to gain access to Antelope Road. He testified his father died in 1939, and it was at that time the sign was erected and that the road was changed a little in 1931 to its present position by him, with his employees, as indicated on Exhibit One in evidence; that this road was traveled by him no less than ten times a year; that after defendants locked the gate erected at the entrance to that road, he asked defendants to unlock it and he was told by them that they did not want anybody going across there because they wanted to farm the land; that he never used this road with defendants' "permission", but at all times "thought I had a right to it" and "nobody said anything about it"; that he "claimed the right to use it"; that the Goulacks previously owned section 27 and they were quite friendly with his parents. Other witnesses testified they traveled this particular road (known as the Harrison Road) since 1936, and could not tell that it had been changed in any manner and that the first time the "private road" sign was noticed by them was in 1945.

Plaintiff Minnie Harrison McComb testified she was born on the property in 1900, used the road in going to school until she was 18 years of age, and to her knowledge this means of entrance to their ranch had never been abandoned; that they never

sought permission to use the road because they believed "we owned the road * * * that's our road"; that they saw the sign there but thought nothing of it and continued to use the road and took their children to school over it because it was shorter that way.

Plaintiff Sarah P. Raxten corroborated the above-mentioned testimony and said she was friendly with defendants in 1941, when the sign was erected; that she consulted an attorney about her claimed right of way and discussed it with Mrs. Bouris, who told her they were going to close the road and that she told Mrs. Bouris she had talked with an attorney who told her it was a "legal road as long as we used it", and accordingly it was "our road", and that she said nothing more and they continued thereafter to use it.

Defendant Sam Bouris testified he and his brother Theodore bought section 27 in 1924; that they were friendly with the Harrisons and they visited back and forth over the road in question and mutually used it for farming purposes; that in 1941 he placed the sign there because he didn't want the general public going over it; that the Harrisons never asked for nor did he ever give them permission to travel over this road, but he knew they were using it over the years and made no objection because it was only a friendly and neighborly gesture.

Defendant George Bouris testified accordingly and said a lock was placed on the gate so he would know who was coming and going over the road; that plaintiffs could have come to his house and secured a key to unlock it but since this action was filed they would be unwilling to do that.

The claim of defendants is that plaintiffs failed to meet the burden of proof necessary to establish an easement by prescription over the defendants' property because there is no showing that the roadway was used openly, notoriously, with the claim of right, and hostile to the owners, continuously during the statutory period of time prior to the filing of their action; that on the contrary, the evidence shows that the use was spasmodic with no definite claim of right conveyed to the owners; that the road

was clearly posted as private property, granting to the plaintiffs permission to pass over it as a neighborly act for a period of over ten years just prior to and at the time the suit was filed; that even though a prescriptive right was obtained prior to 1941, when the sign was posted giving notice that the owner was granting only a permissive right to its use, plaintiffs lost such prescriptive right by using the roadway with full knowledge of the nature of the limitation of right, citing such authority as 17 Cal.Jur.2d p. 117, sec. 18; 17 Am.Jur. p. 980, sec. 71, and cases cited; *Dooling v. Dabel*, 82 Cal.App.2d 417, 186 P.2d 183; *Tarpey v. Veith*, 22 Cal.App. 289, 134 P. 367; *Jones v. Tierney-Sinclair*, 71 Cal.App. 2d 366, 162 P.2d 669; and *Glatts v. Henson*, 31 Cal.2d 368, 188 P.2d 745.

[1-3] The authorities are in accord that a prescriptive right to an easement in a roadway over the real property of another may be acquired only by clear evidence of adverse use, openly, notoriously, under a claim of title, and continuously asserted for the statutory period. 1 Cal. Jur. p. 522, sec. 22. The burden is ordinarily on the one who claims the prescriptive right to affirmatively prove these essential elements. It has been held that a sign, as here displayed, in itself tended strongly to negative any possible presumption that the use by the defendants and the public generally was adverse to the plaintiffs or under a communicated claim of right, and that such a sign clearly imports *permission* to use the roadway. *Jones on Easements*, Sec. 196; *Tarpey v. Veith*, supra; *Jones v. Tierney-Sinclair*, supra.

[4, 5] The question of whether the use of an easement is adverse, under a claim of title, permissive, and with the owners' consent, and whether the nature of the use is sufficient to put the owner on notice, are ordinarily questions of fact. All conflicts must be resolved in favor of the prevailing party, and the evidence viewed in the light most favorable to him. *Arnold v. City of San Diego*, 120 Cal.App.2d 353, 356, 261 P.2d 33.

[6] In the instant case the court found in favor of plaintiffs on this issue. While

the conflicting evidence of adverse use, prior to the posting of the sign, may have been open to two constructions, the trial court had the right to believe that the Harrisons used this claimed easement over the years indicated; that they never obtained permission of the Bourises and the previous owners to pass over it; that they maintained this right believing they had acquired it by such adverse use until the sign was posted by defendants. This conclusion is fortified by the actions of Mrs. Raxten when she approached Mrs. Bouris and told her she had seen her lawyer and was told plaintiffs had previously acquired such an easement and that the placing of the sign, as indicated, would not terminate or interfere with the rights previously acquired, and therefore the Harrisons adversely continued to use the easement until the gate was locked and the roadway was plowed up. The evidence and inferences deducible therefrom sufficiently support the finding. *O'Banion v. Borba*, 32 Cal.2d 145, 148, 195 P.2d 10.

[7] It does not necessarily follow that an easement by prescription, once acquired, is lost by the method of the owner of the servient estate subsequently posting a sign to the effect that the property is private property. Sec. 811, Civ.Code; *Garbarino v. Noce*, 181 Cal. 125, 130, 183 P. 532, 6 A.L.R. 1433. The finding and judgment against defendants in this respect are supported by the evidence.

The next complaint presented is more serious. Plaintiffs' complaint merely alleges that plaintiffs owned part of section 34 and defendants owned section 27; that plaintiffs and their predecessors used a "right of way from their property * * * over the property of defendants, which right of way connected with Antelope Road. A map of this right of way, showing the property of the plaintiffs and defendants and Antelope Road, is attached hereto and designated Exhibit 'A'". Attached to the complaint is a portion of an unidentified map or drawing with broken lines meandering across section 27 from the northwest corner of section 24 to the Antelope Road. It does not indicate the true course, width or length of the claimed

right of way or fix any given point as its beginning or terminus.

Defendants demurred to the complaint on the ground that the description was indefinite and that defendants were entitled to be informed of the definite course, the width, and other limitations of the claimed right of way over their property. The demurrer was overruled by another judge. Defendants complain of this ruling and there is some merit to the complaint. *Green v. Palmer*, 15 Cal. 411; Civ.Code, § 3538; *Matthiessen v. Grand*, 92 Cal. App. 504, 268 P. 675; *Leverone v. Weakley*, 155 Cal. 395, 101 P. 304; *Lambert v. Haskell*, 80 Cal. 611, 22 P. 327; *Mayor, etc., of City of Los Angeles v. Signoret*, 50 Cal. 298.

Without holding that the allegations and the description of the claimed easement in the complaint would be sufficient, and that evidence of a proper description would be allowable at the trial, we will consider the evidence produced. There was some incidental reference to a dirt road across section 27 from plaintiffs' property, terminating at a point on the right of way several feet north of the gate, as indicated on the map, and that over a portion of this distance were certain posts, without wire, marked on the map in evidence (Exhibit IX) which dealt mainly with the freeway improvements. A map (Exhibit XV) was produced by the Assistant Road Commissioner of that county, who testified he had no notes of any survey of the broken lines drawn across section 27 and 34 indicated thereon; that the map was drawn about 1948, but changes were made from time to time to note change of conditions, and that these broken lines did not indicate county roads and apparently were not intended to indicate an accurate description of the course of any easement, width of it, or the place where it actually began or terminated. Photographs in evidence show certain meanderings of the roadway through the canyons and brush over section 27, where a portion of the roadway still remained exposed after the other portions had been plowed up. It is apparent that the broken lines on the Exhibit (XV) were not in-

tended to represent the true course of the easement on the ground at the time the map was made.

The State Right of Way Agent testified that Exhibit XIII was only a map print of State Highway 395 at that point and that the Harrison Road, as he first saw it, was located approximately to scale as indicated on the exhibit.

[8] The findings of the trial court and judgment based thereon as to the course and description of the claimed easement involved, simply revert back to the complaint, finding as true the allegations contained therein, and no further description of the easement is indicated. The judgment, as heretofore set forth, merely follows the language and allegations of the complaint. It is quite apparent from the complaint, the findings, and the judgment that it could not be determined with such certainty as to enable the party upon whose property the easement is imposed to know exactly what portion of his property is so claimed, the extent, and description of it so the easement could not be shifted, and whether such right is limited to ingress and egress of the parties served thereby for road purposes only, or whether it was open to the public in general. Such a finding and judgment appear to be necessary under the authorities. *Weideman v. Staheli*, 88 Cal.App.2d 613, 617, 199 P.2d 351.

[9] It is a fundamental rule that easements acquired by adverse user are limited to the uses made during the prescriptive period, and thereafter no different or greater use can be made of them except by grant or by further adverse user for the prescriptive period. *Beyl v. Yasukochi*, 135 Cal. App.2d 638, 287 P.2d 863.

In *Leverone v. Weakley*, supra, the court held that a judgment reciting in much more detail the description of the easement, was insufficient, and said, in reference to the complaint, 155 Cal. at page 399, 101 P. at page 305:

"There is nothing in this to enable one to definitely locate on the ground the particular strip claimed to consti-

tute the alleged road or highway. It entirely fails to locate the point of commencement, other than to place it on the southerly line of the S.W.¼ of the S.E.¼ of section 20, a line one-quarter of a mile long. There is nothing to indicate that the way is so marked on the ground that the description given will identify it. If it could be held that the description was of a road actually marked out and constructed on the lands of defendant's testator, it might be definite enough; but such is not the effect of the language used."

In reference to the judgment it is said:

"This strip of land or road should be definitely described at least so that with the description in hand it could be readily located and could not be shifted at the will of the public. Its northern initial point should be fixed, and the course of the road from its initial point over defendant's land made definite, and the point established at which it intersects the so-called Hildreth road. The width of the road should be made clear. It is not sufficiently definite to describe it as "sufficient in width for the convenient travel and use by the public with teams, wagons and agricultural implements." "

The evidence in the instant case does show some departure from the original course of the claimed easement. It likewise shows that on the more level land the roadway has been plowed up and it is no longer discernible, so plaintiffs could not rely on the claim that presently or at the time of trial, the description given was of a road actually discernible and constructed on the lands of the defendant and so marked out on the grounds that the general description used in the judgment would identify it.

[10] The portion of the judgment establishing an easement by prescription is affirmed. The remaining portion of the judgment is reversed with instructions to the trial court to take further evidence, if necessary, and to sign adequate findings and judgment, which will make it possible to

identify and locate this easement on this ground.

Each party to pay own costs on appeal.

BARNARD, P. J., and MUSSELL, J.,
concur,



139 Cal.App.2d 114

John LAKE and Asa Lake, husband and wife, Plaintiffs and Appellants,

v.

**Melchar G. FERRER et al., Defendants,
Frances P. Ferrer, Respondent.**

Clv. 21128.

District Court of Appeal, Second District,
Division 1, California.

Feb. 8, 1956.

Rehearing Denied Feb. 28, 1956.

Hearing Denied March 28, 1956.

Action for wrongful death of plaintiffs' minor son drowned in defendants' swimming pool on their lot adjoining plaintiffs' lot. From a judgment of the Superior Court of Los Angeles County, Orlando H. Rhodes, J., dismissing the action after sustaining a general demurrer to the complaint without leave to amend, plaintiffs appealed. The District Court of Appeal, Doran, J., held that trial court's ruling on demurrer was supported by law and facts alleged.

Judgment affirmed.

1. Negligence ⇨23(1), 39

The attractive nuisance doctrine is exceptionally harsh rule of liability and should not be extended.

2. Pleading ⇨205(2)

In action for death of plaintiffs' two and one-half year old son, drowned in swimming pool on defendants' lot adjoining plaintiffs' lot, trial court's ruling sustaining general demurrer to complaint asserting defendants' liability under attractive nuisance doctrine was supported by law and facts alleged.

Richard J. O'Connor, Pacific Palisades, for appellants.

Moss, Lyon & Dunn, Charles B. Smith and Henry F. Walker, Los Angeles, for respondent.

DORAN, Justice.

As recited in appellants' brief, "The case at bar is an action for wrongful death, brought by the parents of a 2½-year old minor, who was drowned in defendants' swimming pool, which is situated on their residential lot adjoining the residence of plaintiffs, who are the appellants on this appeal." A general demurrer was sustained without leave to amend. Judgment of dismissal followed and the within appeal is from the judgment.

The parties to the action reside on adjoining lots about one-half acre in size. As recited in appellants' brief,

"Appellants and respondent reside in a thickly populated canyon in the City of Los Angeles which is known as the Uplifter's Ranch. The back yard of appellants' lot consists of a hillside which slopes sharply upward to the east. Respondent's lot is also located on this hillside and the east boundary line of appellants' lot is contiguous with the west or rear boundary line of respondent's. Along this boundary line there grows a tall hedge.

"On the northern half of respondent's lot there is situated an artificial swimming pool, approximately 20 feet in length, 10 feet in width and 6 feet in depth. A lustrous, metallic ladder which rises approximately 3 feet above the level of the pool, is located at one corner thereof to facilitate exit therefrom. The pool, which is located approximately 30 feet from appellants' western boundary line, is so situated that neither it nor the metallic ladder can be seen from any reasonably accessible position on appellants' lot, nor can it be seen from the public street which surrounds respondent's lot.

* * * * *

"It is alleged that on the morning of the 29th day of March, 1954, the decedent, two and one-half years of age, was permitted by his mother, appellant, Asa Lake,

to play in the back yard with a four-year-old neighbor's child. After playing there for some time these children found themselves at the rear of the appellants' lot at a point some 30 feet distant from the respondent's pool. At this position they were able to see the upper portion of the aforesaid ladder in the pool, and, attracted thereby, they went on respondent's lot and up to the pool. In so doing, the children had no reason to believe that they were trespassing, especially by reason of the presence of a dirt pathway situated along the western boundary line of respondent's lot and to the immediate east of the hedge separating respondent's and appellants' lots. This pathway closely resembles a network of paths which run throughout appellants' yard area, both front, side and rear.

"Upon reaching the pool area, the decedent either climbed into the pool, which was then filled with water, by means of the ladder, or fell therein while the two children were playing about it. At about 11:00 A.M. the infant's dead, fully clothed body was removed from the pool in which he had been floating for approximately ten minutes.

"The complaint further alleges that the decedent, by reason of his extremely tender age, neither knew, nor had reason to know of the danger of climbing or falling into a swimming pool such as that maintained by respondent.

"It is further alleged that the appellants neither know of, nor had any reasonable means of discovering, the existence of the pool. This ignorance is alleged to stem solely from the position of the pool on respondent's lot, whereby it was totally concealed from view, either from any reasonably accessible position on appellants' lot or from the public street near by, due to its elevation and the surrounding foliage on respondent's lot.

"Finally, it is alleged that at the time of the drowning and for four months prior thereto, respondent knew, or had reason to know of the presence next door of the decedent, of the unlikelihood that such a child would have reason to realize the danger of falling into the pool, of the ignorance of the appellants as to the existence of the

danger, and of the likelihood that decedent would be attracted to and fall into the said pool. In spite of this knowledge, the respondent took no steps whatever, not so much as a neighborly warning, to prevent, or attempt to prevent the tragedy which is the basis of the case at bar."

It is contended and argued by appellant that, "The trial court erred in sustaining respondent's demurrer to appellant's first cause of action in that a pool of water can be an attractive nuisance.

"A. The attractive nuisance doctrine constitutes a salutary exception to the rule that a landowner is under no duty to keep his premises safe for trespassers."

Appellant cites and quotes from many cases, including *Peters v. Bowman*, 115 Cal. 345, 47 P. 113, 598, and argues that, "It seems abundantly clear from these quotations what the court considered to be the essence of the earlier drowning cases: that the children involved were chargeable with knowledge of the danger of water. Of capital importance for purposes of this Brief is the recognition by the court of the vital impact of the *age* of the child involved in determining this imputation: 'To take respondent's striking presentation of the matter: *If a child of the age of appellant's son*, while trespassing on private property, is attracted to an artificial pond and falls in and drowns, there is no liability; * *' (Emphasis added.)"

[1] Respondent, on the other hand, argues that, "In the absence of sufficient to invoke the attractive nuisance doctrine, a landowner owes no different or greater duty to an infant trespasser than to an adult trespasser." And, that, "No matter how young a child may be, its age will not cast its care upon a stranger nor give rise to a duty where none otherwise would exist. The principle is well stated as follows in *Wilson v. City of Long Beach*, 71 Cal.App.2d 235, 241 [162 P.2d 658, 163 P.2d 501] (hearing denied by the Supreme Court), in language peculiarly applicable here in view of some of appellants' statements and arguments: 'The following from 38 American Jurisprudence 779 is applicable: 'The accepted view is that the tender

age of a child, rendering it incapable of looking out for its own safety, does not raise a duty where none otherwise exists. * * * It is said that the responsibility for avoiding injury to a trespassing child from defective or dangerous premises lies with the parent or legal custodian of the child rather than with the proprietor of the premises." In 19 California Jurisprudence 624 a similar statement occurs: "In the absence of circumstances which bring a case under the attractive nuisance doctrine, it is said that an owner of land owes no other duty to a child who is trespassing * * * than he owes to an adult trespasser." * * * It is also argued that, "The complaint fails to state facts sufficient to invoke application of the attractive nuisance doctrine." It is pointed out that, "Our courts hold the attractive nuisance doctrine is an exceptionally harsh rule of liability and is not to be extended. As expressed in *Whalen v. Streshley*, 205 Cal. 78, 81 [269 P. 928, 929, 60 A.L.R. 445]: 'Unless the case falls within the doctrine of the turntable cases—a doctrine which this court and others have refused to extend—the plaintiff may not recover, and we are of the opinion that there is no analogy between those cases and the instant one. In the case of *Peters v. Bowman*, 115 Cal. 345, 47 P. 113, 598, this court refused to extend the rule of the turntable cases to a pond of water, and characterized that rule as an exceptionally harsh rule of liability.'

"That the courts, recognizing the doctrine, refuse to extend it is also pointed out in 65 C.J.S., *Negligence*, p. 479, § 29(14) where it is said: 'Even in jurisdictions where the attractive nuisance doctrine has been accepted, the tendency is to limit rather than to extend it, and the doctrine is said to be one which should be applied very cautiously and only when the facts come strictly and fully within the rule.'

"The language hereinabove quoted from the *Whalen* case (205 Cal. 78, 81, 269 P. 928)—to the effect that there can be no recovery unless the case falls within the doctrine, a doctrine which the courts have refused to extend and which was characterized as an exceptionally harsh rule of liability—was quoted and followed in *Camp v.*

Peel, 33 Cal.App.2d 612, 613-614, 92 P.2d 428 (hearing denied by the Supreme Court). In addition, it was held (33 Cal.App.2d at page 613, 92 P.2d at page 429) in reversing plaintiffs' judgment: '[T]he judgment can be upheld only by the application of the attractive nuisance doctrine. That doctrine, although frequently exposed to the likelihood of extension through the influence of sympathy, is definitely limited.'"

[2] From a review of the record it appears obvious that the trial court's ruling on the demurrer is supported by the law and the facts.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.



139 Cal.App.2d 235

**The PEOPLE of the State of California,
Plaintiff and Respondent,**

v.

**Franklin J. CLINGENPEEL and Bonnie
Ann Clingenpeel, Defendants and
Appellants.**

Cr. 2605.

**District Court of Appeal, Third District,
California.**

Feb. 15, 1956.

Defendants were convicted of burglary. The Superior Court, Butte County, J. F. Good, J., entered judgment accordingly and defendants appealed. The District Court of Appeal, Schottky, J., held that the evidence sustained conviction.

Affirmed.

1. Burglary §41(1)

Evidence on issue of whether defendants had been principals or accessories supported burglary convictions.

2. Criminal Law $\S$ 853(2), 1174(1)

In burglary prosecutions, wherein jury returned for further instructions as to aiding and abetting, instructions thereupon given correctly defined burglary and what constituted aiding and abetting, and although they were technically incorrect in stating that distinction between accessory before fact and after fact had been abolished, they were not prejudicial under claimed infirmity of depriving defendants of defense that they were only guilty as accessories. West's Ann.Pen.Code, $\S$ 32.

Paul S. Garstang, Chico, for appellants.

Edmund G. Brown, Atty. Gen., by G. A. Strader, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice.

Appellants husband and wife were accused by information of the crime of burglary, and were found guilty by a jury. Their motions for a new trial were denied and judgment was pronounced against them, Franklin J. Clingenpeel being sentenced to imprisonment in the State Prison and Bonnie Ann Clingenpeel being granted probation. Both have appealed from the order denying their motion for a new trial, and Franklin J. Clingenpeel has appealed from the judgment against him and Bonnie Ann Clingenpeel has appealed from the order granting probation.

The record shows that on June 27, 1954, the residence of Mr. and Mrs. Van Gooden in Pentz, Butte County, California, was broken into and a number of articles taken from the house. These were a 30-30 rifle, approximately \$60, consisting mostly of 50-cent pieces from a piggy-bank, and four pairs of argyle socks. There was also a quantity of gasoline taken from a gasoline tank located outside the house.

At the time that the burglary and theft occurred, Mr. and Mrs. Van Gooden were away and one Tony Kasch was in charge of the premises as caretaker. At approximately 4:00 p. m. on the day of June 27, Mr. Kasch observed several people leave the premises in an old automobile. He first saw the automobile when he was some 300 or 400 yards away. Upon observing the

car, he started walking toward the house. He then heard somebody in the automobile shout and sound the horn. Thereafter he saw two men running from the direction of the front of the house toward the gate in the fence surrounding the house proper. Mr. Kasch temporarily lost sight of these two men when the course of their flight was obscured by other buildings. He then saw the car driving away.

Mr. Kasch then examined the house and noted that the back screen door leading from the outside to a screen porch had been forced open and that there was also a large torn area in the screen of the screen porch. The back door leading from the screen porch to the inside of the house had also been forced open. Mr. and Mrs. Van Gooden also noted the same things upon returning to the house at about 6:30 p. m. of the same day.

The front door of the house which was secured by a spring lock which could be opened from the inside was unlocked and opened.

Later that evening appellants Clingenpeel and a third companion stopped at a hotel and dining room operated by Mrs. Gwinn. Mr. Clingenpeel made some purchases which he paid for with a number of 50-cent pieces. On the early morning of June 28 appellants Clingenpeel stopped at a motel in Chester, California. On this occasion they were also accompanied by a third person. They rented a room for the night which Mr. Clingenpeel paid for in advance with 15 50-cent pieces.

On the morning of June 28 at approximately 10:00 o'clock, appellants Clingenpeel and their male companion stopped at a service station in Chester and purchased gasoline. Mr. Clingenpeel paid for approximately \$5.00 worth of gasoline in 50-cent pieces.

The gun which was taken from the Van Gooden residence was discovered by a Mr. Harry Benninger at Butte Meadows. According to the admission of Mr. Clingenpeel, the gun was thrown out of his automobile.

Following their arrest both Mr. and Mrs. Clingenpeel signed a statement admitting that they, in company with one Ray Dill-

man, stopped at the Van Gooden farm on the afternoon of June 27, 1954, and upon noticing that there was no one at home, decided to steal gasoline from a tank in the yard. After taking the gasoline, Mr. Dillman expressed his intention to break into the house for the purpose of committing theft. According to the testimony of appellant Franklin J. Clingenpeel, he attempted to dissuade Mr. Dillman from entering the house. However, according to their own admissions, the appellants did not leave but acted as lookouts, and when Mrs. Clingenpeel saw Mr. Kasch coming toward the house she shouted to the men and honked the horn. Mr. Clingenpeel and Mr. Dillman then ran from the direction of the house, got into the car and, with Mr. Clingenpeel at the wheel, drove off.

The appellants first contend that the evidence viewed most favorably for the People fails to establish that the appellants were principals in the commission of the crime of burglary and that such evidence at the most shows that they were guilty of the crime of being accessories after the fact to the crime of burglary and the crime of petty theft. Appellants argue that their signed admissions and testimony established that they did not participate in the commission of the burglary but attempted to dissuade Ray Dillman from entering the house and at the most they aided Dillman subsequent to the commission of the offense and were therefore accessories after the fact. Respondent argues that in this case the jury was entitled to disbelieve the testimony of Mr. Clingenpeel that he attempted to dissuade Dillman from entering the house. Respondent argues also that the contrary conclusion is adequately supported by the circumstantial evidence, and points out that there was testimony that entry into the house had been made by two separate means—a hole had been made in the screen of the back porch and the screen door of the back porch had also been forced open, the logical conclusion being that one person had entered by the hole in the screen while another had forced open the door. There is evidence that Mr. Clingenpeel was seen by Mr. Kasch running from the direction of the front porch toward the gate

in the fence surrounding the house. Since the gasoline tank was located outside of this enclosure, there was no necessity for him to be inside the fence at the front door of the house unless he was aiding and abetting in the commission of the burglary. Mrs. Clingenpeel remained in the car and when she observed Mr. Kasch she shouted a warning to the two men and honked the horn. From this it can be inferred that she was willingly and knowingly aiding and abetting in the commission of the burglary as a lookout. Also, there are the circumstances that appellant did not leave the premises when the entry was made, but remained and that they later shared in the fruits. It was Mr. Clingenpeel, not Mr. Dillman, who paid the various bills with 50-cent pieces.

[1] From the foregoing it is clear that there was ample evidence to support the judgment of conviction. While appellants upon this appeal urge the insufficiency of the evidence, the record shows that upon the hearing of appellants' motion for a new trial appellants' counsel stated to the court that the evidence was sufficient to support the conviction.

The principal contention of appellants is that "The court erred in instructing the jury that the crime of accessory after the fact had been abolished."

Appellants contend that such instruction was prejudicially erroneous and permitted the jury to convict them as principals in the crime of burglary upon evidence which showed merely that they were accessories after the fact to such crime.

After the jury retired to deliberate upon their verdict they returned to the courtroom and the record shows the following occurred:

"The Court: Do you have a question?"

"The Foreman: Yes, we request that we be informed of the degree of burglary of which the people are charged or the exact reading of the wording of burglary or how it is charged. We are trying to define the difference between—if they stole gasoline is that burglary of one degree or did they enter the house, or were around the house, is that a certain type of burglary. In

other words, we want to know what the charge is.

"The Court: They are charged with first degree burglary and I have given you the definition of first degree burglary. The question of entering the house of course, is of the essence of a first degree burglary, however, the instructions are—it may be that you are more interested in the instruction as to the aiding and abetting under the California Law. To use the time worn example of the classical bank robbery where someone drives up to a bank, waits in the car, the other person goes in, holds it up, comes out with the swag, they are both guilty of breaking and entering you see. Under the California law the information charges the crime, it is not necessary to charge the business of principal and accessory and that was why the instructions as to maintaining a lookout, as to accessory so forth and so on were in fact given to you. Does that clarify the question? So that you are to view the evidence from the standpoint of all of the instructions. As I say, the charge is first degree burglary. I can read those instructions to you again if you think it is necessary.

"The Foreman: The question came up and it was brought out, that was the subject that was raised, and why the charge was not clear as far as we were concerned.

"The Court: The Penal Code is very definite on the matter of charging the crime in the circumstances. There used to be a distinction between accessory before the fact and after the fact and so forth and so on and all of that has been abolished and that may be something that some of you may have been remembering. The question for you to determine of course is, whether or not there was aiding and abetting within the instructions as given you. Now, if you need any of those further instructions, I will be happy to go over them again.

"The Foreman: No, could we have the exhibits and statements?"

Appellants argue that their only defense, which was that they were accessories after the fact and not principals was destroyed by the above-quoted statement of the court

that "there used to be a distinction between accessory before the fact and after the fact and so forth and so on and all of that has been abolished and that may be something that some of you may have been remembering."

[2] It is apparent from a reading of the entire proceeding when the jury returned to the courtroom that the jurors desired some further information as to the nature of the charge and about aiding and abetting. The court then gave them some further instructions which correctly stated what constituted burglary and aiding and abetting. The court then made the statement hereinbefore complained of as to the distinction between accessory before the fact and after the fact being abolished. The court then concluded by stating to the jury: "The question for you to determine, of course, is whether or not there was aiding and abetting within the instructions as given you. Now, if you need any of those further instructions, I will be happy to go over them again," to which the foreman answered in the negative.

The record shows that the jury had previously been fully and correctly instructed as to the nature of the charge, the degrees of burglary as to what constituted aiding and abetting, and that the court also gave the following instruction offered by appellants:

"Cal.Penal Code Sec. 32 provides, every person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony. It follows that a person charged as a principal cannot be convicted on the mere proof that he was an accessory. In this particular case both defendants have been charged as principals."

While the statement of the court that the distinction between accessory before the fact and after the fact has been abol-

ished was technically incorrect, we do not believe that, under the circumstances of the instant case, appellants were prejudiced thereby because the court re-emphasized the instructions previously given, and in view of the entire record we are satisfied that the verdict of the jury was not affected by what was undoubtedly an inadvertent statement by the court.

From a careful study of the entire record we are convinced that the appellants received a fair trial, that the evidence against them was such that no verdict other than guilty could reasonably be expected, and that no error was committed which resulted in a miscarriage of justice.

The judgment and the orders are affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



139 Cal.App.2d 191

Joseph L. PACE, Plaintiff and Appellant,
v.

The MAGNAVOX COMPANY, a Corporation,
Joe E. Levitt and Joe E. Levitt, doing business as Coast Radio Company, Defendants and Respondents.

Civ. 16634.

District Court of Appeal, First District,
Division 2, California.

Feb. 14, 1956.

Action by television purchaser against manufacturer and dealer to obtain rescission of contract for sale of combination radio, phonograph, and television set alleged to have been defective and to recover for cost of repairs made to set by another. The Superior Court, Santa Clara County, Byrl R. Salsman, J., entered judgment for defendants, and purchaser appealed. The District Court of Appeal, Devine, J., pro tem., held that evidence was sufficient to sustain the trial court's finding that there

had not been a prompt rescission and that the repairs had not been expended because of any violation of warranty.

Judgment affirmed.

1. Appeal and Error ⇐183

Where in action by purchaser against manufacturer and dealer to obtain rescission of contract for sale of combination radio, phonograph, and television set alleged to have been defective and to recover for cost of repairs made to set by another, defendants who did not make demand for an election of remedies nor make any reference in the trial court to inconsistency of the remedies, would be precluded from raising such point on appeal.

2. Trial ⇐404(1)

Findings are to be read together and reconciled with a view to supporting the judgment.

3. Sales ⇐130(3), 441(3)

In action by purchaser against manufacturer and dealer to obtain rescission of contract for sale of combination radio, phonograph, and television set alleged to have been defective and to recover for costs of repairs made to set by another, evidence was sufficient to sustain the trial court's finding that there had not been a prompt rescission and that the repairs had not been expended because of any violation of warranty.

Wade H. Hover, Howard Lund, San Jose, for appellant.

Miller, Morton & Wright, Charles V. Caillat, San Jose, for respondents.

DEVINE, Justice pro tem.

[1] Plaintiff filed a complaint against a manufacturer and a dealer for rescission of a contract of sale of a combination radio, phonograph and television set which he alleged to be defective. He also sought damages for repairs to the set, and although respondents attempt to make the point on this appeal that the remedies are inconsistent, they made no demand for election of remedies nor did they make any reference to the

inconsistency in the trial court, and are precluded from raising the point now.

Much energy has been expended by both sides in discussing the nature of the warranty given to plaintiff. Plaintiff, who appeals the judgment against him, contends that the finding of the court that the only warranty given was a certain guaranty against defective parts for 90 days, is erroneous, because, they say, there is another warranty of fitness both by the operation of law and by an oral statement of respondent dealer's salesman.

We do not deem it necessary to discuss the law relating to the type of warranty given, because the trial judge expressly found untrue the allegation in plaintiff's complaint that the machine did not function properly in that it was extremely noisy and of no use for the purpose for which it was purchased. To the contrary, the court specifically found that the machine was of merchantable quality and was fit for the uses and purposes for which it was sold and purchased.

The fact, then, that the court also found that the warranty was a more limited one than plaintiff contends for, does not vitiate the other finding of fitness, which, if supported by the evidence, would satisfy the very warranty claimed by appellant.

[2] Findings are to be read together and reconciled, with a view to supporting the judgment, *Pensa v. Noffsinger*, 105 Cal.App. 2d 99, 101, 232 P.2d 521, and when that is done, the effect of the findings is that the only warranty was the written one, but that even considering a general warranty of fitness, the court found such warranty to have been fulfilled.

Taking the evidence that is favorable to respondents as true, there having been direct conflict in the testimony of the witnesses, we find that: (1) the hum of the fan in the set, which plaintiff found to be annoying, was, in this 12 inch set bought in the early days of television, a normal sound which disappeared as the volume was slightly increased, and (2) although several condensers failed, they were quickly replaced by respondents, without charge to appellant.

[3] The purchaser made no further remonstrance until the filing of the complaint more than a year later. It is true that at one time, plaintiff offered to give the set back in return for refund of his money, but according to the testimony of defendant Levitt, after a third chassis which had been thoroughly tested had been placed in the machine, no more complaints were forthcoming. The silence and inaction of the buyer not only justified the seller in assuming that there was no further complaint, but also justified the court in its finding that there was not a prompt rescission.

The \$92.14 which plaintiff paid another serviceman for some repair to the set almost a year and a half after the sale was found in substance not to have been expended because of any violation of warranty.

This is a classic case of an appeal which must fail because the trial court, weighing conflicting testimony, has found the essential facts against the appellant.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.



139 Cal.App.2d 65

Harrison D. LEEPER and Gaynell Leeper,
Plaintiffs and Respondents.

v.

Henry NELSON, Defendant and Appellant.

Civ. 21248.

District Court of Appeal, Second District,
Division 2, California.

Feb. 6, 1956.

Action for damages arising out of intersectional collision between west-bound motorist who had green traffic light in his favor and who was in act of making left turn and north-bound motorist who ran red traffic signal, the go arm of which was

allegedly signalling north-bound motorist to proceed. The Superior Court, Los Angeles County, Arthur Crum, J., entered judgment for both plaintiffs and defendant appealed. The District Court of Appeal, Ashburn, J., held that even assuming that north-bound motorist did see go arm on traffic signal beckoning to him to proceed the evidence did not show unavoidable accident as evidence was sufficient to at least raise inference of negligence on north-bound motorist's part.

Judgment affirmed.

1. Appeal and Error ⇨931(3), 989

Where appellant challenges sufficiency of evidence, appellate court's function begins and ends with determination as to whether or not there is any substantial evidence which will support findings of trier of fact and evidence must be viewed most favorably to the judge's implied findings.

2. Automobiles ⇨150, 171(9)

A person to meet test of ordinary care, must maintain reasonable lookout for traffic lawfully on highway and when entering signal controlled intersections on the "go" signal the entrant should look to see if cross traffic which has lawfully entered intersection has cleared it.

3. Automobiles ⇨150, 168(1)

Operator of automobile is bound to anticipate that he may meet persons or vehicles at any point of street, and he must, in order to avoid charge of negligence, keep proper lookout for them and keep his machine under such control as will enable him to avoid collision with another automobile driven with care and caution as reasonably prudent person would do under similar conditions.

4. Automobiles ⇨150

Drivers of vehicles on public highway are required by law to keep vigilant lookout ahead so as to avoid, if reasonably possible, collision with any other vehicle or person lawfully upon such highway and failure to keep such lookout, or failure to see that which may be readily seen, if driver is looking, would constitute negligence as matter of law.

5. Automobiles ⇨244(11, 36)

In action for damages arising out of intersectional collision between west-bound motorist, who had green traffic light in his favor and who was in act of making left turn and north-bound motorist who ran traffic signal, but who alleged signal was stuck and go arm of that signal was beckoning him to proceed, evidence was sufficient to at least raise an inference of negligence on part of north-bound driver even assuming go arm did go up beckoning him to proceed and thus north-bound motorist did not show unavoidable accident. Vehicle Code, § 550(a).

6. Husband and Wife ⇨262(1)

In action for damages for personal injuries to wife and also for damages to husband's automobile, wherein husband testified automobile belonged to him and record disclosed nothing else upon subject, presumption arose that automobile was community property.

7. Husband and Wife ⇨260

Damages for personal injuries to wife are community property.

8. Husband and Wife ⇨270(5, 10)

Where complaint by husband and wife set forth separate causes of action, one on behalf of wife to recover for personal injuries and one on behalf of husband to recover for damage to automobile and also contained separate prayers, both husband and wife were owners of each cause of action and joint judgment was proper.

9. Appeal and Error ⇨223, 293

Where motion for new trial was not made or objection to form of judgment was not registered in any manner in trial court such point could not be raised properly for first time on appeal.

10. Judgment ⇨245

Any irregularity in joint judgment awarded to husband and wife was of no concern to defendant because it did not injuriously affect his rights and defendant could exact joint satisfaction from husband and wife when paying judgment and thus end his obligation.

Walter L. Gordon, Jr., Los Angeles, for appellant.

W. P. Smith, Los Angeles, for respondents.

ASHBURN, Justice.

Defendant Nelson appeals from a judgment for \$1,060.97 rendered in favor of both plaintiffs, Harrison D. Leeper and Gaynell Leeper, after a non-jury trial. Findings were waived.

[1] Appellant challenges the sufficiency of the evidence. In such case, "The appellate court's function begins and ends with a determination as to whether or not there is any substantial evidence which will support the findings of the trier of fact." *In re Guardianship of Kentera*, 41 Cal.2d 639, 645, 262 P.2d 317, 320. The evidence must be viewed most favorably to the judge's implied findings, *In re Estate of Reed*, 132 Cal.App.2d 732, 734, 282 P.2d 935; *Murphy v. Ablow*, 123 Cal.App.2d 853, 858, 268 P.2d 80.

So construing the evidence, it appears that the plaintiffs, husband and wife, were driving westerly on Florence Avenue in the city of Los Angeles, on November 18, 1951, and nearing its intersection with Avalon Boulevard (a north and south street); immediately before the accident in question plaintiff husband was driving at about 25 miles an hour; when they were a short distance from the intersection the automatic traffic signal turned green for them; Mr. Leeper put out his hand giving a left turn signal, entered the intersection on the green light, and when within the intersection began the left turn, having reduced his speed to about five miles an hour; to his left he and his wife saw defendant's car, northbound, entering the cross-walk on the south side of Florence Avenue at a speed of about 25 miles an hour; defendant came straight ahead with no reduction in speed and struck plaintiffs' car at the left front door, knocking it into another westbound car which was north of plaintiffs in the adjoining lane. Defendant did not see plaintiffs' car at any time before he hit it, although it was then at the center of the intersection. Defendant said it appeared

"out of nowhere" and too late for him to do anything but hit it.

Defendant's attempted justification for his conduct is that the green light of the automatic signal on the southeast corner was stuck and "said go" and that it stayed green and he followed this direction and the accident was inevitable. There were automatic signals on all four corners. He did not look at the one on the northwest corner, which was working properly and which also controlled north and south traffic. Though defendant testified that the light signal was stuck and misled him, he told the police at the scene of the accident that he did not notice the light but saw the "go" arm go up for him. As a matter of fact, the light in the signal on that corner was working normally and the "go" arm did not go up for him; it was stuck with the "go" signal displayed. At the trial defendant testified that both lights and arm appeared to be out of order. It is a fair inference that he was not misled by the signal because he was not watching. But if it be assumed that he did see the "go" arm beckoning to him he does not show an unavoidable accident for that term presupposes no negligence on the part of any participant. *Jaeger v. Chapman*, 95 Cal. App.2d 520, 522, 213 P.2d 404.

[2-5] Defendant's failure to see plaintiff's automobile, lawfully within the intersection and making a left turn when he entered the intersection, was negligence. Plaintiff had the right of way. Vehicle Code, § 550(a). Moreover, one who has the signal with him is required to exercise ordinary care. He must keep a lookout for cars ahead and see those things which a reasonably prudent person would see. "It should be clear that for a person to meet the test of ordinary care, he must maintain a *reasonable* lookout for traffic *lawfully* on the highway. * * * When entering signal controlled intersections on the 'go' signal the entrant should look to see if cross traffic which has lawfully entered the intersection has cleared it." *Freeman v. Churchill*, 30 Cal.2d 453, 459, 183 P.2d 4, 7. *Huetter v. Andrews*, 91 Cal.App.2d 142, 146, 204 P.2d 655, 658: "The operator of an

automobile is bound 'to anticipate that he may meet persons or vehicles at any point of the street, and he must in order to avoid a charge of negligence, keep a proper lookout for them and keep his machine under such control as will enable him to avoid a collision with another automobile driven with care and caution as a reasonably prudent person would do under similar conditions' and, 'All drivers of vehicles on a public highway are required by law to keep a vigilant lookout ahead so as to avoid, if reasonably possible, a collision with any other vehicle or person lawfully upon such highway. Failure to keep such lookout, or failure to see that which may be readily seen, if the driver is looking would constitute negligence as a matter of law.' *Berlin v. Violet*, 129 Cal.App. 337, 340, 18 P.2d 737, 738." Defendant's view was unobstructed and he should have seen plaintiff's car turning left in the middle of the intersection. The least that can be said is that an inference of negligence on his part arose.

Mrs. Leeper was injured and the automobile was damaged to the extent of \$367.97. Findings having been waived, the judge signed a judgment awarding \$1,060.97 to both plaintiffs, husband and wife. Their complaint set forth separate causes of action, one on behalf of the wife to recover for her personal injuries, and one of the husband to recover for damage to the automobile; it also contained separate prayers; appellant argues that in this state of the pleading it was error to render a joint judgment.

[6-8] The husband testified that the automobile belonged to him and the record discloses nothing else upon the subject. A presumption arose that the car was community property, *Tibbetts v. Fore*, 70 Cal. 242, 244, 11 P. 648; *Gaines v. California Trust Co.*, 48 Cal.App.2d 709, 714, 121 P.2d 28; *In re Estate of Caswell*, 105 Cal.App. 475, 483, 288 P. 102; *Lynam v. Vorwerk*, 13 Cal.App. 507, 509, 110 P. 355. Of course, damages for personal injuries to the wife are community property (10 Cal.Jur.2d, § 31, p. 698). Both plaintiffs were owners of each cause of action.

[9, 10] It does not appear that any motion for new trial was made or that objection to the form of the judgment was registered in any manner in the trial court; the point cannot be raised properly for the first time on appeal. Cf. 4 C.J.S., Appeal and Error, § 314d, p. 645; 3 Am.Jur., § 406, p. 134. Regardless of the effect of failure to seasonably object, it has been repeatedly held that any irregularity in a judgment, such as the one claimed at bar, is of no concern to the defendant because it does not injuriously affect his rights. *Fairchild v. Bay Point, etc., Ry. Co.*, 22 Cal.App. 328, 330, 134 P. 338; *De Arman v. Connelly*, 134 Cal.App. 173, 181, 25 P.2d 24; *Cavagnaro v. Delmas*, 29 Cal.App.2d 352, 354, 355, 84 P.2d 274; *Thomas v. Smith*, 2 Cal. App.2d 701, 702, 38 P.2d 827; *Bock v. Hamilton Square Baptist Church*, 219 Cal. 284, 289, 26 P.2d 7. Considerations of convenience to defendant, such as those urged at bar, are disposed of in *Fairchild v. Bay Point, etc., Ry. Co.*, supra, 22 Cal.App. at page 330, 134 P. at page 339: "The defendant does not question the amount of the award, and, as the findings and judgment are satisfactory to the plaintiffs, no substantial right of the defendant is impaired, and hence he cannot be heard to complain." In *Bock v. Hamilton Square Baptist Church*, supra, 219 Cal. at page 289, 26 P.2d at page 9, it is said: "The second reason advanced is that, by failure to separately fix the amount of damage suffered by the husband and wife respectively, it is impossible to determine the propriety of the award so far as it concerns either. In our opinion, appellant is not entitled as a matter of right to such segregation, and may not complain if the amount awarded to cover the general damage sustained by both respondents finds support in the evidence." Defendant at bar may exact a joint satisfaction from plaintiffs when paying the judgment; after that he need have no further worry about the matter.

The judgment is affirmed.

MOORE, P. J., and FOX, J., concur.

**Angelita AGUIRRE, by and through her
guardian ad litem, Ling Aguirre, Plain-
tiffs and Appellant,**

v.

**CITY OF LOS ANGELES, Defendant and
Respondent.***

Civ. 21326.

**District Court of Appeal, Second District,
Division 1, California.**

Feb. 9, 1956.

Rehearing Denied Feb. 28, 1956.

Hearing Granted March 28, 1956.

Action against city for injuries to girl who received electric shock when she roller skated across bolt securing pull-up box lid in sidewalk just as she took hold of metal street light standard. The Superior Court of Los Angeles County, Robert J. Scott, J., granted city's motion for nonsuit at conclusion of plaintiff's case, and appeal followed. The District Court of Appeal, Doran, J., held that evidence was insufficient to show that city had notice or knowledge, actual or constructive, of dangerous condition either as matter of fact or matter of law, as required to hold city liable under Public Liability Act of 1923.

Order affirmed.

1. Municipal Corporations ⇨733(2)

Street lighting is governmental function of municipality.

2. Municipal Corporations ⇨1016

It is only by express statutory permission that any governmental agency may be sued, and every plaintiff seeking damages from municipality acting in governmental capacity must bring himself within provisions of public liability statutes. West's Ann.Gov.Code, §§ 53050-53056.

3. Municipal Corporations ⇨723½

Public Liability Act of 1923 is in derogation of common-law rule of no liability for malperformance of governmental function, and is to be strictly construed. West's Ann.Gov.Code, §§ 53050-53056.

4. Municipal Corporations ⇨857

Complaint under Public Liability Act of 1923 which fails to allege that there was dangerous condition of public property, that

* Opinion vacated 299 P.2d 862.

city had notice or knowledge, actual or constructive, of that dangerous condition, and that city failed for reasonable time after receiving notice of dangerous condition to remedy same, states no cause of action. West's Ann.Gov.Code, §§ 53050-53056.

5. Electricity ⇨19(5)

In action against city for injuries to girl who received electric shock when she roller skated across bolt securing pull-up box lid in sidewalk just as she took hold of metal street light standard, evidence was insufficient to show that city had notice or knowledge, actual or constructive, of dangerous condition either as matter of fact or matter of law, as required to maintain action against city under Public Liability Act of 1923. West's Ann.Gov.Code, §§ 53050-53056.

Richard A. Ibanez, Los Angeles, for appellant.

Roger Arnebergh, City Atty., Bourke Jones, Asst. City Atty., William E. Still, Deputy City Atty., Los Angeles, for respondent.

DORAN, Justice.

The action is for damage for personal injuries to appellant resulting from alleged negligence on the part of respondent city. The case was tried before a jury and at the conclusion of plaintiff's case a motion for a non-suit by defendant was granted. The appeal is from the judgment that followed.

The facts as recited in appellant's brief are as follows:

"On 7 August 1953 at approximately 8:00 o'clock P.M. Angelita was injured by escaping electricity from the City's street-lighting system. At the time, Angelita was skating on the public sidewalk a short distance from her home.

"On the sidewalk where Angelita was skating there was a cement receptacle, rectangular in form, with top dimensions of approximately 12 inches by 24 inches. This receptacle, called a pull-up box, recessed into, and part of the sidewalk, was made of cement just like the sidewalk. The top of the pull-up box had a cement lid

with two 'J-bolts' also recessed into the lid and located on the longitudinal ends of the lid.

"This pull-up box was part of the sidewalk intended for use by the public to walk over just like the rest of the sidewalk.

"The pull-up box was situated approximately three feet from the curb inward towards the property line.

"Between the pull-up box and the curb and rising from the sidewalk was a metal lamp standard.

"This pull-up box as well as the light-standard were part of the City's street-lighting system.

"Angelita approached the pull-up box and light-standard with metal skates on both shoes. As the wheels of one of her skates rolled over the lid of the pull-up box it came into contact with the metal J-bolt. At the same time Angelita took hold of the metal light-standard with her bare hand and arm. That instant electricity passed through Angelita's body from the J-bolt to the light-standard causing her to sustain the injuries which are the ingredients of this lawsuit."

"The motion made by the City was based upon two grounds, namely, that there was a failure of proof, and, that the complaint failed to state a cause of action. These two contentions made at the trial by the City will now be considered *seriatim*."

It is contended on appeal that, "there was sufficient evidence to make out a *prima facie* case and the trial court erred in finding otherwise by nonsuiting the plaintiff appellant", and that "the complaint does state a cause of action against the City under the Public Liability Act".

As recited in appellant's brief,

"Briefly stated the requirement of proof under the Public Liability Act are (a) the existence of a defective condition of the street within the City's jurisdiction so as to constitute a direct menace to travel by persons using it, and an injury proximately caused thereby; (b) knowledge of this condition by the City before the injury and, (c) reasonable time after notice to enable the City to remedy a condition. (BAJI 219-C and BAJI Supp. 219-C).

"That there was a defective condition by virtue of the existing 'energized' J-bolt which injured Angelita cannot be gainsaid. The more difficult question is what notice prior to the accident of this defective condition did the City have?

"The law does not require actual notice. If the evidence indicates that there was a long continuous existence of the dangerous or defective condition, this fact will support an inference of notice called constructive notice. (BAJI 219G). Because electricity is a dangerous instrumentality with an inherent risk to do injury, if it escapes, the City, in the exercise of ordinary care, was required to make reasonable inspections. (Polk v. City of Los Angeles, 26 Cal.2d 519, 159 P.2d 931; Van Dorn v. City & County of San Francisco, 103 Cal. App.2d 714, 230 P.2d 393; Laurenz v. Vranizan, 25 Cal.2d 806, 155 P.2d 633; Warren v. City of Los Angeles, 91 Cal. App.2d 678, 205 P.2d 719.)

"Here the jury was deprived of the opportunity of inferring from the circumstances whether there was constructive notice to the City. Also whether in the exercise of ordinary care the City should have inspected the pull-up boxes and if so, whether such inspection would have revealed the dangerous condition."

It is also contended, "that the doctrine of *res ipsa loquitur* is equally applicable to an action of this kind against the City as it is against a private defendant".

It is also argued that, "The rule is well settled that where a defendant proceeds to trial upon the merits without making objections by way of demurrer to the manner of pleading such formal defects cannot be raised for the first time on appeal. Fleischmann v. Lotito, 6 Cal.2d 365, 57 P.2d 922.

"Objections to the pleadings will be deemed to have been waived, where no objection was made by demurrer or otherwise to the sufficiency of any of the pleadings, and the cause was tried on the assumption that they stated a cause of action. Simpson v. Bergmann, 125 Cal.App. 1, 13 P.2d 531."

Respondent, on the other hand, points out that, "The doctrine of *res ipsa loquitur*:

does not take the place of, or supply the proof of any of the elements required in the Public Liability Act. The doctrine may apply only after there has been proof of at least constructive notice and it is essential where this doctrine is sought to be used that all requirements conditioning the City's liability be supplied. *Van Dorn v. San Francisco*, 103 Cal.App.2d 714, 716 [230 P.2d 393]; *Bodholdt v. Garrett*, 122 Cal. App. 566, 570 [10 P.2d 533]."

It is also pointed out by respondent that, "The pull boxes are not periodically inspected and are opened only for 'trouble' calls; Mr. Greenwood (Assistant Superintendent of Electric Trouble, Department of Water and Power) expressed the opinion that there is no reason to open them otherwise. Although records are kept by Department of Water and Power trouble crews of work done in the pull boxes on trouble calls, no such records were demanded or offered for proof of inspection of this pull box. No routine inspection of the pull boxes is carried on by the Bureau of Street Lighting, and none is necessary.

"No one has received a shock from lights since 1926, when the Bureau of Street Lighting was formed, except men working directly with the wires. A J-bolt has never been known to be energized before this accident.

"The accident could only happen when the lights were on, with a contact made on the electric cable and then touching the lamp post. Electricity tends to follow the path of least resistance, generally along its principal conductor—it is only a possibility that the electricity would jump to another conductor where there is a break in the conductor's insulation. The presence of an insulating material, e. g., neolite sole of a shoe, would also limit the possibility of receiving a shock. The addition of roller skates would increase the possibility of shock where the other necessary factors are combined. Under Section 56.15 of the Los Angeles Municipal Code it is illegal to use roller skates on a sidewalk." The foregoing as recited by respondent is supported by the reporter's transcript.

Respondent concludes with the observation that, "The record is absolutely devoid

of any evidence that the circumstances of this accident are the natural and probable consequences of this installation and should have been anticipated from past experience within the reasonable expectation of the authorities planning, constructing and maintaining such system. This accident was a pure freak."

It does not appear, from a review of the record, that the respondent had notice or knowledge, actual or constructive, of the dangerous condition either as a matter of fact or a matter of law.

[1] As noted by respondent, "Street lighting is a governmental function of a municipality. *Logan v. Glendale*, 102 Cal. App.2d 861, 229 P.2d 128.

[2, 3] "Every plaintiff seeking damages from a municipality acting in a governmental capacity must bring himself within the provisions of the public liability statutes of this State. It is only by expressed statutory permission that any governmental agency may be sued. So, in this case, we must look to the provisions of the Public Liability Act of 1923, Govt.Code, §§ 53050-53056, and judge the sufficiency of facts stated in plaintiff's complaint by the requirements of that Act. This statute is in derogation of the common law rule of no liability for malperformance of a governmental function and is to be strictly construed. *Loewen v. City of Burbank*, 124 Cal.App.2d 551, 553, 269 P.2d 121; *Hoel v. City of Los Angeles*, 136 Cal.App.2d 295, 288 P.2d 989.

[4] "Under the 1923 Public Liability Act a complaint must allege the essential elements of that act. It must allege that there was a dangerous condition of public property. It must allege that the City had notice or knowledge, actual or constructive, of that dangerous condition, and it must allege that the City failed for a reasonable time after receiving notice of a dangerous condition to remedy the same. Without one or all of these allegations the complaint states no cause of action. *Benton v. City of Santa Monica*, 106 Cal.App. 399, 289 P. 203."

[5] From a review of the record, in the light of the Public Liability Act of 1923,

it appears that the trial court's ruling on defendant's motion for a nonsuit was correct.

The order is affirmed.

WHITE, P. J., and FOURT, J., concur.



139 Cal.App.2d 157

ARGONAUT INSURANCE EXCHANGE,
Plaintiff,

v.

SAN DIEGO GAS and ELECTRIC CO., De-
fendant, Cross-Complainant and
Appellant,

Chagnon Electric Co., Inc., Cross-Defendant
and Respondent.
Civ. 5246.

District Court of Appeal, Fourth District,
California.

Feb. 9, 1956.

Action by a workmen's compensation insurance carrier which had paid compensation to injured employee to recover on theory of subrogation for amount paid to employee from company whose negligence allegedly caused injuries. The defendant filed a cross-complaint against the employer who by written contract had agreed to indemnify the company from any liability which might arise from the accident involved. The cross-defendant filed a demurrer to the cross-complaint. The Superior Court, Orange County, Robert Gardner, J., sustained the demurrer without leave to amend and entered judgment and the defendant and cross-complainant appealed. The District Court of Appeal, Barnard, P. J., held that the defendant was not entitled as matter of right to maintain the cross-complaint as part of the original action since the presence of the cross-defendant was not essential to complete determination of the controversy between the original parties and that the carrier was not and could not have been a party to agree-

ment between the cross-complainant and the cross-defendant.

Judgment affirmed.

1. Pleading ⇨149

A defendant's right to file a cross-complaint is limited to cases in which he seeks affirmative relief against a "party" to action, and he may not file a cross-complaint for affirmative relief against one who is not already a party to action without first obtaining permission from court. West's Ann.Code Civ.Proc. § 442.

2. Parties ⇨51(4)

The statute permits bringing in of new party to action only when a complete determination of controversy cannot be had without presence of such other party. West's Ann.Code Civ.Proc. § 389.

3. Pleading ⇨149

The test for cross-complaint against a new party is more stringent than that governing cross-claims against the plaintiff or codefendants. West's Ann.Code Civ.Proc. §§ 389, 442.

4. Pleading ⇨149

Where a party plaintiff is not a party to an agreement between some defendants and a stranger, controversy between latter two parties cannot be made the subject of a cross-complaint in main action. West's Ann.Code Civ.Proc. §§ 389, 442.

5. Parties ⇨51(4)

Where employer's workmen's compensation insurance carrier, which had paid compensation to injured employee, sued company on theory of subrogation to be reimbursed for amount paid to employee whose injuries were allegedly caused by company's negligence, company was not entitled, as matter of right, to maintain cross-complaint against employer which had agreed to indemnify company from all liability that might arise from accident involved, since presence of employer was not essential to complete determination of controversy between original parties, and carrier was not and could not have been a party to agreement between employer and company. West's Ann.Code Civ.Proc. §§ 389, 442.

6. Parties 51(4)

Where employer's workmen's compensation insurance carrier, which had paid compensation to injured employee, sued company on theory of subrogation to be reimbursed for amount paid to employee whose injuries were allegedly caused by company's negligence, trial court's disallowing company to maintain cross-complaint against employer which had agreed to indemnify company from any liability arising from accident involved was not an abuse of discretion. West's Ann.Code Civ. Proc. §§ 389, 442.

James V. Brewer, Los Angeles, for appellant.

Dryden, Harrington, Hogan & Swartz, Los Angeles, for respondent.

BARNARD, Presiding Justice.

The plaintiff brought this action against the defendant San Diego Gas & Electric Company. The complaint alleged that the plaintiff was the Workmen's Compensation Insurance carrier for the Chagnon Electric Company; that one Nelson, an employee of Chagnon Electric Company, was injured while in the course of his employment; that his injuries were directly and proximately caused by the negligence of the defendant gas company; and that because of these injuries and pursuant to the workmen's compensation statutes the plaintiff, as the insurer of Chagnon Electric Company, had been obliged to pay the workmen's compensation amounting to \$6,662.75. Based on a subrogation theory, the plaintiff prayed for judgment against the gas company for \$6,662.75 as reimbursement for the amount it had been obliged to pay.

So far as material here, the defendant gas company filed a cross-complaint naming the Chagnon Electric Company as the cross-defendant. It was alleged therein that the cross-defendant was performing work under a written contract for the cross-complainant at the time of the accident; that the cross-defendant and its agents, including Nelson, were guilty of negligence which caused or contributed to the accident; and that by a written con-

tract between them the cross-defendant had agreed to indemnify and save harmless the cross-complainant from all loss, damage or liability that might arise from the accident in question. The prayer was that in the event the plaintiff should recover judgment against the cross-complainant, it should have judgment in the same amount against the cross-defendant. The cross-defendant Chagnon Electric Company filed a demurrer to the cross-complaint which was sustained without leave to amend, and judgment was entered decreeing that the gas company take nothing by reason of its cross-complaint.

The defendant gas company has appealed from the judgment, contending that its cross-complaint stated a cause of action in that it alleged a contract under which Chagnon Electric Company agreed to indemnify and save harmless the gas company from any loss or liability that might arise from this accident; that Sections 442 and 389 of the Code of Civil Procedure were designed to prevent a multiplicity of suits and should receive a liberal construction; that the cross-defendant is in the place of an indemnitor and would be the one actually liable if the plaintiff is successful in the original action; and that the cross-defendant is a necessary party to the original action in order to determine the question of ultimate liability in this one action.

The appellant relies on *Eastin v. Roberts, Carpenter & Co.*, 19 Cal.App.2d 567, 66 P.2d 224; *Kent v. Clark*, 20 Cal.2d 779, 128 P.2d 868, 124 A.L.R. 576; *Television Arts Prod. v. J. Fairbanks, Inc.*, 134 Cal.App.2d 293, 285 P.2d 695; and *Atherley v. MacDonald, Young & Nelson, Inc.*, 135 Cal.App.2d 383, 287 P.2d 529. In the *Eastin* case, the cross-defendant had taken over the assets of a business and had agreed to pay the note upon which plaintiff's suit was based. The cross-defendant's obligation related directly to the note involved in the original action, and the court pointed out that the situation was one where the plaintiff was entitled to enforce the original obligation against either the defendant or the cross-defendant, that such a relationship is most frequently illustrated in cases which in-

volve the assumption of mortgages, and that in such a situation equity will permit the mortgagee to bring in the party primarily liable in order to avoid circuity of action. In the Kent case, no new party was brought in and the claim of each party was based upon the effect of the same contract. In that case [20 Cal.2d 779, 128 P.2d 873], the court said:

"If the defendant's pleading sets forth matter inextricably related to the matter forming the basis of the plaintiff's complaint, it meets the statutory requirements of a cross-complaint, * * *".

In both the Television Arts case and the Atherley case the cross-defendant was named in the original action as a codefendant of the cross-complainant.

[1-4] The only authorization for the filing of a cross-complaint is found in Sections 442 and 389 of the Code of Civil Procedure. The distinction between the effect of the provisions of Section 442 and those contained in Section 389 is pointed out in *Alpers v. Bliss*, 145 Cal. 565, 79 P. 171 and in *Atherley v. MacDonald, Young & Nelson, Inc.*, 135 Cal.App.2d 383, 287 P.2d 529, 532. In *Alpers v. Bliss*, the court stated that a defendant's right, under Section 442, to file a cross-complaint is limited to cases in which he seeks affirmative relief against a "party" to the action, and that he may not file a cross-complaint for affirmative relief against one who is not already a party to the action without first obtaining permission from the court. Also, that Section 389 permits the bringing in of a new party to the action only when a complete determination of the controversy cannot be had without the presence of such other party. As stated in *Atherley v. MacDonald, etc.*, "Thus the test for a cross-complaint against a new party is more stringent than that governing cross-claims against the plaintiff or codefendants. Under C.C.P. 389 the stranger must be a party *necessary to a complete determination of the contro-*

versy between the original parties." In *Linder v. Russian Health Baths*, 131 Cal.App.2d 621, 281 P.2d 314, the court said:

"When a party plaintiff is not a party to an agreement between some of the defendants and a stranger to the action the controversy between the latter two parties cannot be made the subject of a cross-complaint in the main action."

While the facts therein were somewhat different from those in the above cited cases, the same principles were applied in *Metro-politan, etc., Co. v. Margulis*, 38 Cal.App.2d 711, 102 P.2d 459.

[5, 6] Applying the established rules to the facts of this case it must be held that the appellant was not entitled, as a matter of right, to maintain the cause of action set forth in its cross-complaint as a part of the original action. The presence in the action of the cross-defendant was not essential to the complete determination of the controversy between the original parties to the action. No claim was asserted in the cross-complaint against any other party to the original action and, in fact, appellant's claim against the cross-defendant was conditional and depended upon the result of the decision in the original action. In this respect, the situation here was similar to the ordinary one where a plaintiff must first recover a judgment against a defendant in a negligence case before he may sue the defendant's insurance carrier. The cross-complaint was based on an agreement between the appellant and the respondent, to which agreement the original plaintiff was not a party and could not have been a party. If it be assumed that the matter of permitting this cross-complaint to be maintained was one within the discretion of the trial court, no abuse of that discretion appears.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

Amelia PANOPULOS, Plaintiff and Appellant,
v.

Gussie MADERIS, Defendant and Respondent.

Catherine FITTS, Plaintiff and Appellant,
v.

Gussie MADERIS, Defendant and Respondent.

Beatrice SCHUNKE, Plaintiff and Appellant,
v.

Gussie MADERIS, Defendant and Respondent.

Elizabeth HODENSON, Plaintiff and Appellant,
v.

Gussie MADERIS, Defendant and Respondent.*

Civ. 16318-16321.

District Court of Appeal, First District,
Division 1, California.

Feb. 14, 1956.

Rehearing Denied March 15, 1956.

Hearing Granted April 11, 1956.

Automobile accident case. The Superior Court, Santa Clara County, John D. Foley, J., rendered judgment adverse to plaintiffs, and they appealed. The District Court of Appeal, Peters, P. J., passing on a question not theretofore discussed by any California appellate court, held that owner, who had stepped out of vehicle without applying emergency brake, leaving motor running and leaving automatic shift in such position that a light push would start the vehicle, was not the "driver" of such vehicle, for purposes of statute depriving guest of his negligence action against "driver" or person liable for conduct of "driver"; and held that guests, who were injured when runaway vehicle hit wall at high rate of speed, could recover if owner had been guilty of mere negligence, as distinguished from wilful misconduct.

Reversed.

1. Automobiles ⇨181(1)

Driver's conduct in getting out of automobile with motor running, and in leaving it probably in gear without the emer-

gency brake properly adjusted, might constitute negligence, but not wilful misconduct, for guest statute purposes. Vehicle Code, § 403.

2. Automobiles ⇨181(1)

Guest law was aimed at limiting cause of action by one voluntarily accepting ride against his host-driver, but it was not intended to apply to negligence of owner of automobile independent of his or his agent's activities as a driver. Vehicle Code, § 403.

3. Automobiles ⇨181(1)

Owner, who had stepped out of vehicle without applying emergency brake, leaving motor running and leaving automatic shift in such position that a light push would start the vehicle, was not the "driver" of such vehicle, for purposes of statute depriving guest of his negligence action against "driver" or person liable for conduct of "driver"; and guests, who were injured when runaway vehicle hit wall at high rate of speed, could recover if owner had been guilty of mere negligence, as distinguished from wilful misconduct. Vehicle Code, §§ 69, 403.

See publication Words and Phrases, for other judicial constructions and definitions of "Driver".

4. Appeal and Error ⇨171(1)

The rule that one may not change his theory on appeal is based on concept that fairness and justice to respondent requires that appellant be limited to theory urged in trial court in any case where to change theory would adversely affect respondent in that he might have failed to present evidence that he could have had on point not raised; but rule will not be followed where error is fundamental and where problem presented is one of law and not of fact.

5. Appeal and Error ⇨171(1)

Even though plaintiffs' main theory in lower court had been that they were not within guest statute because they had paid for ride, they would not be precluded from raising on appeal question as to whether defendant had been, at time of accident, the "driver" of the vehicle, for guest statute purposes, where basic question had been whether or not guest statute was applicable

to facts of case and it was undisputed that defendant had been out of vehicle when accident occurred. Vehicle Code, § 403.

James F. Boccardo, San Jose, Edward J. Niland, San Jose, of counsel, for appellants.

Campbell, Custer, Warburton & Britton, Frank L. Custer, San Jose, W. R. Dunn, Burlingame, of counsel, for respondent.

PETERS, Presiding Justice.

The four named plaintiffs filed separate actions for personal injuries received while plaintiffs were occupants of an automobile owned by defendant. The four causes were consolidated for trial. The jury, in response to a special interrogatory, found that all plaintiffs were guests in the automobile, and brought in defense verdicts. From the judgments entered on those verdicts plaintiffs appeal.

The principal question involved is, whether plaintiffs were guests of defendant within the meaning of section 403 of the Vehicle Code.¹ Insofar as this problem involves a controverted question of fact, it has been resolved by the verdicts of the jury adverse to plaintiffs. The principal contention made on this appeal is that, as a matter of law, the guest law is not applicable to the facts here presented.

The accident occurred late in the evening of November 14, 1950. On that evening defendant, driving her new 1950 Chevrolet two-door sedan, had transported five other women from San Jose to Mountain View to attend a public card party. Four of these women are the plaintiffs here involved; the fifth was a Mrs. Pereira.

The automobile involved had been purchased by defendant some two and a half months before the accident, and was equipped with an automatic transmission. Defendant had been driving automobiles since 1913. The gear shift lever on this Chev-

rolet is located between the steering wheel and the dashboard, and is equipped with a gear indicator. There are five positions for the gear lever. From left to right these are "Park," "Neutral," "Drive," "Low," and "Reverse." In order to move the lever from "park" to "neutral," it must first be lifted up and then brought down. The lever can be moved from "neutral" to "drive," however, by the application of fingertip pressure on the lever, without the necessity of first lifting it up. When the emergency brake is properly engaged, even though the gas pedal is pressed and the gear shift lever is in "drive," the car will not move forward. If the lever is in "neutral," assuming a level grade, and the gas pedal is pressed, the car will not move. If the lever is in "drive" and the idling speed of the engine is fast, the car will tend to creep. If the emergency brake at this point is set at about half way, the car will not creep. If the lever is in "park," the back wheels lock and the car cannot be moved without skidding the back wheels. The back wheels are not locked while the car is in "neutral." The handbrake can be set by a person of average strength.

On the night in question defendant picked up the five women at their respective homes in San Jose and drove them to the public card party in Mountain View. The six women left the party at about 11:30 p. m. to return to San Jose. They placed themselves in the car with defendant in the driver's seat, Mrs. Fitts next to her and Mrs. Schunke next to her. The other three women were in the back seat. Defendant intended to take Mrs. Fitts home first. Mrs. Fitts lives on Carlisle Street in San Jose, a street that runs east and west, her home being on the north side about 150 feet from where Carlisle Street intersects Santa Teresa. The northeast corner of that intersection is occupied first by a parking lot and then by a market. From Mrs. Fitts' home to the west wall of that market is

1. So far as pertinent here that section provides: "No person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride * * * has any right of action for civil damages against the driv-

er of such vehicle * * * on account of personal injury to * * * such guest during such ride" except in cases of the wilful misconduct or intoxication "of such driver".

about 300 feet. Carlisle Street in this area is apparently level.

Defendant drove down Carlisle Street, going east, and stopped her car in front of Mrs. Fitts' house. The evidence is sharply conflicting as to whether she parked on the north or south side of Carlisle Street. At any rate, after she had stopped, defendant got out of the car, leaving the motor running. She testified that she left the gear shift lever in "neutral," even though she admittedly knew that if she put it in "park" the back wheels would have been locked, and that to get the lever out of "park" it was necessary to lift the lever, but if left in "neutral" very little pressure would shift the lever to "drive" or "low." Defendant did testify that she put the hand-brake on, assuming that this would prevent the car from moving. After alighting from the car defendant told Mrs. Fitts to get out on the driver's side. Mrs. Fitts, at the time of the accident, was 83, small and infirm. She had never driven a car. The other occupant of the front seat, Mrs. Schunke, also was a non-driver. Mrs. Fitts started to slide under the wheel to get out. As she did so the automobile suddenly started forward. Mrs. Fitts did not know whether she had any connection with this, nor did she know precisely where her hands and feet were when the car started to move. None of the other occupants of the car knew where Mrs. Fitts had placed her hands and feet just prior to the car starting. Defendant, who was standing at the side of the car, testified that Mrs. Fitts was attempting to push or pull herself out of the car, with her right hand on the steering wheel and her left hand on the seat. Defendant could not see where Mrs. Fitts had her feet. Obviously, if the car was in "neutral" Mrs. Fitts must have accidentally moved the lever to "drive" or "low" and her foot must have pressed the accelerator, because the automobile proceeded, driverless, east on Carlisle, jumped the east curb of Santa Teresa, ran across the parking lot and hit the west wall of the market, some 300 feet from where it had started. The defendant estimated the speed at a constant ten miles an hour. Mrs. Schunke estimated that the car reached 35 miles per hour be-

fore the crash. Plaintiff Panopulos testified that the car "went just like a bullet" and hit the wall at a high rate of speed. It must have been going at a fast rate because the car was a total loss. All four plaintiffs were seriously injured.

The evidence was conflicting as to whether the ride was a business transaction for which the plaintiffs paid defendant, or whether the ride was a mere social courtesy. All four plaintiffs testified that their acquaintanceship with defendant was limited to going with her to public card parties, and that, on such occasions, they were expected to and did pay defendant fifty cents each for transportation. They all testified that on the night in question they had paid defendant fifty cents for the ride. If this testimony had been believed the plaintiffs would have been passengers and not guests within the meaning of section 403 of the Vehicle Code. Defendant testified that she did not ask or expect persons riding with her to card parties to pay her money as consideration for the ride, but that she would accept money if it were offered to her; that occasionally women who had been transported would give her ten or fifteen cents, or buy her ticket to the card party. She admitted that on the night in question Mrs. Schunke had given her fifty cents, and that Mrs. Panopulos had bought her ticket (50 cents) to the card party. She denied that Mrs. Fitts or Mrs. Hodenson had paid her anything on the evening in question. Mrs. Pereira testified that she had frequently ridden to card parties with defendant; that she had never seen any ladies riding with defendant pay her any money; that she occasionally slipped defendant 30 or 35 cents, but defendant never asked her for any money; that she did not see any of the plaintiffs pay defendant on the night in question, although she did hear Mrs. Panopulos tell defendant that she would buy her ticket to the card party.

On this evidence, the jury, in response to special interrogatories, found that plaintiffs were guests and not passengers. It may be assumed that, for purposes of these appeals, this finding is binding and that

plaintiffs were non-paying occupants of the automobile.

[1] Plaintiffs next argue that, even if the finding that plaintiffs were non-paying occupants of the car is supported, nevertheless plaintiffs were not "guests" of defendant within the meaning of section 403 of the Vehicle Code. It will be remembered that that section provides "No person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride * * * has any right of action for civil damages *against the driver* of such vehicle or against any other person legally liable for the conduct of *such driver* on account of personal injury to or the death of such guest during such ride" (italics added) unless the driver was guilty of wilful misconduct or was intoxicated. If this statute is applicable then the verdicts of the jury are supported because there is no evidence of wilful misconduct or intoxication on the part of defendant. Her conduct in getting out of the car with the motor running, and in leaving it probably in gear without the emergency brake properly adjusted, would support a finding of negligence, but not one of wilful misconduct. See annotation 16 A.L.R.2d 979.

Section 403 of the Vehicle Code is a limitation upon the common-law action of a guest against his automobile-driving host. It took away the common-law cause of action such guest had against his host-driver for ordinary negligence. For this reason the Supreme Court of this state has properly ruled that the section must be strictly construed. In *Prager v. Isreal*, 15 Cal.2d 89, 93, 98 P.2d 729, 731, the Supreme Court laid down the following rules of construction: "It is well settled in this and other states that the so-called 'guest laws' are in derogation of the common law and must be construed strictly. [Citing cases.] Furthermore, as stated in *Rocha v. Hulen* [6 Cal.App.2d 245, 254, 44 P.2d 478, 483], 'The common-law right of having redress for injuries wrongfully inflicted, being lessened by such statutes, necessitates strict construction, and also *that cases be not held within the provisions of such statutes unless it clearly appears that it*

should be so determined.'" (Emphasis the court's.)

[2,3] This rule of construction has been applied to various factual situations, but the question as to whether one outside the car is a "driver" within the meaning of the section seems never to have been discussed by any California appellate court. It will be noted that the section does not deprive a guest of his negligence action in all situations. It does so only in actions "against the driver of such vehicle", or person liable "for the conduct of such driver". The basic question here is whether, when the accident happened, was defendant the "driver of such vehicle"?

Even without the rule of strict construction it seems quite clear that, when defendant got out of the car and left it unattended, she was no longer the "driver of such vehicle", as those terms are generally understood. A driver is one who is driving, or is in a position to drive the vehicle. The defendant was outside the car and so was not driving, nor was she in a position to drive the vehicle. This common sense interpretation of the term "driver" is corroborated, if such corroboration were necessary, by the provisions of section 69 of the Vehicle Code defining the term "driver." It provides: "'Driver' is a person who drives or is in actual physical control of a vehicle." Obviously "a person who drives" must be one who is in a position to drive. One completely outside a vehicle is not one "who drives" the vehicle. Equally apparent is it that one who is outside the vehicle is not one "in actual physical control of a vehicle." Support for this construction is found in the case of *Puckett v. Pailthorpe*, 207 Iowa 613, 223 N.W. 254, 256, the precise point in that case was whether one who had not yet entered a vehicle which was driverless at the moment, was a guest within the meaning of the Iowa law. The court pointed out that to fall within the legislation a person must be riding, without fare, in a motor vehicle "operated by a driver" on a "journey." Then, discussing the Iowa guest law, the court said, 223 N.W. at page 256: "Manifestly, section 5026b1, *supra*, contemplates a person on

such journey in a motor vehicle, driven or operated by some one. * * *

"* * * Entrance must be made into an automobile then in the operation of a driver so that a journey can be taken. There can be no trip without a driver. Thus a person in such motorcar without a driver operating it is not a passenger, within the meaning of the section under consideration; for, in the absence of the necessary operator, there can be no journey, and consequently no riding. Without the driver, the journey, and the riding, there is no passenger in the case at bar. If then, under the provisions of the statute in question, there is no driver, there can be no passenger. That is the very underlying fundamental principle embodied within the section. * * *

"With these observations in mind, a conclusion must be reached that a driver was or was not operating appellees' automobile at the time in question. It appears from appellant's petition that no one was in charge, driving or operating the vehicle when appellant was injured. 'Driver' is not mentioned in that pleading. At the time appellant attempted to enter the conveyance, no one was in actual charge thereof, so far as her petition reveals. Hence she was not a passenger for the purposes of the legislation under consideration, because no driver was operating the machine. * * * She in truth could not make a journey, nor could she ride, until the arrival of a driver. During that interim, appellant was not on a journey, nor was she riding in a vehicle driven or operated by a driver."

This language is applicable in the present case. The guest law was aimed at limiting the cause of action by one voluntarily accepting a ride against his host-driver. It was not intended to apply to negligence of the owner of the car independent of his or his agent's activities as a driver.

Defendant argues that in the instant case her negligence was committed as "driver" of the car. It is argued that if it was negligence to get out of the car with the motor running without properly setting the brake, and leaving the automatic shift in a position that a slight push would start the car,

all of such acts were committed by defendant as driver of the car and while she was still in complete control of it. These arguments lose sight of the fact that none of these acts would have been dangerous had defendant remained in the driver's seat. They became dangerous only, because, after they were committed, defendant committed another independent act of negligence, that is, in leaving the automobile unattended. The jury could have found that this negligence was the proximate cause of the accident. If the jury so finds, plaintiffs may recover for this negligence.

There seems to be no California case directly discussing the question as to the applicability of the guest law when the driver steps out of the car. But there are cases involving the converse of this situation—that is, where the guest steps out of the car, or is injured by the car while he is in the act of entering it. In such a situation, applying the doctrine of strict construction, the courts have held that the "ride" has not yet started or has been interrupted and the guest law is not applicable. *Harrison v. Gamatero*, 52 Cal.App.2d 178, 125 P.2d 904; *Smith v. Pope*, 53 Cal.App.2d 43, 127 P.2d 292.

The case of *Frankenstein v. House*, 41 Cal.App.2d 813, 107 P.2d 624, cited by defendant, is not contrary to the rule here stated. There a demurrer was sustained without leave to amend and judgment entered for defendant. The complaint in that action charged that plaintiff was riding with defendant in the latter's car when defendant parked the car on a steep hill, left it unattended, and the car rolled down the hill, and plaintiff was injured. The only point discussed by the court was the status of the plaintiff. The court did not discuss the status of the defendant. The court held that plaintiff entered the car as a guest and not as a paying passenger, and that such status did not change. The holding of the court was, on page 816 of 41 Cal. App.2d, on page 626 of 107 P.2d: "As long as a person, without compensation to the driver, has entered a car upon the invitation of such driver and remains 'in the vehicle upon a highway', 'during such ride'

(sec. 403) he is a guest and cannot recover damages for the simple negligence of the host." This is, of course, generally speaking, sound law. Section 69 of the Vehicle Code is not mentioned in the opinion, nor did the court discuss the question as to whether defendant was still the driver after he left the car. The case cannot be accepted as an authority on a point it did not discuss.

[4, 5] The only other point necessary to mention is defendant's contention that the point discussed above was not raised in the trial court and is being raised for the first time on appeal. It is urged that plaintiffs are precluded from changing their theory on appeal.

It must be conceded that in their pleadings, and at the trial, the main theory of plaintiffs was that they were passengers because they paid for the ride. But the basic question was whether or not section 403 of the Vehicle Code was applicable to the facts of this case. As already held, as a matter of law, under the undisputed facts, the section is not applicable. The rule that one may not change his theory on appeal is based on the concept that fairness and justice to respondent requires that the appellant be limited to the theory urged in the trial court in any case where to change the theory would adversely affect the respondent in that he may have failed to present evidence that he might have had on a point not raised. The rule will not be followed where the error is fundamental and where the problem presented is one of law and not of fact. See discussion and cases cited in 3 Witkin, California Procedure, p. 2264. In the instant case it is undisputed that defendant was out of the car when the accident happened. Defendant, as well as all other witnesses, so testified. As a matter of law, section 403 is not applicable to such a situation. In such a case, as a matter of law, plaintiffs may recover for the ordinary negligence of the defendant. Instructions were offered to that effect by plaintiffs. That being so, fairness and justice to the plaintiffs require that the case be presented to the jury on the proper theory. Defendant cannot legally object

to the case being presented to the jury on a proper theory. This was not done.

The judgments appealed from are reversed.

BRAY and FRED B. WOOD, JJ., concur.



139 Cal.App.2d 33

Joseph E. BREWER and Daniel Carmichael, as Trustees of the Estate of Griffin Walter Wilson, deceased; Joseph E. Brewer and Kathaleen M. Brewer, Plaintiffs and Respondents,

v.

Gladys KING and Gladys King, as Administratrix with the will annexed of the Estate of George W. King, also known as Henry H. King, deceased, Defendant and Appellant.

Civ. 21353.

District Court of Appeal, Second District,
Division 1, California.

Feb. 6, 1956.

Rehearing Denied March 1, 1956.

Hearing Denied March 28, 1956.

Action to quiet plaintiff's title to realty claimed by defendant and to enjoin defendant, individually and as administratrix with the will annexed of her husband's estate, from filing or prosecuting actions against plaintiffs in regard to the realty involved. The Superior Court, Los Angeles County, Joseph W. Vickers, J., entered judgment for plaintiffs, and defendant appealed. The District Court of Appeal, Fourth, J., held that evidence was sufficient to sustain judgment for plaintiffs.

Judgment affirmed.

See also 121 Cal.App.2d 765, 264 P.2d 586.

I. Injunction ⇐128

Quieting Title ⇐44(3)

In action to quiet plaintiffs' title to realty claimed by defendant and to enjoin

defendant, individually and as administratrix with the will annexed of her husband's estate, from filing or prosecuting actions against plaintiffs in regard to the realty involved, evidence was sufficient to sustain judgment for plaintiffs.

2. Injunction 26(9)

Judgment, which quieted in plaintiff's title to land claimed by defendant, would be res judicata against defendant's claim in any court of law or equity, and therefore defendant, who had had her day in court in regard to such property, was properly enjoined from filing or prosecuting actions against plaintiffs in regard to such realty. West's Ann.Code Civ.Proc. § 526, subs. 1, 6.

Gladys King in pro. per.

Danielson & St. Clair, by H. Spencer St. Clair, Los Angeles, for respondents.

FOURT, Justice.

The respondents herein, plaintiffs in the superior court, filed a complaint to quiet title to certain particularly described real property, and to enjoin Gladys King, both individually and as administratrix with the will annexed of the estate of George W. King, deceased, from further maintaining two pending superior court actions (No. 584,337 and No. 590,986), and from filing or prosecuting any further actions against plaintiffs involving the title to the property described in the complaint. Appellant prosecutes her appeal from the judgment for plaintiffs as prayed for, which was entered December 7, 1954.

The two causes which the trial court has enjoined appellant from further prosecuting are the most recent in a series of actions filed by appellant against respondents and/or Griffin W. Wilson, of whose estate respondents Joseph E. Brewer and Daniel Carmichael are trustees, over a period of some ten years. Chronologically, the record shows the history of these cases to be as follows:

The appellant, Gladys King, and George W. King were married September 19, 1938, in Reno, Nevada. At the time of the marriage he was eighty-five years of age and

she was thirty-four years of age. Mr. King died December 18, 1941. In probate proceedings in Los Angeles County superior court (No. 210,334), appellant filed a contest to the will of George W. King, and the codicils thereto, offered in probate. Appellant was nonsuited and the judgment was affirmed in *Re Estate of King*, 63 Cal. App.2d 365, 146 P.2d 952 (March 21, 1944). The will and codicils devised the entire estate of the deceased to Griffin W. Wilson, a long-time friend and associate, who also became executor of the estate.

On June 6, 1942, at which time the appeal in the will contest action was still pending, appellant, as special administratrix of the estate of George W. King, deceased, filed an action in the superior court of Los Angeles county (No. 477,624), against George W. Wilson, Joseph E. Brewer and Kathaleen Brewer, by which she sought to recover certain described property. Among other things she alleged in her complaint that George W. King had placed title to all of his property in the name of the defendants as agents for himself. Each of the defendants denied that they held any property as agents or trustees for George W. King. Thereafter, the judgment of nonsuit in the probate proceedings was affirmed and Griffin W. Wilson was substituted as plaintiff in action No. 477,624, and the matter was dismissed.

On September 2, 1944, appellant filed an action in the superior court in Los Angeles county (No. 495,880), against Griffin W. Wilson, Joseph E. Brewer and Kathaleen M. Brewer, wherein she sought to quiet title to and recover several parcels of property, including all the property described in the instant action, and asked for an accounting. No summons was issued at the time the complaint was filed. Defendants made a voluntary appearance on June 7, 1945, but no steps were taken to have the matter set for trial until June, 1947. Thereafter, appellant voluntarily dismissed the proceedings on October 2, 1948, two days before the scheduled trial of the action.

On June 30, 1945, appellant filed an action in the superior court in Los Angeles county (No. 503,467), against Griffin W.

Wilson, Joseph E. Brewer and Kathaleen M. Brewer, to quiet title to certain properties, including all the properties set forth in the action at hand. In that suit she also sought an accounting. No summons was issued at the time of the filing of the complaint. Later summons was issued and was served about three years after the filing of the action. A demurrer was interposed by the defendants, which the trial court sustained without leave to amend. Appellant prosecuted an appeal from that decision which was affirmed in *King v. Wilson*, 96 Cal.App.2d 212, 215 P.2d 50. (February 24, 1950.)

On June 6, 1946, appellant filed an action in the superior court in Los Angeles county (No. 515,154), against Griffin W. Wilson, as executor of the estate of George W. King, deceased. This action was on a rejected claim of appellant for services as a nurse, housekeeper and assistant to decedent. Service of summons was not made until April, 1948. The executor demurred to the complaint and the trial court sustained the demurrer with leave to amend. Appellant voluntarily dismissed the action on July 12, 1948.

On August 27, 1948, appellant filed another action in the superior court of Los Angeles county (No. 533,635), against Griffin W. Wilson, Joseph E. Brewer and Kathaleen M. Brewer. By that suit appellant sought to quiet title to and recover the same property involved in the former actions. The cause was tried March 7, 1950, upon the affirmative defenses of the statute of limitations and the statute of frauds. Judgment was in favor of the defendants upon both defenses. An appeal was taken and respondent's motion to dismiss the appeal was granted in *King v. Wilson*, 101 Cal.App.2d 242, 225 P.2d 270. (December 20, 1950.)

Griffin W. Wilson died on June 8, 1950, and Joseph E. Brewer and Daniel Carmichael were appointed executors of his estate in superior court proceedings in Los Angeles county (No. 307,504). A first account current was filed to which appellant filed objections, individually and as administratrix with the will annexed of the estate of George W. King, deceased. These

objections were, upon motion of the executors, stricken. Appellant thereafter appealed and the judgment of the trial court was affirmed in *Re Estate of Wilson*, 114 Cal.App.2d 468, 250 P.2d 266. (November 28, 1952.)

Joseph E. Brewer and Daniel Carmichael, as the executors of the estate of Griffin W. Wilson, deceased, filed an accounting of the deceased executor, Griffin W. Wilson, in the estate of George W. King. Appellant, individually and as administratrix of that estate, filed objections thereto. On motion duly made the objections were stricken and appellant prosecuted an appeal. The action of the trial court was affirmed in *Re Estate of King*, 121 Cal. App.2d 765, 264 P.2d 586 (December 9, 1953), the appellate court also holding the appeal was frivolous.

On March 23, 1951, appellant, individually and as administratrix with the will annexed of the estate of George W. King, deceased, filed an action in the superior court in Los Angeles county (No. 584,337), to declare a trust and to quiet title to and recover all of the property covered by the former actions, including the property involved in the instant action. An answer was filed to the third amended complaint and defendants filed a memorandum for setting trial on August 12, 1952. After the case was set for trial appellant noticed a motion for a continuance and the cause was, by stipulation, taken off calendar and continued. A trial date was finally set for November 14, 1955, but on motion of defendants the cause was ordered off calendar upon the ground, *inter alia*, that Gladys King had been restrained from further prosecuting the action.

On September 27, 1951, appellant filed an action in the superior court in Los Angeles county (No. 590,986), against Joseph E. Brewer and Daniel Carmichael, as executors of the estate of Griffin Walter Wilson, deceased, and against Joseph E. Brewer and Kathaleen M. Brewer, to quiet title to certain of the properties described in the complaint in the cause now before us. No summons was issued at the time of the filing of the complaint. Summons was later issued and service was made on the defend-

ants on August 22, 1954, some three years after the date of filing the complaint. A motion was made to dismiss the action for lack of prosecution, which the court granted on September 10, 1954. Appellant has appealed from that judgment.

The litigation promoted by the appellant has obviously been expensive to the respondents, has prevented the sale of the property, and has caused the trustees to use income to pay obligations of the estate, including among other things, taxes, legacies and inheritance taxes.

After the respondents had completed the introduction of their testimony in the case at hand, and after a continuance had been granted the appellant during the course of the trial to the end that she would be better able to present her side of the matter, counsel for the appellant stated to the trial judge as follows:

"In consideration of the courtesy shown me Monday by the Court and Mr. St. Clair, I have tried to handle this so we can wind it up quickly. After going over the voluminous documents with Mrs. King and talking with her for some hours, I have reached the conclusion that as to all of the properties except Lot 16, possibly, in the second cause of action, that at this late date, no matter what may have been the case some years ago, there is no valid defense to the action. More important and more perhaps more difficult, I think that I have convinced Mrs. King of that, at least to the effect that she is willing to abide by my opinion on it, so what I have here will be addressed entirely to Lot 16."

Evidence was thereupon introduced by the appellant. She sought to establish an equitable right in herself in derogation of the record title, only as to the one parcel. The trial court found as to that parcel that appellant had no interest in it. It thus appears that appellant has been afforded many opportunities to be heard on the same matters as were presented in the case at hand. She had the opportunity to, and did, present proper evidence in the case now before us.

At the conclusion of the case, after the trial court had announced that judgment would be for the plaintiffs as prayed for,

counsel for the appellant stated, "I think the court's conclusions are sound."

[1] Appellant now contends that the judgment was not sustained by the evidence. It was stipulated at the trial that the title to the property in question was of record as shown in the title guarantee policy and title report. A policy of title insurance was introduced, without objection, as to the property in Los Angeles county. A title report was introduced, also without objection, as to the property in Tulare county. Since 1940, all of the property in the first cause of action was in the possession of either Griffin W. Wilson, or the plaintiffs as executors or trustees of his estate. All of the property in the second cause of action was in the possession of plaintiffs Joseph E. Brewer and Kathaleen M. Brewer, for at least ten years before the time of the trial of the action.

The facts in support of the third cause of action were either admitted by the pleadings or established by the records introduced into evidence.

Appellant has failed completely to point out to this court wherein the evidence is insufficient to sustain the judgment.

[2] Appellant's next contention is that she should not have been enjoined from prosecuting the pending actions referred to, namely Superior Court Los Angeles County No. 584,337 and Superior Court Los Angeles County No. 590,986.

Section 526 of the Code of Civil Procedure provides in part as follows:

"An injunction can not be granted:

"1. To stay a judicial proceeding pending at the commencement of the action in which the injunction is demanded, unless such restraint is necessary to prevent a multiplicity of such proceedings".

The appellate court has heretofore had an occasion to speak out with reference to the activities of the appellant in *Re Estate of King*, 121 Cal.App.2d 765, 775, 264 P.2d 586, 592, wherein Justice McComb said:

"In the instant case appellant by one action or proceeding after another has kept litigation involving the same identical issue pending since the death of George W.

King in December of 1941. She successfully frustrated the attempt of Griffin W. Wilson as executor to realize something from the assets that were in the estate. She has consistently clouded title to the property of Griffin W. Wilson and of his estate as well as other defendants named in the various actions.

"Since the affirmance of the appeal on appellant's unsuccessful will contest, she has filed five lawsuits against Griffin W. Wilson and others, four of which were practically identical, in seeking to recover on a trust theory certain described property which was allegedly held for her deceased husband who had, not without cause, disinherited her. The record of such actions clearly evinced the fact that appellant was not proceeding in good faith to secure a judicial determination of her alleged rights. The pattern she followed was typical of the procedure of one using the processes of the court for the purposes of harassment, vexation and delay rather than for a determination of bona fide controversies. Actions were filed without the issuance or service of summons, actions were not set for trial when at issue, actions were voluntarily dismissed and every effort was made to delay and procrastinate. Gladys King objected to and delayed all efforts of the executor to liquidate the limited assets that were actually in the estate until she finally was able to acquire rights to the property and declare a forfeiture of the estate's interest, thereby preventing any recovery for the estate.

"Appellant has filed six actions against the same defendants. In addition she has filed numerous objections in the estate proceedings and has intermeddled without right in the estate of Griffin W. Wilson. She has prosecuted four appeals in the appellate court and filed a separate petition for writ of review in all of which she was unsuccessful. Justice may be blindfolded, but it is not stupid and the courts have the power to prevent abuse of their processes."

In the case of *Taylor v. Hawley*, 6 Cal. App.2d 576, 45 P.2d 226, the court held that injunction is a proper remedy to terminate expensive and troublesome interfer-

ence with the ownership and right of possession of property by one who has been regularly determined by a court of equity to be entitled thereto; and that the trial court did not err in directing the issuance of an injunction in an action to quiet title, restraining defendants from interfering with plaintiff's title and right of possession by maintaining litigation or otherwise, which injunction had the effect of enjoining defendants from further prosecuting an action previously commenced by them involving similar issues and which was still pending at the time of trial of the action. The court said, 6 Cal.App.2d at page 580, 45 P.2d at page 228:

"The court did not err in directing the issuing of an injunction in this case restraining the defendants from interfering with the plaintiff's title and right of possession by maintaining litigation or otherwise. *Wolf v. Gall*, 174 Cal. 140, 162 P. 115; 22 Cal.Jur. 133, § 20. Injunctive relief incident to a decree quieting title is an ancient remedy growing out of what has been termed the 'bill of peace in a court of chancery.' It is a proper inherent remedy to terminate expensive and troublesome interference with the ownership and right of possession of property by one who has been regularly determined by a court of equity to be entitled thereto. Our statute authorizes the issuing of an injunction 'to prevent a multiplicity of judicial proceedings'. Section 526, subd. 6, Code Civ.Proc."

The action of *Wolf v. Gall*, 174 Cal. 140, 162 P. 115, was brought to quiet title to certain property in San Francisco. Plaintiffs asserted ownership in the property as heirs of Tobe Funkenstein. The defendants, also heirs of the deceased, claimed ownership of the property by virtue of a deed alleged to have been executed to them by Tobe Funkenstein in her lifetime. The court found that the defendants were the owners of the property, that the plaintiffs had no right or title to it and further adjudged that the plaintiffs and all parties claiming under them be perpetually enjoined and restrained from making any claim to the property involved in the action. Plaintiffs took an appeal from the judgment.

Later one of the plaintiffs filed another action in which he alleged he was an heir of Tobe Funkenstein; that at the time of her death she was the owner of the property in question and further assailed the validity of the deed from Tobe Funkenstein to the defendants. The court said, 174 Cal. at page 144, 162 P. at page 116:

"Furthermore, the injunction here granted was not in fact incidental to the main relief sought. It was a substantial and inherent part of the relief. The plaintiffs and defendants were seeking to have title quieted against each other. The action to quiet title, under our practice, is a development of the bill of peace of the court of chancery. The main purpose of this proceeding was to prevent repeated attempts to litigate a title, and to protect the real owner of the right against the annoyance and expense incidental to a multiplicity of suits. It was upon these considerations that the court of chancery 'has granted perpetual injunctions to restrain further litigation, and thus has in some degree put that restraint upon litigation which was the policy of the ancient law in real actions.' 1 Pomeroy Eq. Jur. (3d Ed.) § 248. 'The obvious design of such a bill,' says Story (2 Eq. Jur. (13th Ed.) § 853), 'is to procure repose from perpetual litigation, and therefore it is justly called a bill of peace. * * The obvious ground of the jurisdiction of courts of equity in cases of this sort is to suppress useless litigation and to prevent multiplicity of suits.'"

In Wellborn v. Wellborn, 67 Cal.App.2d 540, at page 544, 155 P.2d 95, at page 98, the court said:

"In Pomeroy's Equity Jurisprudence, [fifth edition, volume 1, page 461, et seq.], there are listed four conditions in which equity jurisdiction may be exercised to prevent a multiplicity of suits. One of these is stated as follows: '2. Where the dispute is between two individuals, A and B, and B institutes or is about to institute a number of actions either successively or simultaneously against A, all depending upon the same legal questions and similar issues of fact, and A by a single equitable suit seeks to bring them all within the scope and ef-

fect of one judicial determination. A familiar example of one branch of this class is the case where B has brought repeated actions of ejectment to recover the same tract of land in A's possession, and A finally resorts to a suit in equity by which his own title is finally established and quieted, and all further actions of ejectment by B are enjoined.'"

Appellant has had her full, long day in court as to any claims she might have had with reference to the property described in the complaint.

The judgment quieting the title in the plaintiffs was sustained by the evidence. Such a judgment would be *res judicata* against the appellant's claim in any court of law or equity. See, *In re Estate of Clark*, 190 Cal. 354, at page 360, 212 P. 622, at page 625, where the court said: "It is well settled that a judgment or decree necessarily affirming the existence of any fact is conclusive upon the parties or their privies whenever the existence of that fact is again in issue between them, not only when the subject-matter is the same, but when the point comes *incidentally* in question in relation to a *different* matter in the same or any other court. Freeman on Judgments, §§ 249 and 253; *Lamb v. Wahlenmaier*, 144 Cal. 91, 77 P. 765, 103 Am.St.Rep. 66; *Reed v. Cross*, 116 Cal. 473, 484, 48 P. 491; *Atchison, T. & S. F. Ry. Co. v. Nelson*, 9 Cir., 220 F. 53, 135 C.C.A. 621. That is to say, 'a matter of fact once adjudicated by a court of competent jurisdiction, concurrent or exclusive, may be relied upon as an estoppel in any subsequent collateral suit in the same or any other court, at law, in chancery, in probate or in admiralty, when either party, or the privies of either party, allege anything inconsistent with it, and this too whether the subsequent suit is upon the same or a different cause of action. The facts decided in the first suit cannot be disputed.' Bigelow on Estoppel, pp. 110, 111, 112; *Rauer v. Rynd*, 27 Cal.App. 556, 150 P. 780."

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

139 Cal.App.2d 193

Howard Leon INGRAM, a minor by Lols M. Ingram, His Guardian Ad Litem, and Lols Ingram, Plaintiffs and Respondents,

v.

BOB JAFFE CO., a corporation, Allen Tufeld, doing business as Coast Auto Parts; Allen Tufeld; Fred Jenkins; Sarah Jenkins; Elnora Thompson; John H. Teatiller; Doe One; Doe Two and Doe Three, Defendants.

Allen Tufeld, Individually and Allen Tufeld, doing business as Coast Auto Parts,

Appellant.

Civ. 21208.

**District Court of Appeal, Second District,
Division 1, California.**

Feb. 14, 1956.

Hearing Denied April 11, 1956.

Action for personal injuries sustained by fourteen year old boy on bicycle, who was allegedly struck down at intersection by automobile operated by a defendant, with permission of other defendants. The Superior Court, of Los Angeles County, Joseph M. Maltby, J., rendered joint and several judgment against the several defendants, and a defendant appealed. The District Court of Appeal, White, J., held that evidence that though boy was riding bicycle on left side of street in violation of statute, operator saw him, and that engine of automobile was dead before automobile jumped forward suddenly and struck boy, was sufficient to support finding that operator had last clear chance to avoid striking boy, and that operator had been negligent.

Judgment affirmed.

1. Judgment ⇨112

Where automobile operator, who was one of several defendants in action for personal injuries sustained by fourteen year old boy who was struck down by automobile, did not appear and answer, such was confession that all material facts alleged in complaint were true

2. Automobiles ⇨244(7)

In action for personal injuries sustained by fourteen year old boy on bicycle, who was struck down at intersection by auto-

mobile operated by a defendant, with permission of other defendants, evidence of boy that engine of automobile was dead, that operator saw him go in front of automobile, and that automobile jumped forward suddenly and struck him, together with other evidence, was sufficient to sustain finding of operator's negligence. West's Ann.Vehicle Code, §§ 177, 178, 402(a).

3. Negligence ⇨83.1

Whether or not the doctrine of last clear chance applies in a particular case depends entirely upon the existence or non-existence of the elements necessary to bring it into play.

4. Negligence ⇨136(32)

The application of doctrine of last clear chance is controlled by factual circumstances, and must ordinarily be resolved by fact-finder.

5. Automobiles ⇨244(59)

In action for personal injuries sustained by fourteen year old boy on bicycle, who was struck down at intersection by automobile operated by a defendant, with permission of other defendants, evidence that though boy was riding bicycle on left side of street in violation of statute, operator saw him, and that engine of automobile was dead before automobile jumped forward suddenly and struck boy, was sufficient to support finding that operator had last clear chance to avoid striking boy. West's Ann.Vehicle Code, §§ 177, 178, 402(a).

6. Automobiles ⇨184

Under statute making person liable for injury to another resulting from negligence in operation of vehicle by one operating vehicle with person's permission, and imputing to person negligence of operator, person is charged with negligence of operator, not with his willful misconduct. West's Ann.Vehicle Code, §§ 177, 178, 402(a).

7. Automobiles ⇨158

Willful misconduct in the operation of a motor vehicle is intentionally doing something, or failing to do something, with the knowledge that injury to another will be probable result of such act or omission.

8. Automobiles ⚡244(4)

In action for personal injuries sustained by fourteen year old boy on bicycle, who was struck down at intersection by automobile operated by a defendant, with permission of other defendants, evidence sustained finding that operator was, though negligent in failing to take last clear chance to avoid injury to boy known to be in place of peril, not guilty of willful misconduct in striking boy. West's Ann.Vehicle Code, §§ 177, 178, 402(a).

9. Automobiles ⚡243(1)

Testimony of fourteen year old boy plaintiff in automobile personal injury action, that, while visiting him in hospital, person, who had been loaned automobile by another, said that she, in turn, had loaned automobile to its operator, was admissible against person and, therefore, other, as evidence that operator was driving with permission of other at time of accident, under Code of Civil Procedure provision that where question in dispute between parties is obligation or duty of third person, whatever would be evidence for or against such person is prima facie evidence between parties. West's Ann.Vehicle Code, §§ 177, 178, 402(a); West's Ann.Code Civ.Proc. § 1851.

10. Automobiles ⚡244(22)

In action for personal injuries sustained by fourteen year old boy on bicycle, who was struck down at intersection by automobile operated by a defendant, with permission of other defendants, evidence sustained finding that operator was using automobile with permission of two defendants, who, in turn, had been given unrestricted use of automobile by another defendant, and, accordingly, that operator was driving with permission of such other defendant. West's Ann.Vehicle Code, §§ 177, 178, 402(a); West's Ann.Code Civ.Proc. § 1851.

Pacht, Ross, Warne & Bernhard, Isaac Pacht, Leo Altshuler, Los Angeles, for appellant.

Morrison, Simon & McKinsey, T. W. McKinsey, Long Beach, for respondents.

WHITE, Presiding Justice.

Defendant Allen Tufeld has appealed from a judgment rendered against him

jointly and severally with the other defendants. The other defendants have not appealed. They are Elnora Thompson, the driver of a 1940 Buick automobile, Sarah Jenkins, sister of Elnora, and Fred Jenkins, the husband of Sarah and the person who purchased said automobile from Tufeld. Sections 177 and 178 of the Vehicle Code had not been complied with and Tufeld was "liable and responsible for the * * * injury to person * * * resulting from negligence in the operation of such motor vehicle * * * by any person using or operating the same with [his] permission, express or implied, * * * and the negligence of such person shall be imputed to [him] for all purposes of civil damages." Section 402(a), Vehicle Code.

[1] Appellant urges that the evidence is insufficient to support the finding of negligence on the part of the defendant Elnora Thompson. In his opening brief he states, "It is undisputed that the automobile driven by Mrs. Thompson struck the plaintiff. But that fact alone does not prove negligence on the part of said defendant." Much of the brief is concerned with the preponderance of the evidence. That portion of his argument should have been, and no doubt was, addressed to the trial court. The question to be determined on appeal is whether there is any substantial evidence in the record contradicted or uncontradicted to support the finding attacked. The driver, Elnora Thompson, was personally served with summons and complaint, failed to appear and answer, and her default was duly entered. Elnora's failure to appear and answer was a confession that all the material facts alleged in the complaint were true. *Freeze v. Salot*, 122 Cal.App.2d 561, 566, 266 P.2d 140; 14 Cal.Jur. 887, Sec. 19. She did not appear as a witness. Howard Ingram, the minor plaintiff who was injured when the Buick collided with his bicycle, did testify fully as to the circumstances surrounding the collision as he saw it. Briefly stated, the Buick was stopped on 19th Street about three feet before it reached the boulevard stop at the entrance into Orange Street in Long Beach. When Howard was riding his bicycle north on the west or left side of Orange about 35 feet south of the south curb line of 19th Street, Elnora

was looking down inside the automobile and Howard noticed that the engine was not running. Before he entered the intersection, she looked toward him and followed him with her eyes until he started to go in front of the Buick. The engine was still dead then and she appeared to be watching him. When he was directly in front of the Buick, she looked back down toward the dashboard and Howard looked straight ahead. Before he cleared the car, the engine roared and the car jumped out and struck him.

[2] The evidence here stated and other evidence appearing in the record supports the finding of the driver's negligence. An automobile with a dead engine does not ordinarily come to life and jump from behind a boulevard stop sign into a through street with such speed as to collide with one passing in front of it unless its driver has been negligent. It is undisputed that no one interfered in any way with Elnora's control of the automobile.

In appellant's opening brief, he states: "We do know that the car then suddenly lurched forward and struck the plaintiff. The how or why of this sudden movement of this automobile has never been explained by plaintiffs and no evidence has been offered on that subject at all. We all know that an automobile may be started in motion suddenly without any negligence of any kind on the part of the driver. The gears may suddenly mesh, even though the gears have been left in a neutral position. Sometimes the brakes or the clutch may fail. What appears to be a dead battery may suddenly come to life. There may be other mechanical failures over which the driver has no control."

The court is not authorized to indulge in surmises as to the possibility of mechanical failure; and the circumstances surrounding the collision in the instant action do support the finding that the driver was negligent.

[3,4] "Whether or not the doctrine of last clear chance applies in a particular case depends entirely upon the existence or nonexistence of the elements necessary to bring it into play. Such question is con-

trolled by factual circumstances and must ordinarily be resolved by the fact-finder." *Daniels v. City and County of San Francisco*, 40 Cal.2d 614, 619, 255 P.2d 785, 788.

[5] In the instant action, that Howard was riding his bicycle on the left side of Orange in violation of the statute is not disputed. The court found, however, that Elnora had the last clear chance to avoid the collision. Appellant urges that, although Howard's own negligence had placed him in peril, the other two requisites for the application of the doctrine were missing; and that Elnora had no actual knowledge that Howard was in danger, and had no clear chance to avoid the collision. Howard's testimony that Elnora raised her head and appeared to be looking at him and following him with her eyes supports the finding that she knew Howard was there; and the finding that the driver of the car which was standing still with a dead engine had a clear chance to avoid injuring the person passing in front of the car will not be disturbed.

[6] Appellant is charged with the negligence of the driver, and not with her wilful misconduct. *Weber v. Pinyan*, 9 Cal.2d 226, 229, 70 P.2d 183, 112 A.L.R. 407.

Appellant urges that "It is also the general rule that a driver who fails to take advantage of the last clear chance to avoid injury to another, has acted with more than ordinary negligence and is guilty of wilful and wanton misconduct".

[7,8] Wilful misconduct in the operation of a motor vehicle is *intentionally* doing something, or failing to do something, with the knowledge that injury to another will be a probable result of such act or omission. *Turner v. Standard Oil Co.*, 134 Cal.App. 622, 626, 25 P.2d 988; *Weber v. Pinyan*, 9 Cal.2d 226, 232, 70 P.2d 183, 112 A.L.R. 407. There is no evidence in the instant action from which it could be found that Elnora Thompson *intended* to injure Howard or *deliberately* disregarded his safety. She knew where he was. She told Mrs. Ingram, Howard's mother, that: "I was only going to the grocery store. I had never driven that car before. It died. I started my motor up again and from then

on things happened so fast I don't remember." The court could reasonably infer that she had negligently failed to check the controls of the car before pressing the starter. Intention is a question of fact. The evidence in the record on the instant appeal fully supports a finding of simple negligence on the part of Elnora Thompson. The decisions cited by appellant in this connection have no application to the facts now before us, and it would serve no useful purpose to discuss them here. Elnora Thompson failed to use ordinary care to avoid injury to Howard who was known by her to be in a place of peril, and she is responsible because she had the last clear chance to avoid the injury.

Appellant urges that the judgment against him must be reversed for the reason that the evidence is wholly insufficient to support the finding that defendant Thompson was driving with his permission and consent. In his opening brief, he states: "* * * The sole testimony of plaintiff to support the finding of driving with permission is found in the testimony of plaintiff Howard Leon Ingram, a 14-year-old boy who testified concerning an alleged conversation he had with the defendant Thompson. This testimony was as follows:

"Q. Did you have any conversation with either Mrs. Thompson or Mrs. Jenkins regarding Mrs. Thompson's use of the car on that day? A. Mrs. Jenkins said if I had known anything like this was going to happen, I wouldn't have let her borrow the car."

"Inasmuch as this conversation admittedly took place out of the presence of defendant Tufeld, and there was no agency relationship between Tufeld and Mrs. Jenkins, the answer was clearly hearsay as to defendant Tufeld, and a proper objection on that ground was timely made but erroneously overruled."

[9] Section 1851 of the Code of Civil Procedure provides: "And where the question in dispute between the parties is the obligation or duty of a third person, whatever would be the evidence for or against such person is prima facie evidence between the parties." See also *Standard Oil Co. of*

California v. Houser, 101 Cal.App.2d 480, 489, 225 P.2d 539; and *Nye & Nissen, Inc. v. Central Surety and Ins. Corp.*, 71 Cal. App.2d 570, 575, 163 P.2d 100. Mrs. Jenkins' statement quoted above was, according to Howard's testimony, made when she and Elnora were visiting him in the hospital. The evidence was admissible against Mrs. Jenkins and, therefore, against Tufeld.

[10] Elnora, Mrs. Jenkins' sister, was a member of the Jenkins household for several months before, at the time of, and several months after her collision with Howard. While both Mrs. Jenkins and her friend testified that Mrs. Jenkins had told Elnora positively not to drive the Buick, those statements are merely evidence in conflict with Mrs. Jenkins admission and the other circumstances from which the court could have inferred permission. Appellant concedes that he delivered possession of the Buick to defendants Jenkins and made no restrictions on their use of the car or as to who should drive it. The owner's liability under Vehicle Code, Section 402, attached to appellant.

The judgment is affirmed.

DORAN and FOURT, JJ., concur.



139 Cal.App.2d 221

C. W. SEYBERT and Jean M. Seybert,
Plaintiffs and Respondents,

v.

COUNTY OF IMPERIAL, James Gibson,
Clifford Gibson, Rowland Gibson, Alma
Gibson, Ed Rutherford et al., Defendants.

James Gibson, Roland Gibson, sued as Row-
land Gibson, Pauline Gibson, sued as Alma
Gibson, and Ed Rutherford, Appellants.

Civ. 21423.

District Court of Appeal, Second District,
Division 1, California.

Feb. 15, 1956.

Personal injury action. The Superior Court, Los Angeles County, A. Curtis

Smith, J., denied a motion for change of venue, and the movants appealed. The District Court of Appeal, Fourt, J., held that denial of venue change motion, predicated upon nonresidence of three of four answering defendants and their claim that fourth defendant had been made a party solely for purpose of having action tried in Los Angeles County, was not a bar to subsequent motion, grounded on convenience of witnesses and promotion of ends of justice, even if movants could not show a "change of circumstances."

Reversed with directions.

1. Venue ⇐43

Denial of venue change motion, predicated upon nonresidence of three of four answering defendants and their claim that fourth defendant had been made a party solely for purpose of having action tried in county, was not a bar to subsequent motion, grounded on convenience of witnesses and promotion of ends of justice, even if movants could not show a "change of circumstances." West's Ann.Code Civ.Proc. §§ 395, 396, 397, 473.

2. Venue ⇐51, 52(1)

Where it appeared that accident giving rise to personal injury action had occurred in Imperial County and that at least six eyewitnesses to events surrounding accident were residents of that county, and there was no showing by plaintiffs that they had any necessary and material witnesses who resided in Los Angeles County, or whose convenience would be aided by retaining trial in Los Angeles County, it was an abuse of discretion of Los Angeles court to deny venue change motion grounded upon convenience of witnesses and promotion of ends of justice. West's Ann. Code Civ.Proc. §§ 397, subd. 3, 1989.

Crider, Tilson & Ruppe, Los Angeles, Jerome M. Budinger, for appellants.

Robert S. Butts, Hollywood, for respondents.

FOURT, Justice.

In this action for personal injuries, the plaintiffs pray for a money judgment. The defendant Roland Gibson (sued herein as Rowland Gibson and hereafter referred to as Roland Gibson) resides in Los Angeles county. All of the other defendants and the plaintiffs reside in the county of Imperial. The accident in question occurred on April 11, 1954, at Weist Lake, an inland body of water located in and allegedly owned by the county of Imperial. An unverified complaint was filed in the superior court in the county of Los Angeles on September 14, 1954.

On October 14, 1954, an attorney from a law firm of El Centro, representing certain of the defendants other than the county of Imperial, filed his affidavit for an order extending the time within which to plead. The attorney set forth in his affidavit, among other things, that he intended to move for a change of venue and that it would be necessary to secure the affidavits of the various defendants.

On November 4, 1954, the appearing defendants filed their answer and concurrently therewith filed a notice of motion for change of venue, setting forth in the notice that the grounds for the change were that at the time of the commencement of the action, James Gibson, Pauline Gibson (sued herein as Alma Gibson and hereafter referred to as Pauline Gibson) and Ed Rutherford were residents of the county of Imperial and that Roland Gibson (the resident of Los Angeles county) was not a proper party and had been named for the sole purpose of having the action tried in the superior court in Los Angeles county, and that the superior court in the county of Imperial was the proper court for trial of the case. Concurrently with the notice there was filed the affidavits of Roland Gibson, Pauline Gibson, James Gibson and Ed Rutherford, in support of the motion: An affidavit of Robert Butts, the attorney for the plaintiffs, in opposition to the motion was filed on November 19, 1954. The motion came on to be heard on November 22, 1954, and was continued to December 6, 1954.

An unverified first amended complaint was filed on November 29, 1954. (So far as appears from the record presented to us, no appearance has as yet been made on the first amended complaint.) A supplemental affidavit of James Gibson was filed on December 1, 1954. On December 6, 1954, the motion was heard and denied.

On January 12, 1955, James Gibson, Roland Gibson, Pauline Gibson and Ed Rutherford caused to be filed a notice of motion to change venue from the superior court in Los Angeles county to the superior court in Imperial county. The notice set forth that the motion would be made upon the ground that the convenience of witnesses and the ends of justice would be promoted by changing the place of trial to the superior court in the county of Imperial. The affidavit of James Gibson set forth in substance that he and all of his witnesses resided in the county of Imperial within fifteen miles of El Centro and more than 207 miles from Los Angeles. He further set forth the names of the eight witnesses he expected to call and the substance of the testimony he expected each to give. A reading of this affidavit would indicate that each of such witnesses, with one exception, saw what took place either before, at the time of or immediately after the accident, and consequently are extremely important witnesses to a proper disposition of the case.

No affidavits were filed by the plaintiffs in opposition to the defendants' affidavits in reference to the claim of convenience of witnesses and promotion of justice.

The motion came on to be heard on January 19, 1955, and was at that time continued to February 9, 1955, at which time it was submitted. On February 15, 1955, the motion was denied.

This appeal was taken by James Gibson, Roland Gibson, Pauline Gibson and Ed Rutherford. Appellants' contention is that there was an abuse of discretion and that under the circumstances the motion should have been granted.

[1] Respondents contend, in substance, that but one right is given to a defendant in a personal action to move to change the

place of trial of the action to the county of his residence and but one time fixed when he may assert it; that in this case the defendants made their motion to change on November 4, 1954, and it was denied. The respondents argue that if the defendants wanted to change the place of trial for the convenience of witnesses and the promotion of justice, they should have filed and had heard such motion at the time of the original motion to change the place of trial, and not having done so, are now foreclosed.

The order appealed from does not specify the grounds for the denial.

The first motion which was made in the case at bar was upon the grounds that at the time of the commencement of the action three of the four answering defendants were residents of the county of Imperial and that the fourth defendant was not a proper party to the action and was named solely for the purpose of having the action tried in Los Angeles county; that the county of Imperial was the proper place for the trial. The plaintiffs in that instance caused to be filed a counter-affidavit and the court denied the motion. The motion was made under the provisions of section 395, Code of Civil Procedure.

The second motion was made upon the ground that the convenience of witnesses and the ends of justice would be promoted by changing the place of trial to the county of Imperial. That motion was made under the provisions of section 397, Code of Civil Procedure.

Section 395 of the Code of Civil Procedure provides in part as follows:

"In all other cases, except as in this section otherwise provided, and subject to the power of the court to transfer actions or proceedings as provided in this title, the county in which the defendants, or some of them, reside at the commencement of the action, is the proper county for the trial of the action. If the action be for injury to person, * * * or negligence, either the county where the injury occurs, * * * or the county in which the defendants, or some of them, reside at the commencement of the action, shall be a proper county for the trial of the action. * * * If any per-

son is improperly joined as a defendant, or has been made a defendant solely for the purpose of having the action tried in the county, city and county, or judicial district where he resides, his residence must not be considered in determining the proper place for the trial of the action."

Section 396b of the Code of Civil Procedure provides in part as follows:

"Except as otherwise provided in Section 396a, if an action or proceeding is commenced in a court having jurisdiction of the subject-matter thereof, other than the court designated as the proper court for the trial thereof, under the provisions of this title, the action may, notwithstanding, be tried in the court where commenced, unless the defendant, at the time he answers or demurs, files with the clerk, or with the judge if there be no clerk, an affidavit of merits and notice of motion for an order transferring the action or proceeding to the proper court, together with proof of service, upon the adverse party, of a copy of such papers. Upon the hearing of such motion the court shall, if it appears that the action or proceeding was not commenced in the proper court, order the same transferred to the proper court; * * * provided further, that in any case, if an answer be filed, the court may consider opposition to the motions, if any, and may retain the action in the county where commenced if it appears that the convenience of the witnesses or the ends of justice will thereby be promoted."

Section 397 of the Code of Civil Procedure provides in part as follows:

"The court may, on motion, change the place of trial in the following cases:

* * * * *

"3. When the convenience of witnesses and the ends of justice would be promoted by the change".

The rule laid down by the Supreme Court in *McNeill & Co. v. Doe*, 163 Cal. 338, 340, 125 P. 345, and followed in *Yellow Mfg. Acceptance Corporation v. Stoddard*, 93 Cal.App.2d 301, 305, 208 P.2d 1040, is not applicable to the case before us, since in each of those cases the successive motions for change of venue were made upon the

same ground urged in the first motion, namely nonresidence of the defendant.

The case of *McNeill & Co. v. Doe*, *supra*, cited by both parties herein, was commenced in Fresno county and was in claim and delivery to recover certain personal property from the defendant. On June 9, 1910, the defendant filed a demurrer to the complaint and at the same time served notice and demand for a change of the place of trial to Tulare county on the ground he was a resident of the latter county when the action was commenced. The demand was accompanied by what purported to be an affidavit of merits. Before the day of hearing, the defendant filed a supplemental affidavit of merits. The motion was denied on June 20, 1910, as the affidavits of merits were radically defective. No appeal was taken from that order. On July 5, 1910, the defendant filed his answer and therewith served another notice of demand for a change of place of trial on the ground of his residence in Tulare county, where the action was commenced and on the further ground of the convenience of witnesses. On July 18th, the motion on both grounds was denied; properly as applying to the convenience of witnesses, as the affidavit of merits contained neither the names of the witnesses nor any statement of the matters as to which they would testify, and properly as applying to the demand for a change on the ground of residence of the defendant. No appeal was taken from that order.

On August 27, 1910, the defendant again served a notice and demand for a change of place of trial, partly on the ground of his residence in Tulare county at the commencement of the action and on the further ground of convenience of the witnesses, and filing therewith an affidavit of merits addressed to both grounds. The plaintiff filed a counter-affidavit on the matter of convenience of the witnesses. The court denied the motion.

The Supreme Court, in deciding the case, '63 Cal. at page 340, 125 P. at page 346, said:

"The order appealed from as far as it denied the application for a change of the place of trial on the ground of the residence of the defendant, was correct."

The court went on further to set forth that section 395 of the Code of Civil Procedure gave to the defendant in that case the right to a trial in the county where he resided when the action was brought; that the procedure for securing that right was contained in section 396 of the Code of Civil Procedure. The court said, 163 Cal. at pages 340-341, 125 P. at page 346: "*Thereunder* but one right is given to a defendant to move on *that* ground, and but one time fixed when he may assert *it*; and he is only then entitled to an order therefor upon a sufficient showing in his affidavit of merits. The appellant here was required to make his motion for the change when he filed his demurrer, and he did so; but, as his affidavit of merits was entirely insufficient, within the plain requirements of the law, the court properly denied his motion. He accepted this ruling as correct, as it undoubtedly was; and it was conclusive of any right to subsequently renew his motion on his own initiative, and *on the same ground*. His right to move ended with that denial. Hence, when he made this third motion on the *same ground* of residence in Tulare County, the court properly denied it, as his right to move in *that* respect was exhausted with the denial of his original application." (Emphasis added.)

The court went on further to say, 163 Cal. at page 341, 125 P. at page 346:

"As to the denial of the motion on the ground of the convenience of witnesses. Appellant lays but little stress for a reversal of the order on this point. Whatever other reasons might be assigned in support of the order of the court, denying a change on this ground, it is sufficient to say that, while the affidavits on the part of appellant tended to show some inconvenience in the attendance of his witnesses, should the trial be held in Fresno county, the affidavit of the plaintiff in some degree tended to show a like inconvenience to the witnesses of plaintiff if the trial was changed to Tulare county. The matter of granting a change of the place of trial on the ground of convenience of witnesses is a matter addressed to the sound discretion of the superior court; and this court will not interfere with its exercise, unless it ap-

pears that such discretion has been abused, or injustice done by the ruling. The situation presented here does not admit of such a claim."

In the case of Yellow Mfg. Acceptance Corporation v. Stoddard, supra, 93 Cal. App.2d 301, 208 P.2d 1040, the appellant Stoddard and one French were named as defendants in an action brought in the superior court in Alameda county for damages based upon contract. Appellant filed a demurrer and a notice of motion for change of venue and affidavit setting forth that he never had been a resident of Alameda county, but was a resident of Los Angeles county, and that the contract was made and performed there. Plaintiff filed no counter-affidavit, but the complaint set forth that the contract was made, so far as the plaintiff was concerned, in Alameda county. There was no showing in that proceeding that the co-defendant was not a resident of Alameda county. The court denied the motion for a change of venue and sustained the demurrer. No appeal was taken from that order. Plaintiff thereafter filed an amended complaint and appellant filed a demurrer, a notice of motion under section 473 of the Code of Civil Procedure to vacate the order denying the first motion, a new motion for change of venue and an affidavit showing appellant's residence in Los Angeles county and co-defendant's residence in Stanislaus county, and that the contract was entered into and was to be performed in Los Angeles county. The court denied both motions. No probative facts were set up or shown in the proceedings under section 473 and that motion was properly denied. In the opinion, the court said, among other things, 93 Cal.App.2d at page 306, 208 P.2d at page 1042:

"While it is true that a defendant's right to have the action tried in the county of his residence is a substantial and material right, *Thurber v. Thurber*, 113 Cal. 607, 45 P. 852, it is a right which can be exercised only by a proper application to the court. *McNeill & Co. v. Doe*, supra, 163 Cal. 338, 125 P. 345. Here, defendant made his application, but obtained a ruling adverse to him, and is not now entitled to a second application upon *the same grounds* (in the

absence, of course, of circumstances which, under section 473, would entitle him to relief). To allow a second application *under the circumstances of this case* would mean that there never would be a *final* ruling of the court on the question of venue. A defendant could bring not only a second but a third and fourth application." (Emphasis added.)

It is to be noted that in the McNeill case, the second and third motions for change of venue, in addition to being upon the ground of non-residence were also upon the further ground of convenience of the witnesses. With respect to the ground of non-residence, the court stated that defendant having once asserted his right to a trial in the county where he resided at the time the action was brought, and such motion having been properly denied, it was conclusive on any right to subsequently renew such motion on the *same* ground. The court then considered the matter of the denial of the defendant's motion to change the place of trial upon the ground of convenience of the witnesses. Had the court been of the opinion that having once made an application for a change of venue, the defendant was precluded from thereafter making another application therefor upon a different ground, it could have sustained the denial of the third motion as to both grounds under the one rule. On the contrary, however, the court considered separately the question of convenience of the witnesses and the denial of the motion was affirmed upon the ground that affidavits tending to show some inconvenience in the attendance of their witnesses had been filed by each of the parties and the matter of granting a change of the place of trial on such ground being addressed to the sound discretion of the trial court, its decision would not be disturbed in the absence of a showing of an abuse of discretion.

There is no merit in respondents' contention that "where the pleadings and the circumstances remain the same at the time of the second motion as they were at the time of the first motion, the moving party is barred from a second consideration or attempt to effect a change of venue." *Connell v. Bowes*, 49 Cal.App.2d 542, 122 P.2d

71, cited by respondents in support of their contention, is not applicable to the facts in the instant case. In that case, which was an action on a contract, the complaint alleged that the contract was made and entered into in Alameda county. Defendants filed a notice of motion for change of venue, accompanied by affidavit, averring the residence of all the defendants in the city and county of San Francisco. No reference was made in the motion or in the supporting affidavit to the allegation in the complaint that the contract was entered into in the county of Alameda. The motion was denied. Subsequently defendants filed a second motion for change of venue to the city and county of San Francisco, also based upon the residence of defendants therein, and in addition averred that the contract was entered into, and to be performed, in said city and county. They denied the allegation in the complaint that it was entered into, or to be performed, in the county of Alameda. Upon appeal from the denial of the second motion the court stated, 49 Cal.App.2d at page 544, 122 P.2d at page 72, that if the complaint and the conditions remained unchanged, a second motion for a change of venue should be discouraged; that "[i]t was never contemplated that determination of the merits of an action should be delayed by repetition of a motion for change of venue when it appears that the second motion is based upon a ground that could have been presented upon the first motion."

In the cited case, the allegation as to the place in which the contract was made and entered into appeared on the face of the complaint, and defendants could have urged that ground at the time of their first motion. The facts upon which to base a motion for a change of venue based upon the grounds of convenience of the witnesses and that the ends of justice would be promoted obviously would not, under all circumstances, be within the knowledge of defendant at the time he is required to file a motion for change of venue upon the grounds of non-residence. It is more often the rule than the exception that the matter of the convenience of witnesses is not discovered until some time after the cause is

at issue. In the case at hand, if defendants were denied their right to move for a change of venue on the grounds of the convenience of witnesses because they could not show a "change of circumstances," the plaintiffs, if they are so minded, could apparently dismiss as to the Los Angeles county resident and thereafter we would have the absurd situation of all the parties and all the witnesses being residents of Imperial county, litigating over an accident which took place in Imperial county in a court in the county of Los Angeles, which is some fifteen months behind in jury cases and some 200 miles away from the county of their residence. The net result would be that all of the witnesses will be seriously inconvenienced if they appear at all, and the defendants cut off from a right to have the cause tried in the county where they reside. The legislature certainly did not intend any such situation.

It is not contended that the defendants have unreasonably delayed the bringing of their motion, nor is there any showing that they are seeking to delay the determination of the action on its merits by a repetition of a motion for change of venue based upon grounds they could have presented upon their first motion. The record before us indicates that the amended complaint has never been demurred to nor answered and that therefore the case is not, at this time, at issue. It is difficult to see how or in what manner the plaintiffs could in anywise be prejudiced by a granting of the motion for a change of venue.

[2] The only remaining question is whether there was an abuse of discretion by the trial court in denying the motion. We think there was.

It appears to us from the record that the convenience of the witnesses and the ends of justice would be promoted by a change of the place of trial to the county of Imperial. The accident occurred in Imperial county. At least six eyewitnesses to the events surrounding the accident are all residents of Imperial county. These witnesses reside within fifteen miles of El Centro, the site of the court house in Imperial county. The distance from where the witnesses reside to the county of Los

Angeles is about two hundred miles. There was no showing by the plaintiffs that they have any necessary and material witnesses who reside in Los Angeles county, or whose convenience would be aided by retaining the trial in Los Angeles county. There was, therefore, no conflict of evidence presented to the court.

It would be difficult to imagine a situation where it would be more inconvenient to the witnesses if the place of trial was to be in Los Angeles county. Contemplate the difficulty that would be encountered if the jurors or the court or either of the parties determined that they would like to view the scene where the accident occurred. In this particular case a view of the place where the accident happened might well be essential to a proper understanding of the testimony of the witnesses. There are many other difficulties and inconveniences which are immediately apparent. If the place of trial is to be in Los Angeles county, personal attendance of the witnesses cannot be compelled. Code Civ. Proc. § 1989. It is true that the depositions of the witnesses could be taken, but as stated in *Carr v. Stern*, 17 Cal.App. 397, at page 408, 120 P. 35, at page 40, "* * * still it is manifestly always more satisfactory and desirable, in jury cases in particular, to present the testimony first hand to those who must determine the questions of fact, than to submit the same through depositions, which, in practical effect, is always a sort of hearsay way of adducing the proofs."

In the case of *Bartholomae Oil Corporation v. Associated Oil Co.*, 203 Cal. 176, 263 P. 516, the plaintiff brought the action in San Francisco. The defendant made a motion for a change of venue to the county of Los Angeles upon the grounds of convenience of material witnesses. Code Civ. Proc. § 397, subd. 3. The court stated, 203 Cal. at page 179, 263 P. at page 517:

"From the showing made by the parties in their affidavits and from the record, upon which alone the motion was made and denied, it appears that all witnesses upon behalf of defendant who will be required to testify to material facts reside in the county of Los Angeles. Plaintiff has failed

to aver that witnesses who will testify to facts aiding its case reside without the county of Los Angeles or would be inconvenienced if San Francisco, rather than Los Angeles, were the place of trial. The transaction arose entirely within the county of Los Angeles, and it is plaintiff, with its principal place of business in Los Angeles and the party demanding a jury trial, which is resisting the transfer. We are of the view that under the circumstances the denial of the motion for a change of the place of trial from the city and county of San Francisco to the county of Los Angeles constituted an abuse of discretion, and that the order should be reversed. See *Carr v. Stern*, 17 Cal.App. 397, 120 P. 35, and *Thompson v. Brandt*, 98 Cal. 155, 32 P. 890."

In the case of *Thompson v. Brandt*, 98 Cal. 155, 32 P. 890, the defendants moved to change the place of trial on account of the convenience of witnesses; the motion was denied. The plaintiff in that case did not deny in any manner the materiality of defendants' witnesses, nor that their convenience required a change of the place of trial, nor that the ends of justice would be promoted, nor that it alleged that it would cause delay in the trial, nor was the good faith of the defendants impugned. The court stated, in its decision, as follows, 98 Cal. at pages 156-157, 32 P. at page 890: "The record does not show the grounds upon which the court denied the motion, and we are at a loss to conceive of any grounds upon which the order appealed from could be justified. The action could properly have been brought in Fresno county, in which county the greater part of the land lies; and, no reason appearing in the record against the change, the order cannot be justified upon the ground that granting such orders are in the discretion of the court, for here there was no fact or reason against the change, and hence no basis for the exercise of discretion. The order should be reversed, and the court below directed to enter an order granting the motion."

In *First-Trust Joint Stock Land Bank of Chicago v. Meredith*, 16 Cal.App.2d 504, at page 508, 60 P.2d 1023, at page 1025, 62 P.2d 369, the court stated: "The rule is

well settled, of course, that a motion for a change of venue grounded upon the convenience of witnesses rests largely in the discretion of the trial court, the exercise of which will not be disturbed on appeal in the absence of a showing of its abuse. *Wrin v. Ohlandt*, 213 Cal. 158, 1 P.2d 991. But, where there is a showing that the convenience of witnesses and the ends of justice will be promoted by the change and there is absolutely no showing whatever to the contrary and a change has been denied, then there has been an abuse of discretion and there is no conflict of evidence to sustain the decision of the trial court. In the case of *Carr v. Stern*, 17 Cal.App. 397, 407, 120 P. 35, 39, the court said: 'It will thus be observed that, as stated, the defendants have not only wholly failed to deny or contradict the showing made by plaintiff for a change of the place of trial to the county of San Mateo, but have themselves made absolutely no showing that they have necessary and material witnesses who reside in the City of San Francisco or whose convenience would be subserved by retaining the trial in said city. There is therefore no question of a conflict of evidence presented which would, under the rule as to a substantial conflict in the evidence, render the decision of the trial court conclusive upon a reviewing court.'"

In the case of *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055, Gilbert brought the action in the Southern District of New York, but resided in Lynchburg, Virginia, where he operated a public warehouse. He alleged that in violation of the ordinances of the town, the oil company carelessly handled a delivery of gasoline and caused a fire and explosion which resulted in his damage. The oil company was a Pennsylvania corporation, doing business in New York and Virginia. When sued in New York, the corporation invoked the doctrine of "forum non conveniens" and claimed that the appropriate place for trial was in Virginia, where both parties did business, where all the events in litigation took place, where the most of the witnesses resided and where both federal and state courts were open to the plaintiff. The court, in the decision, set forth

much which is appropriate here, as follows, 330 U.S. at page 507, 67 S.Ct. at page 842:

"The principle of forum non conveniens is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute. These statutes are drawn with a necessary generality and usually give a plaintiff a choice of courts, so that he may be quite sure of some place in which to pursue his remedy. But the open door may admit those who seek not simply justice but perhaps justice blended with some harassment. A plaintiff sometimes is under temptation to resort to a strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself.

"Many of the states have met misuse of venue by investing courts with a discretion to change the place of trial on various grounds, such as the convenience of witnesses and the ends of justice."

At page 508 of 330 U.S., at page 843 of 67 S.Ct., it is said:

"If the combination and weight of factors requisite to given results are difficult to forecast or state, those to be considered are not difficult to name. An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining the attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, 'vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.

"Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home."

The order heretofore made denying the motion for a change of venue upon the grounds of convenience of the witnesses and the promotion of the ends of justice is reversed, and the court is ordered to make an order granting the motion.

WHITE, P. J., and DORAN, J., concur.



139 Cal.App.2d 199

O. H. HAGEN, Plaintiff and Respondent,

v.

Manuel R. SILVA, Rose M. Silva, Vincent Anthony Pine, Mary Anne Pine and San Jose Abstract & Title Insurance Company, a corporation, Defendants and Appellants.

Civ. 16598.

District Court of Appeal, First District,

Division 2. California.

Feb. 15, 1958

Quiet title action wherein defense of unpaid notes secured by deed of trust to property was interposed and wherein plaintiff alleged payment to person in whose office note had been negotiated and who had admitted authority to collect interest. The Superior Court, County of Santa Clara, David H. Adams, J. pro tem., entered judgment for plaintiff and defendants appealed.

The District Court of Appeal, Devine, J. pro tem., held that evidence on issue of whether such person to whom payment had been made had authority to collect principal would not support finding of payment.

Reversed and remanded for new trial.

1. Witnesses ⇨54

Where one spouse alone is plaintiff or defendant, since necessarily evidence sought to be introduced from other spouse must be for or against the marital partner, it must be excluded on objection by spouse. West's Ann.Code Civ.Proc. § 1881, subd. 1.

2. Witnesses ⇨54

Where both spouses are parties defendant, but one of them has disclaimed either expressly or virtually any interest in property subject to suit, spouse disclaiming becomes nominal and not real party in interest, and cannot invoke prohibition against admission of testimony from other spouse. West's Ann.Code Civ.Proc. § 1881, subd. 1.

3. Witnesses ⇨76(3)

In quiet title action, wherein plaintiff did not state nature of defendants' claims, and wherein defendants, husband and wife, in answer to general allegation of complaint stated that claims were without merit, came forth with asserted claims and prayed that their interest to extent of claimed indebtedness of plaintiff secured by deed of trust be declared, defendants thereby waived statutory prohibition against admission of testimony of either spouse. West's Ann.Code Civ.Proc. § 1881, subd. 1.

4. Quieting Title ⇨37(1)

Answer, filed in quiet title action where plaintiffs did not state nature of defendants' claims, stating that plaintiff's claims were without merits and praying declaration of defendants' interest to extent of claimed indebtedness of plaintiff to defendants secured by trust deed to property, if allegations were sustained by evidence, entitled defendants to judgment, even though no cross-complaint was filed, and even though no affirmative relief was asked.

5. Payment ⇨65(6)

In quiet title action wherein defendants claimed to be holders of promissory

notes secured by deed or trust to property, plaintiff had burden of proving his allegation of payment.

6. Bills and Notes ⇨499

Payment of negotiable note is made in due course when it is made at or after maturity to holder, and one who pays to someone other than holder has burden of proving that person to whom he paid it was authorized to receive payment. West's Ann.Civ.Code, § 3169.

7. Principal and Agent ⇨105(8)

An agent's authority to collect interest does not, in itself, carry with it authority to collect principal, but circumstances added to authority to collect interest may establish authority to collect principal.

8. Principal and Agent ⇨105(2)

To support implication of authority to collect note, in agent who negotiated note, under scrivener's rule, there must be union of two elements, agency in making note and known possession of indicia of indebtedness intentionally left in negotiating agent's custody, and mere possession alone does not suffice.

9. Principal and Agent ⇨123(10)

In quiet title action wherein defense was on basis of unpaid notes secured by deed or trust to property and plaintiff alleged payment to person in whose office note had originally been negotiated, and who had admitted authority to collect interest, evidence on issue whether such person had authority to collect principal would not support finding of payment. West's Ann.Civ.Code, § 3169.

Machado & Machado, San Jose, for appellants.

Bohnett, Hill, Cottrell & Bohnett, by L. D. Bohnett, San Jose, for respondent.

DEVINE, Justice pro tem.

Judgment on a complaint to quiet title having been rendered in favor of plaintiff, defendants husband and wife, who claimed to be holders of a promissory note and of a deed of trust on the property, have appealed. The issue in the case is whether

or not full payment of the note was made by plaintiff, and this is to be decided by determining whether the person to whom payments amounting to the entire principal and interest were made, was the agent of defendants for the purpose of receiving these payments.

Plaintiff executed the note and deed of trust on March 30, 1943, to parties named Pine, and exactly one year later the note and deed of trust were assigned to appellants Manuel R. Silva and Rose M. Silva. The note was payable at the office of Wesley L. Pieper Co. One Gladys E. McCormick transacted business under the fictitious name Wesley L. Pieper Co. Plaintiff, who had made a few interest payments earlier, paid several years' interest on the note on January 18, 1950, and on January 20, 1950, he paid the entire principal, both payments being by check made payable to "Pieper & Co." On January 26, 1950, he made a payment which, by the terms of McCormick's receipt, was to cover interest for the month of January to the 26th, and the fee for recording a reconveyance. Plaintiff was then about eighty-eight years old, was ill, thought he was about to die, and wished to clear up the debt. He made several demands for reconveyance, but was put off by McCormick, who misappropriated the money. It was not until 1953 that plaintiff learned, by his first direct contact with the Silvas, that remittance had not been made to them, and that McCormick had been arrested.

Mrs. Silva bought the note through McCormick, left the note at the Pieper Company, and, as she testified "it was to be the pay as it was before." She collected interest from time to time from McCormick. She had made loans to other persons through McCormick, but the dates of such loans do not appear.

McCormick became bankrupt, and no payment has been available from the bankruptcy proceedings.

Since one of two innocent parties must suffer, it must be decided whose agent McCormick was.

Almost all of the testimony which would tend to show that McCormick was the

agent of defendants for collection was the testimony of Rose M. Silva, under section 2055 of the Code of Civil Procedure, given over objection by her counsel acting as counsel for her husband.

Appellants argue that appellant husband's objection to the admissibility of this testimony should have been sustained under section 1881, subdivision 1, of the Code of Civil Procedure, which provides, among other things, that a wife cannot be examined for or against her husband without his consent.

Husband and wife were defendants in the cause and, in answer to the complaint, alleged that they owned the note, that it was unpaid, and that they held the deed of trust.

[1] In cases where one spouse alone is plaintiff or defendant, since necessarily the evidence sought to be introduced from the other spouse must be for or against the marital partner, it must be excluded. *Marple v. Jackson*, 184 Cal. 411, 193 P. 940.

[2] When both spouses are parties defendant, but one of them has disclaimed (either expressly or virtually) any interest in property, the spouse disclaiming becomes a nominal, not a real party in interest, and cannot invoke the prohibition of section 1881, subdivision 1. *Johnston v. St. Sure*, 50 Cal.App. 735, 195 P. 947; *Schwartz v. Brandon*, 97 Cal.App. 30, 275 P. 448; *Sylvester v. Kirkpatrick*, 79 Cal. App.2d 443, 180 P.2d 36.

It has been held that where husband and wife are parties plaintiff, the testimony of either may be given without the consent of the other, on the ground of waiver of the incompetency. In *re Strand*, 123 Cal. App. 170, 11 P.2d 89.

Apparently, there is no California case in which both spouses are defendants, and in which there has been no disclaimer of interest by one of them, in which it has been decided whether or not either spouse may be examined without the consent of the other. In *Dean v. Superior Court*, 103 Cal.App.2d 892, 230 P.2d 362, this court held that consent of the husband was not necessary when the wife, who had been

joined with the husband as a defendant in a personal injury case, her liability being predicated on her ownership of the automobile, was asked specifically about such ownership, but was not asked questions affecting *his* liability; and the court found it unnecessary to attack any broader question relating to privilege or incompetency to testify.

[3] It seems to be unnecessary, on this appeal, to give an answer which would apply to every cause in which plaintiff chooses to name both spouses as defendants and causes each, perforce, to be an interested party. It is sufficient to say that in such a quiet title action as this, wherein plaintiff does not state in his complaint, and is not required to state, the nature of defendants' claims, *Hyatt v. Colkins*, 174 Cal. 580, 163 P. 1007; *Kroeker v. Hurlbert*, 38 Cal.App. 2d 261, 101 P.2d 101, and in which defendants, in answer to the general allegation in the complaint that their claims are without merit, come forth in their answer with the assertion of their claims, and with a prayer that the court declare their interest to the extent of the claimed indebtedness, they are in position akin to that of parties plaintiff as in the *Strand* case, *supra*, and have waived the benefit of section 1881, subdivision 1, of the Code of Civil Procedure.

[4] Such an answer as filed by the defendants would, if the allegations were sustained by the evidence, entitle them to a judgment, even though no cross-complaint was filed, and even though affirmative relief was not asked. *Wolf v. Gall*, 174 Cal. 140, 162 P. 115; *Ridgway v. Ridgway*, 95 Cal.App.2d 46, 212 P.2d 6. To permit defendants to assert their claim and at the same time to permit the husband to prevent questioning of his wife about that claim, if not "monstrous" (as was described the possibility of immunity from scrutiny of a transaction by which one spouse took property from another in alleged defraud of creditors, in *Tobias v. Adams*, 201 Cal. 689, 258 P. 588) would at least be incongruous and unfair. Although, as appellants argue, the code section itself does not mention an exception in this situation, and an exception cannot be read into it, *Ayres v. Wright*, 103 Cal.App. 610, 284 P. 1077, the

benefits of the section may be waived, as in the *Strand* case, *supra*, and must be held to have been waived herein.

Considering, then, the testimony of Mrs. Silva together with that of plaintiff, we turn to the main question, whether or not the trial court's finding the note had been fully paid can be sustained.

[5] The burden of proving payment, once the uncanceled note, which had not been returned to the payor, and the deed of trust were proved (and plaintiff himself introduced the evidence of his debt), was upon the plaintiff. *Griffith v. Lewin*, 125 Cal. 618, 58 P. 205; *Bank of Italy, etc., Ass'n v. Bettencourt*, 214 Cal. 571, 577, 7 P. 2d 174.

[6] Payment of a negotiable note is made in due course when it is made at or after maturity to the holder, § 3169, Civil Code, and one who pays to someone other than the holder has the burden of proving that the person to whom he paid it was authorized by the creditor to receive payment, *Brainard v. Brainard*, 17 Cal.App.2d 520, 522, 62 P.2d 403, or that there was ratification, or that the creditor is estopped to deny the agency.

[7] It is admitted that McCormick was the Silvas' agent for the collection of interest. Mrs. Silva called at McCormick's office to collect interest on the note, and did collect interest through McCormick several times. However, an agent's authority to collect interest does not, in itself, carry with it authority to collect principal. 2 C.J. S., Agency, § 107 P. 1279; Restatement of the Law of Agency, Vol. I, § 71b; 21 R.C. L. 868.

In California, this rule has found expression in the case of *Schomaker v. Petersen*, 103 Cal.App. 558, 285 P. 342, which holds that authority to collect interest does not establish agency to collect principal, nor does it give rise to an estoppel. It is true that in that case the purported agent had made but one authorized collection of interest, undertook to make a discount from the principal sum, and made the collection before maturity, but the decision is based not only on those facts, but also on the general proposition of law as stated above.

Circumstances added to the authority to collect interest may establish authority to collect principal. 2 C.J.S., Agency, § 107, p. 1279; cases collected in 111 A.L.R. 584 et seq.

The circumstances in this case, in addition to the agency to collect interest, which are to be considered are: 1. that the note was made payable at the office of Wesley L. Pieper Co. 2. that in transactions with other persons McCormick was authorized by the Silvas to collect principal as well as interest. 3. that the note was left with McCormick, who had negotiated the loan, by Mrs. Silva.

The fact that the note was made payable at the office where the check was delivered is of little importance. This simply appointed the place where the offer of performance might be made under section 1489, subdivision 1 of the Civil Code. The note did not state that it was payable to Wesley L. Pieper Co., but to the Pines, or order, and there was not an endorsement by the Pines in blank, but an assignment, on the back of the note, by the Pines to the Silvas. The combination of the three factors of authority to collect interest, payment to be made at the agent's office, and negotiation of the loan by that agent were held insufficient to show authority to collect principal in *Tilton v. Boland*, 147 Or. 28, 31 P.2d 657.

The transactions in which McCormick was authorized by the Silvas to collect principal and interest on notes of other persons might have been helpful in showing, by circumstantial evidence, the extent of the agency in this case. There is no evidence, however, to show whether these transactions were earlier, concurrent with, or later than the Hagen "payment." The "other transactions" were lumped together in a claim filed by the Silvas in the McCormick bankruptcy, with no reference to dates. It is quite possible that the other transactions were subsequent ones, and would have no probative effect as showing a general agency at the time in question.

Finally, there is the fact that the Silvas permitted McCormick, who had negotiated the loan, to retain possession of the note. There is no evidence that Hagen saw the note, or demanded its return or demanded to see it; to the contrary, his testimony is that after he signed it, he never saw it again.

[8] The rule governing the permitted retention of the note by the agent who negotiated the loan is set forth in *Schomaker v. Petersen*, supra, 103 Cal.App. at page 567, 285 P. at page 346, as follows: "5. To support the implication of authority to collect under the scrivener's rule, there must be the union of two elements—agency in making the loan, and known possession of the *indicia* of indebtedness intentionally left in the negotiating agent's custody.

"* * * Mere possession alone does not suffice. It is the possession, known at the time, which gives the appearance of authority."

It is the appearance of authority which is the basis for the rule that possession by the negotiating agent may give rise to the inference of authority to collect principal, and not the mere possession, unknown to the payor. 2 C.J.S., Agency, § 107, p. 1278; 2 Am.Jur. 128.

In his unbusinesslike drawing of a check to Pieper & Co., plaintiff did not, so far as the evidence shows, have any knowledge that McCormick possessed the note.

[9] The evidence in the case as a whole was meager, and it may be that, with the question of evidence decided, a more thorough inquiry into the business relations of Mrs. Silva and McCormick may show an authority which, as the evidence now stands, cannot be held to have been established even by giving to the judgment the benefit of all reasonable inferences.

The judgment is reversed and the cause is remanded for a new trial.

NOURSE, P. J., and DOOLING, J., concur.

139 Cal.App.2d 78

**A. Richard MAST, Petitioner and Appellant,
v.**

**STATE BOARD OF OPTOMETRY of the
State of California et al., Defendants
and Respondents.**

Civ. 20721.

District Court of Appeal, Second District,
Division 2, California.

Feb. 7, 1956.

Hearing Denied March 28, 1956.

Proceeding by optometrist to set aside order of Board of Optometry revoking his license. The Superior Court, Los Angeles County, Kenneth C. Newell, J., sustained Board's finding as to one of the violations charged and denied writ, and optometrist appealed. The District Court of Appeal, Fox, J., held that evidence sustained finding that defendant had violated statute prohibiting payment of unearned rebates as inducement for referring patients.

Judgment affirmed.

1. Appeal and Error ⇨931(1)

On appeal, evidence is viewed in light most favorable to party successful in trial court

2. Physicians and Surgeons ⇨11(3)

In proceeding to revoke defendant's license as optometrist, evidence sustained finding that defendant had violated statute prohibiting payment of unearned rebates as inducement for referring patients. West's Ann.Bus. & Prof.Code, § 650.

3. Administrative Law and Procedure ⇨312

Technical rules of evidence need not be observed in an administrative hearing.

4. Administrative Law and Procedure ⇨313

Hearsay evidence is admissible in an administrative hearing if it is relevant and of such character or quality as that on which responsible persons are accustomed to rely in conduct of serious affairs. West's Ann.Gov.Code, § 11513(c).

5. Physicians and Surgeons ⇨11(3)

In proceeding to revoke optometrist's license on ground of violation of statute prohibiting payment of unearned rebates as inducement for referring patients, affi-

davits of persons who allegedly had received rebates for referring patients were admissible. West's Ann.Gov.Code, § 11513(c); West's Ann.Bus. & Prof.Code, § 650.

6. Physicians and Surgeons ⇨11(3)

Record in proceeding to revoke optometrist's license on ground of violation of statute prohibiting payment of unearned rebates as inducement for referring patients disclosed that hearsay affidavits had been properly used to supplement or explain direct evidence. West's Ann.Gov.Code, § 11513(c).

7. Appeal and Error ⇨994(3), 1012(1)

Questions of credibility of witnesses and weight to be given evidence is for triers of fact.

8. Mandamus ⇨172

In mandamus proceeding to set aside an administrative order, a mere attack on credibility of a witness at administrative hearing does not entitle party to call that witness for further examination and impeachment unless a showing is made to satisfaction of trial court that he was unreasonably foreclosed from proceeding with his impeachment at original hearing or that he has available new impeaching evidence which he could not with reasonable diligence have produced before the board. West's Ann.Code Civ.Proc. § 1094.5(d).

9. Mandamus ⇨172

In mandamus action to set aside administrative order revoking optometrist's license, wherein it appeared that witness at administrative hearing had been subjected to examination with ample opportunity for impeachment, and it appeared that optometrist did not expect to elicit anything beyond that already in record, trial court did not abuse discretion in refusing to permit further testimony from witness for impeachment purposes. West's Ann.Code Civ.Proc. § 1094.5(d).

10. Mandamus ⇨168(4)

In mandamus proceeding to set aside order revoking optometrist's license, evidence sustained finding that administrative hearing officer had not acted arbitrarily or capriciously and had not been guilty of misconduct.

11. Physicians and Surgeons ⇨11(3)

Accusation charging optometrist with unprofessional conduct in respect to violation of statute prohibiting payment of unearned rebates as inducement for referring patients sufficiently advised optometrist of acts with which he was charged to enable him to prepare defense, and was not required to state particular individuals referred at specific times or specific sums paid. West's Ann.Gov.Code, § 11503; West's Ann.Bus. & Prof.Code, § 650.

12. Physicians and Surgeons ⇨10, 11(3)

An excessive charge to patients is not an essential element of violation of statute prohibiting payment of unearned rebates as inducement for referring patients, and optometrist could be found guilty of violation without finding that excessive charges had been made. West's Ann.Bus. & Prof. Code, § 650.

13. Administrative Law and Procedure

⇨818

Where an agency exercising state-wide jurisdiction has imposed a single penalty based on multiple charges of misconduct, and reviewing court holds some of them to be unsupported, case should normally be returned to agency with direction to reconsider penalty.

14. Physicians and Surgeons ⇨11(3)

Where Board of Optometry found optometrist guilty of unprofessional conduct in three respects, and stated that each violation warranted revocation of license, but reviewing court found that two of the charges were unsupported, reviewing court was not required to remand matter to Board for reconsideration of penalty. West's Ann.Bus. & Prof.Code, §§ 650, 3100, 3101.

15. Physicians and Surgeons ⇨11(2)

Board of Optometry's action in revoking optometrist's license for violation of

statute prohibiting payment of unearned rebates as inducement for referring patients was not abuse of discretion. West's Ann. Bus. & Prof.Code, § 650.

Gomer & Himmelfarb, Beverly Hills, and Newell & Chester, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Edward M. Belasco, Deputy Atty. Gen., for respondents.

FOX, Justice.

Petitioner brought this mandate proceeding to set aside the order of respondent board revoking his license to practice optometry.

An accusation was filed with the board charging petitioner with three counts of unprofessional conduct, viz.: (1) employment of "cappers" or "steerers" to obtain business, Business & Professions Code, § 3100; (2) obtaining fees by fraud or misrepresentation, B. & P. Code, § 3101; and (3) payment of unearned rebates as inducement for referring patients, B. & P. Code, § 650. Following hearing, the board found petitioner guilty on all counts and ordered his license revoked. Upon a review of these proceedings the trial court found there was insufficient evidence to sustain the board's findings that petitioner had violated sections 3100 and 3101 of the Business and Professions Code. The court, however, sustained the board's finding that petitioner had violated section 650, Business and Professions Code¹ and thereupon denied a peremptory writ of mandate. It is from this judgment that petitioner appeals.

[1] The record² reveals that petitioner was licensed to practice optometry in Cali-

1. Section 650, B. & P. Code, reads: "The offer, delivery, receipt or acceptance, by any person licensed under this division of any unearned rebate, refund, commission, preference, patronage dividend, discount, or other unearned consideration, whether in the form of money or otherwise, as compensation or inducement for referring patients, clients, or customers to any person, irrespective of any membership,

proprietary interest or co-ownership in or with any person to whom such patients, clients or customers are referred is unlawful."

2. On appeal the evidence is viewed in the light most favorable to the successful party in the trial court. Kendall v. Board of Osteopathic Examiners, 105 Cal.App.2d 239, 233 P.2d 107.

fornia in 1943. He established offices in San Jose, Oxnard, Riverside, Brawley and San Bernardino. It is his activities in connection with the latter office that are here under review.

Raymond N. Roth, a lieutenant in the United States Air Force, was assigned to duty at Norton Air Base, which is in the vicinity of San Bernardino, from June, 1951, to the date of the hearing before the respondent board in May, 1953. He was the only optometrist at the base. Petitioner became acquainted with Lt. Roth in July, 1951. He also knew Lt. Roth's wife, Audrey. Petitioner advised Roth that he was interested in securing optometrical work from the base, and, according to his testimony, he was willing to give a 30 percent discount. Petitioner provided Lt. Roth with boxes and his professional envelopes for use in transmitting prescriptions. Lt. Roth, in sending patients to petitioner from the base, prepared referrals for refractions marked "Referred to Dr. A. R. Mast, 509 'E' Street, San Bernardino," signed "R. N. Roth." The patients brought these signed referrals to petitioner's office, hence by this procedure petitioner knew which patients had been referred by Lt. Roth. Mrs. DeRosie, who was employed by petitioner as receptionist, bookkeeper and record keeper, initially received these referrals. One of her principal duties was handling referrals of patients from the Norton Air Base. Roth "was in contact with the office constantly." He reported at one time that people were complaining that they were being overcharged and that such complaints had reached the Adjutant General's office and that office was "getting suspicious." He arranged a conference with petitioner to discuss the matter.

In petitioner's office, the Air Base business was kept separately on report sheets. Also, under Dr. Mast's orders, a separate bank account was set up for this business.

Petitioner conducted his San Bernardino office personally during July and August, 1951, but on September 4, 1951, he employed Dr. Arthur Harris, an optometrist, to do the optometry work in this office. Such arrangement continued until the mid-

dle of October, 1952, when differences arose between the parties over the amount of compensation to which Dr. Harris was entitled. The relationship was thereupon terminated. During this period petitioner was in the San Bernardino offices only a few days each month.

In discussing this referral business, petitioner stated to Dr. Harris that "he had 25 percent advertising costs at the Air Base * * *." He declined, however, to explain what he mean by "advertising costs." Petitioner told Mrs. DeRosie that "it was costing him 25 percent to get the business from the base." On another occasion he told her "he was paying Lt. Roth 25 percent to get the business."

Six checks signed by petitioner and payable to Audrey Roth, wife of Lt. Roth, were introduced in evidence. These covered a period from August 2 to October 15, 1951. They ranged from \$17.23, the amount of the first, to \$63.44, the face of the last. Petitioner, however, claims these checks were in payment for services rendered on an hourly basis by Mrs. Roth in connection with his advertising program, she assertedly having had some experience in preparing advertising copy. The only specimen of her work that was offered in evidence was a pencil draft of a proposed newspaper advertisement 2 x 3¼ inches, announcing the opening of petitioner's San Jose office, together with another sheet containing 16 lines relative to advertising media. It does not appear, however, that this material was used. While petitioner's bookkeeper testified that Mrs. Roth acted as petitioner's advertising consultant, she did not render any services at the San Bernardino office. No record was offered to show the number of hours she worked per day or per week; no bill was submitted for services rendered. The checks were drawn in favor of Mrs. Roth by the bookkeeper in such amounts as either petitioner or Mrs. Roth requested. A withholding statement appears to have been prepared.

Although Lt. Roth and his wife were called as witnesses and admitted acquaintance with petitioner, they both refused to answer upon constitutional grounds all

questions concerning their dealings with or relationship to him.

There was received in evidence, over petitioner's objections, Exhibit 29, which is an affidavit by Lt. Roth, subscribed and sworn to before a deputy attorney general of California on March 3, 1953, reading as follows:

"Norton Air Force Base
San Bernardino, California
March 3, 1953

"I, Raymond N. Roth, 1st Lt. AO 962907, Hq 2796th Medical Group, USAF Hospital, Norton AFB, hereby give the following written statement freely and voluntarily without promise of any reward or immunity, with full realization that said statement may be or will be used at a hearing to be held before a hearing officer of the State of California in and for the State Board of Optometry, or at any deposition necessarily set or required under the aforementioned hearing.

"Shortly after my arrival after being assigned to Norton AFB, San Bernardino, Calif., in the latter part of the month of June 1951, I first met Dr. A. R. Mast, having been asked by a mutual friend, a Dr. E. M. Lubow, at Dayton, Ohio, a school-mate of Dr. Mast's, to say hello. We met socially on many occasions and during one of these occasions Dr. Mast broached the subject of a referral fee for patients referred for corrective spectacles. I believe the referral fee was, as I remember, 10% of the gross in each case. The period in which this was continued was from approximately September 1951 until September 1952. Originally payment was made in the form of employment for my wife, and later this was discontinued. This was a nominal employment. Later this practice was discontinued and direct payments were made to my wife. The payments were approximately \$80 to \$90 every month.

"I discontinued receiving any payment from Dr. Mast after September of 1952.

"I, Raymond N. Roth, have read the foregoing statement and I hereby state that it is my own.

"(Signed) Raymond N. Roth"

On June 30, 1953, Roth executed another affidavit, Exhibit O, in which he asserted the above affidavit of March 3, 1953, "was obtained under duress by reason of promises of immunity, undue influence, and intimidation" and that he was under medical care and did not realize what he was signing.

William J. McMahan, Special Agent for the United States Air Force, testified the signature of Lt. Roth to Exhibit 29 was not obtained by duress; that no promise of immunity was offered; neither were any threats made, nor any coercion exercised. He further testified that Lt. Roth was in uniform and did not appear to be ill.

Gene S. Boaz, Special Agent, 18th District Office of Special Investigation, Norton Air Base, testified to a conversation with Mrs. Roth, in the presence of her husband, in which she stated that she had never been employed by Dr. Mast for any particular work, that she was merely placed in the payroll as a means to convey a percentage or referral fee that was promised by Dr. Mast to her husband for referring patients from Norton Air Base to his optometry office in San Bernardino. Special Agent Boaz also testified that Roth told him Dr. Mast had offered him 10 percent of the gross business that he referred to Mast's office and that this amounted to approximately \$1,500 over the period September 1951 to September 1952.

The trial court found, after exercising its independent judgment on all the evidence, that petitioner did violate the provisions of section 650, supra, in the following manner: "That in or about the month of July, 1951, the [petitioner] and said Roth entered into an oral agreement whereby the said Roth would refer military personnel or their dependents from the Norton Air Base to the [petitioner's] offices, located at 509 E Street, San Bernardino, California, for optometrical services, and that in consideration of said Roth so referring military personnel or their dependents to said [petitioner] for optometrical services, the [petitioner] would pay said Roth for said referrals; that it was further agreed between the [petitioner] and said Roth that the payment for said referrals would not be

made directly to said Roth, but that said payments would be made to Audrey Roth, the wife of said Roth; that pursuant to said oral agreement, said Roth did refer, during the period from July, 1951, to in or about September, 1952, military personnel and their dependents from the Norton Air Base to the [petitioner's] office for optometrical services, and that [petitioner] did furnish optometrical services to said military personnel and to dependents of said military personnel and did receive from said military personnel and said dependents of said military personnel payment for said optometrical services, and that said [petitioner] did pay, during the period from in or about July, 1951 to on or about October 15, 1951, a consideration in cash to said Audrey Roth for the referrals of military personnel and dependents of military personnel to [petitioner] for optometrical services. That said payments to said Roth and Audrey Roth were consideration for the referrals of military personnel and the dependents of military personnel to [petitioner] for optometrical services and were not for the optometrical services of any nature rendered by said Roth or wife."

[2] Petitioner's first contention is that "the findings of fact are not supported by the evidence." This contention is lacking in merit.

Petitioner's solicitation of Lt. Roth for the optometrical work from the air base; his furnishing of office supplies to facilitate the referral of such business; Lt. Roth's identification of the referrals by his signature; the substantial number of such referrals; the segregation of the business from the air base on separate report sheets; the maintenance of a separate bank account

for the money coming from this segment of petitioner's business; the constant contact Lt. Roth maintained with petitioner's office; petitioner's admissions that he had to pay for the business from the air base; the checks made to Mrs. Roth; her admissions to Special Agent Boaz of the Norton Air Base; the affidavit of Lt. Roth subscribed and sworn to before a deputy attorney general; and the reasonable inference that may be drawn from this evidence furnish substantial support of the court's finding to the effect that petitioner and Roth entered into an agreement by which the latter would refer military personnel and their dependents from Norton Air Base to petitioner's office in San Bernardino for optometrical services and that petitioner would and did pay Roth therefor by making such payments to his wife, Audrey. Having determined that there is substantial evidentiary support for the findings, we need not, as a reviewing court, go further on this phase of the case. *Kendall v. Board of Osteopathic Examiners*, 105 Cal. App.2d 239, 233 P.2d 107; *Ashdown v. Department of Employment, State of California*, 135 Cal.App.2d 291, 287 P.2d 176; *Webster v. Board of Dental Examiners*, 17 Cal.2d 534, 539, 110 P.2d 992.

[3,4] Appellant points out that the Roth affidavit (Exhibit 29) is hearsay. He then proceeds to argue (a) that it was "improperly admitted into evidence" and, (b) that this affidavit was the "only evidence" regarding any agreement between petitioner and Lt. Roth, and that since it is hearsay it "is insufficient to support a finding of fact." Petitioner relies on Government Code, § 11513(c).³ The statute, however, does not support his conclusions in the circumstances here present. First, it will be noted that technical rules of evi-

3. Government Code, section 11513(c), reads: "The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions.

Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. The rules of privilege shall be effective to the same extent that they are now or hereafter may be recognized in civil actions, and irrelevant and unduly repetitious evidence shall be excluded."

dence need not be observed in administrative hearings. The section then provides that "Any *relevant* evidence shall be admitted *if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs*, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions." (Emphasis added.) Thus hearsay evidence is *admissible* in an administrative hearing if (1) it is relevant, and (2) it is of the character or quality on which "responsible persons are accustomed to rely in the conduct of serious affairs." The affidavit of Lt. Roth meets both of these tests of admissibility. It was clearly relevant for it dealt with the relationship between him and petitioner which had been established by reason of the referrals, and the relationship between petitioner and Mrs. Roth which had been revealed by the checks she had received from him. The affidavit of Lt. Roth obviously meets the second requirement for admissibility, for it is not only in affidavit form but is subscribed and sworn to before a responsible state official. This is the sort of information on which "responsible persons are accustomed to rely in the conduct of serious affairs."⁴

[5] The next sentence relates to the *use* that may be made of admissible hearsay. The section provides that "Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence * * *." In the instant matter there was direct evidence of referrals of military personnel from the air base by Lt. Roth to petitioner, and there was direct evidence of payments by petitioner to Lt. Roth's wife. Lt. Roth's affidavit served to supplant this direct evidence and to explain the relationship between the parties.

Its use was thus plainly within the provisions of the statute.⁵

[6] In this connection, petitioner points to the provision of the statute that hearsay "shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." He then insists that the Roth affidavit is the only evidence of an agreement between the parties for a rebate. Hence, he argues, the finding, quoted supra, is lacking in requisite evidentiary support. In making this argument petitioner overlooks the fact that in addition to the direct evidence of referrals and payments to Mrs. Roth there was also significant indirect evidence before the board and the court. The testimony that petitioner had stated he was having to pay to get the business from the air base, and in particular that he was paying Lt. Roth a certain percentage for such referrals, was before the triers of the facts. There was also testimony that a separate list of the referrals from the air base was kept on report sheets and that a separate bank account was established for this business. Without enumerating additional circumstances or the inferences that may be drawn reasonably from the other testimony, it is patent that the challenged finding is not based solely on hearsay but rather upon both direct and indirect evidence and the reasonable inferences therefrom as well as on admissible hearsay.

[7] Petitioner argues there was no competent evidence to contradict the testimony that Mrs. Roth was employed to and did perform advertising services for him and that his payments to her were for such services. Hence, such testimony should have been accepted. In making this contention petitioner is actually arguing the credibility of the witnesses and the weight to be given to the evidence. That function

4. While petitioner does not specifically complain of the receipt in evidence of Mrs. Roth's hearsay admission, it clearly fails in the same pattern as does Lt. Roth's affidavit. Her statement was relevant because it dealt with the relationship between her and petitioner which had been disclosed by the checks she had received from him. It was made

in her husband's presence to a special agent of the Air Force. Responsible people would undoubtedly rely on information so acquired in the conduct of serious affairs.

5. The same reasoning, with the same result, applies with equal force to the use of the hearsay admission of Mrs. Roth.

is, of course, for the triers of the facts. In evaluating petitioner's testimony they were entitled to take into consideration his personal interest in the outcome of these proceedings. Furthermore, the circumstances, as herein briefly noted, surrounding the asserted rendition of advertising services for petitioner were not such as to command confidence in the story of petitioner and his bookkeeper. The triers of fact were not required, as a matter of law, to give credence to this testimony. There was evidence from which contrary inferences could be drawn. It is well settled that a reasonable inference from indirect or circumstantial evidence may be accepted as true as against direct evidence to the contrary. *Bohn v. Watson*, 130 Cal.App.2d 24, 34, 278 P.2d 454 and cases there cited.

Petitioner asserts he was denied the qualified trial de novo to which he was entitled in a mandamus proceeding to review the administrative determination of a statutory agency exercising statewide jurisdiction. He predicates this argument on the trial court's refusal to allow him to call Mrs. DeRosie and Dr. Harris "for further cross-examination and impeachment." He relies on the following language from *Dare v. Board of Medical Examiners*, 21 Cal.2d 790, 799-800, 136 P.2d 304, 309: "If the credibility of witnesses before the board be brought in question in the mandamus proceeding the opportunity should be afforded for further examination or to contradict or impeach their testimony under well recognized rules of evidence and procedure." In arguing this point before the trial court, Mr. Gomer, petitioner's counsel, stated he wished to cross-examine Mrs. DeRosie as to the number of times she talked with Dr. Mast, claiming he was prevented from pursuing this inquiry by the hearing officer. However, Mr. Gomer conceded this had been answered by Mrs. DeRosie with the statement "I don't recall." Mr. Gomer then stated: "Now, I don't know if anything relevant would come from such a cross-examination * * * maybe she does not recall, but I say that is evasive tactics." Mr. Gomer, in stating he wanted to question Mrs. DeRosie further relative to sales of frames to civilians, said

he was not satisfied with her evasive answers at the hearing. He then observed: "Naturally, she may come back on the stand and still say, 'I don't recall; I don't recall; I don't recall,' and nothing will come of this examination." Other references were made by Mr. Gomer to what he considered vague testimony by Mrs. DeRosie. He made no offer to show that any other or different testimony would be given by Mrs. DeRosie or that her memory of past events would be better at the mandamus hearing than it was at the administrative hearing. It is patent that he expected the same responses from Mrs. DeRosie, and hoped primarily that the court would give little credit to her testimony after observing her demeanor. The court refused to sanction a reiteration of the testimony, observing that the opportunity to impeach had been given at the time of the hearing and there was no showing that a source of impeachment not then available could now be produced and directed against the witness.

[8,9] The court's ruling was sound and within the legitimate bounds of its discretion. Code Civ.Proc. § 1094.5(d). The record shows that petitioner was given ample opportunity to impeach Mrs. DeRosie by the hearing officer. He was curtailed only when he sought to employ improper impeachment methods or when he persisted in asking questions which had already been answered to the best of the witness's ability, though not to his satisfaction. The weight to be given her testimony was for the trial court in its independent review of the record. A mere attack on the credibility of a witness does not entitle a party, in the mandamus action, to call that witness for further examination and impeachment unless a showing is made to the satisfaction of the trial court that he was unreasonably foreclosed from proceeding with his impeachment at the original hearing or that he has available new impeaching evidence which he could not with reasonable diligence have produced before the board. See Code Civ.Proc. § 1094.5(d); *Sautter v. Contractors' State License Board*, 124 Cal.App.2d 149, 154, 268 P.2d 139. The language previously quoted

from *Dare v. Board of Medical Examiners*, supra, when read in the light of the issue before the court and in conjunction with the several sentences immediately preceding it, harmonizes perfectly with the view here expressed. For it was the essential purpose of the *Dare* case, and of Code of Civil Procedure section 1094.5, which was enacted subsequent to the *Dare* case and codified the procedures developed by the cases for reviewing adjudications of statutory statewide administrative agencies, to preserve the dignity and integrity of the proceedings before the administrative tribunal and to avoid a pointless repetition upon the limited trial de novo of the evidence presented before the administrative board. Where, as here, the witnesses in question had been subjected to a searching examination by petitioner at the hearing, where ample opportunity had been offered therein to impeach their testimony, and where it affirmatively appears from the discussion of counsel that he did not expect to elicit anything from the witnesses beyond that already in the record, the trial judge does not abuse his discretion in refusing to permit further testimony from such witnesses, the effect of which would be an encumbrance of the record with redundant matter. *Sparks v. Board of Dental Examiners*, 54 Cal.App.2d 491, 494-495, 129 P.2d 405. This being the situation in the case at bar, the ruling of the court was in full concord with the letter, spirit and purpose of the limited trial de novo provided by mandamus proceeding for judicial review of the action taken by a statutory statewide agency.

[10] Petitioner charges the hearing officer was guilty of misconduct, which prevented him from having a fair and impartial hearing. In support of this charge he recites nine instances in his brief which he asserts show bias, prejudice and misconduct on the part of the hearing officer. The trial judge was called upon to evaluate these incidents. He found as a fact that the hearing officer did not act arbitrarily or

capriciously and did not commit any abuse of discretion.⁶ We have examined these various assignments and find no basis for disagreeing with the trial court's evaluation thereof. To detail and discuss each of these incidents would serve no useful purpose.

Petitioner argues that the accusation is insufficient to advise petitioner of the "nature of the conduct asserted to be improper." There is no merit in this contention.

Paragraph IV of the accusation states: "That the respondent has been guilty of unprofessional conduct in that he has violated the provisions of Section 650 of the Business & Professions Code of the State of California at the time and in the manner as more particularly alleged in Paragraph III of this Accusation."

Paragraph III of the accusation alleges:

"That Raymond N. Roth, First Lieutenant, 2769th Medical Group, USAF Hospital, Norton Air Base, at the times mentioned in this Accusation was not and is not now licensed to engage in the practice of optometry in the State of California by the State Board of Optometry;

"That in or about the month of July, 1951, the respondent and said Raymond N. Roth entered into an oral agreement whereby for the referral by Raymond N. Roth of military personnel or their dependents from Norton Air Base to Respondent's offices in San Bernardino, California, for optometrical services that said Raymond N. Roth would receive from respondent a 10% commission on the gross fee charged or collected for optometrical services by respondent from the referred military personnel or their dependents;

"That pursuant to the above-mentioned agreement between the respondent and Raymond N. Roth, from September, 1951, to September, 1952, Raymond N. Roth referred military personnel and their dependents for optometrical services to the respondent; that pursuant to their agree-

6. This matter was also covered in the conclusions of law in the following language: "That the hearing officer did not act arbitrarily or capriciously, and did

not commit any abuse of discretion in the conduct of said hearing or in the ruling upon objections."

ment the respondent paid to Raymond N. Roth or his wife, Audrey Roth, about \$90.00 per month as said Raymond N. Roth's 10% commission for the referral of the above-mentioned persons to the respondent by Raymond N. Roth; and that said 10% commission paid to Raymond N. Roth was unearned consideration for the referral of the above-mentioned persons."

Section 11503 of the Government Code provides in part: "The accusation shall be a written statement of charges which shall set forth in ordinary and concise language the acts or omissions with which the respondent is charged, to the end that the respondent will be able to prepare his defense."

[11] A mere reading of the accusation demonstrates that it adequately advised petitioner of the "nature of the conduct asserted to be improper" and sufficiently acquainted him with the acts with which he was charged to enable him "to prepare his defense." To require, as petitioner argues, that the accusation must state particular individuals were referred by Lt. Roth to petitioner at specific times, and that in return for such referrals Roth was paid specific sums at specified times would be unreasonable and impractical in the circumstances here presented for such information as was available along these lines was in petitioner's files. We share the view of the trial judge that the accusation was in all respects sufficient.

[12] Petitioner also argues that "the findings are insufficient to support a violation of section 650 of the Business and Professions Code. His theory is that the section was designed to prevent patients from being charged excessive fees in order that a "kickback" could be made to the licentiate who made the referral. He then argues that since there is no finding that petitioner charged the military personnel or their dependents who were referred to him by Lt. Roth a fee higher than that charged by him for other like services, he cannot be held to have violated the law. The statute is not so limited. It was designed to protect the public and to prohibit all unearned rebates, refunds, commissions

and the like among licentiates engaged in the healing arts for the referral of patients. An excessive charge is not an element of the offense. The absence of such a finding is, therefore, wholly immaterial.

Petitioner's final contention is that the trial court erred in not remanding the matter to the board for reconsideration of the penalty. He argues that the board's order revoking his license was based on its finding and conclusions that petitioner had violated sections 3100, 3101 and 650 of the Business and Professions Code. Inasmuch as the court found there was no violation of sections 3100 and 3101, he asserts that it is questionable whether the board would have imposed so drastic a penalty as license revocation for a violation of section 650 alone, and hence the court should have referred the case to the board for reconsideration of the penalty.

[13] This argument would be a compelling one if the state of the record admitted of any doubt as to whether the board would have exacted so severe a penalty for petitioner's violation of section 650 alone. It is now fully established that where an agency exercising statewide jurisdiction has imposed a single penalty based on multiple charges of misconduct, and the court holds some of them to be unsupported, the practice normally to be employed is to return the case to the administrative agency with a direction to reconsider the penalty to be imposed. *Bonham v. McConnell*, 45 Cal.2d 304, 288 P.2d 502; *Cooper v. State Board of Medical Examiners*, 35 Cal.2d 242, 217 P.2d 630, 18 A.L.R.2d 593; *Nelson v. Department of Corrections*, 110 Cal.App.2d 331, 335, 242 P.2d 906. The rationale of this rule is contained in the *Bonham* and *Cooper* cases last referred to. In the *Cooper* case, *supra*, 35 Cal.2d at page 252, 217 P.2d at page 636, the court pointed out that "the board made a single order of license revocation based on its findings and conclusions that both count seven and count nine had been violated. Inasmuch as we hold that the findings do not support the conclusions of unprofessional conduct as to count seven, and since license revocation is in any event a drastic penalty, and, furthermore, in con-

sideration of the fact that we have no means of knowing whether the board itself would have imposed so severe a penalty for violation of count nine alone, we are of the view that the judgment should be reversed with directions to the trial court to set aside the order and send the matter back to the board for reconsideration of the penalty." (Emphasis added.) In the Bonham case, the license of an insurance broker was revoked by the insurance commissioner after he made 15 findings that the broker was guilty of misconduct. The trial court found that three of the findings were not supported, upheld the other twelve, and concluded that they sustained the commissioner's action. In remanding for reconsideration by the board, the Supreme Court pointed out that unless this were done, in the light of the fact that the court had found some of the charges to be unsupported, the commissioner would not be afforded an opportunity for an intelligent exercise of the statutory discretion reposed in him in accord with the exact degree of the licensee's derelictions. The court states, 45 Cal.2d at page 306, 288 P.2d at page 503: "He (the Commissioner) should not be precluded from exercising his discretion either initially or where, as here, some of his findings of misconduct are upheld on judicial review and others are not. Where some of the findings are not supported by the evidence, *it is obvious that his discretion has been exercised under a misconception as to the extent of the licensee's misconduct.*" (Emphasis added.)

[14,15] The circumstances in the Cooper and Bonham cases do not parallel the case at bar in one vital feature. For here the board itself has supplied to the trial court and the appellate tribunal its view as to the penalty to be imposed for a violation of section 650, so that we have a "means of knowing whether the board itself

would have imposed so severe a penalty for violation" of that section alone. And it has exercised its discretion not on the basis of a single order of revocation based on its collective findings but by segregating the findings as to the several charges and designating the penalty appropriate to each violation. The board specifically found that petitioner had violated section 650 by offering and delivering an unearned consideration as compensation to Lt. Roth for the referral of patients to him and that "*for this violation alone*, respondent's [petitioner's] certificate of registration ought to be revoked." (Emphasis added.) The board made similar findings with respect to each of the other charges. It is unmistakable that the board intended to exact the penalty imposed on each count of the charges. See Genser v. State Personnel Board, 112 Cal. App.2d 77, 88, 245 P.2d 1090. It being clearly manifest that the board had exercised its discretion as to the appropriate penalty for the violation of section 650 alone, and that it had fully evaluated and assessed the gravity of the offense and the nature of the penalty warranted thereunder for the enlightenment of a reviewing court pursuant to the admonition of the Cooper case, the court below properly declined to remand the case for a reconsideration which the board's own foresight and anticipatory expression had rendered nugatory. In his closing brief petitioner states that he "does not dispute that the charge against him was serious." It was not an abuse of discretion for the board to order revocation of petitioner's license as the appropriate disciplinary action for such a serious offense.

The judgment is affirmed.

MOORE, P. J., and ASHBURN, J.,
concur.

Hearing denied; CARTER, J., dissenting.

139 Cal.App.2d 43

John L. DONNELLAN, Petitioner,

v.

Benjamin S. HITE, as Registrar of Voters of
the County of Los Angeles, State of
California, Respondent.

Civ. 21611.

District Court of Appeal, Second District,
Division 1, California.

Feb. 6, 1956.

Petition for writ of mandate to compel registrar of voters to omit from official ballot office of municipal judge held by petitioner. The District Court of Appeal, Nourse, J. pro tem., held that in view of fact petitioner had adequate remedy at law writ of mandate would be denied but petition, which was verified, would be treated as a proceeding brought pursuant to election code section providing for such relief and under that section petitioner, who was appointed to previously unoccupied office of municipal judge was entitled to have that office stricken from ballot at primary election, where such election was due to be held less than 10 months from date of petitioner's appointment.

Order accordingly.

1. Mandamus ⇨163

Where respondent filed general demurrer to petition for writ of mandate, truth of fact alleged in petition was admitted.

2. Mandamus ⇨3(8)

Petitioner, who sought writ of mandate to compel registrar of voters to omit from official ballot at any primary election prior to June of 1958, the office now held by petitioner, was not entitled to the writ of mandate as he had plain, speedy, adequate remedy at law under election code section providing that whenever such an error is about to occur as in instant case court shall order office of person charged with error to correct error or desist from wrongful act. West's Ann.Code Civ.Proc. § 1086; West's Ann.Election Code, § 2900.

3. Mandamus ⇨3(8)

The remedy provided by election code section to correct an error or enjoin a wrongful act in regard to primary election ballots, is a speedier and more adequate remedy than would be a writ of mandate inasmuch as no appeal lies from order made pursuant to the section, and such an order is final upon entry. West's Ann.Election Code, § 2900.

4. Action ⇨37

Where proceeding for writ of mandate to compel registrar of voters to omit office held by petitioner from primary ballot at certain election was denied, inasmuch as petitioner had plain, speedy and adequate remedy at law, proceeding would not be dismissed and petition, which was verified, would be treated as proceeding brought pursuant to election code section and alternative writ heretofore issued would be treated as order to show cause issued pursuant to section. West's Ann.Code Civ. Proc. § 1086; West's Ann.Election Code, § 2900.

5. Elections ⇨126(1)

Since adoption of article of constitution relating to nonpartisan offices at primary elections, such election has been in effect, insofar as nonpartisan offices are concerned, a general as distinguished from a nominating election. West's Ann.Const. art. 2, § 2¾.

6. Elections ⇨126(1)

Primary election is an integral part of election process.

7. Elections ⇨126(5)

Under government code section providing that if the office of municipal judge to which any person was appointed was not previously occupied such person shall hold office until successor is elected at next general state election, and providing also that no successor to such appointee shall be elected at any election held within ten months of date of occurrence of vacancy, appointee would hold office until successor was elected at an election where the full elective processes, including both primary and general elections, were available after more than 10 months from date vacancy

occurred, and consequently petitioner, who was appointed to previously unoccupied office of municipal judge was entitled to have the office withheld from ballot in primary election, where primary election for the office was to be held less than ten months from petitioner's appointment. West's Ann.Gov.Code, §§ 71180, 72602; West's Ann.Election Code, §§ 3000 et seq., 5710.

8. Elections ☞38

Elective offices should be subject to being filled by people at earliest practical time; but principle is qualified by further principle that right of suffrage should be exercised through the full elective process in well considered and deliberate election.

Frank & Riley, Earl F. Riley, Whittier, Wm. Christensen, Asst. County Counsel of Orange County, Beverly Hills, amicus curiae, for petitioner.

Harold W. Kennedy, County Counsel of Los Angeles County, Wm. E. Lamoreaux and Alfred Chas. DeFlon, Deputy County Counsels, Los Angeles, for respondent.

NOURSE, Justice pro tem.

[1] Petitioner seeks a writ of mandate to compel the respondent, as Registrar of Voters of the County of Los Angeles, to omit from the official ballot to be printed and prepared by respondent for use by the electors at the primary election to be held in the state of California on June 5, 1956, and from any ballot prepared by him prior to that to be used at the primary election to be held in June of 1958, the office now held by petitioner, to wit: Judge of the Municipal Court of the Whittier Judicial District. Respondent has filed a general demurrer to the petition, thus admitting the truth of the facts alleged in the petition. Succinctly stated, the facts alleged are:

On January 1, 1952, the Municipal Court of the Whittier Judicial District, County of Los Angeles, State of California, was duly and regularly established and had but one office of municipal judge. The Legislature, at its regular session in 1955, amended sec-

tion 72602 of the Government Code so as to provide for one additional office of judge of the municipal court of that judicial district; that amendment became effective on September 7, 1955.

On September 13, 1955, petitioner was appointed by the governor to fill the office created by said amendment and is now the duly appointed and qualified holder of said office. Respondent will, unless otherwise ordered by this court, place on the official ballot to be voted in the Whittier Judicial District in the primary election to be held on the 5th day of June, 1956, the office which petitioner now holds.

[2,3] Upon the filing of the petition here we issued an alternative writ to which, as we have stated, respondent has made his return by filing a demurrer to the petition. Upon further consideration of the matter we have come to the conclusion that petitioner is not entitled to a writ of mandate in this matter inasmuch as he has a plain, speedy and adequate remedy at law. Code Civ.Proc. § 1086, Communist Party of United States of America v. Peek, 20 Cal.2d 536, 539, 127 P.2d 889; Phelan v. Superior Court, 35 Cal.2d 363, 365, 366, 217 P.2d 951. Petitioner has a speedy and adequate remedy at law under section 2900 of the Election Code which provides, in substance, that whenever it is made to appear to the Supreme Court, District Court of Appeal, or Superior Court of the proper county that an error or wrongful act is about to occur in the printing of an official primary election ballot that the court shall order the office or person charged with the error or wrongful act to correct the error or desist from the wrongful act. This remedy is a speedier and more adequate remedy than would be a writ of mandate inasmuch as no appeal lies from an order made pursuant to section 2900 and such an order is final upon entry. Matter of Snyder, 158 Cal. 218, 110 P. 820.

[4] This does not mean that this proceeding must be dismissed. The petition here is verified and we will treat it as a proceeding brought pursuant to section 2900 of the Election Code and the alternative writ heretofore issued as an order to show cause issued pursuant to that sec-

tion. Counsel for all parties, at the oral argument, stipulated to this course of action.

There is but one question to be resolved on this appeal, to wit: Is the office of which the petitioner is now the incumbent, by appointment, to be placed on the ballot at the presidential primary election to be held on June 5, 1956?

We have come to the conclusion that this question must be answered in the negative. The matter of the election of successors to the person appointed to fill a vacancy in the office of municipal judge, which vacancy occurs through the creation of the office, is governed by the provisions of section 71180 of the Government Code. That section, so far as pertinent to the question before us, reads as follows: "Any vacancy in the office of judge of a municipal court shall be filled by appointment by the Governor * * *. If the office to which any person so appointed was not previously occupied, he shall hold office until his successor is elected at the general state election next succeeding the occurrence of the vacancy and qualifies. *No successor to such appointee shall be elected at any election held within 10 months of the date of the occurrence of the vacancy.*" (Emphasis added.)

[5] It is apparent from a reading of the last and emphasized sentence of the section that it contemplates that no general election, as distinguished from a nominating election, shall be held within 10 months of the creation of the vacancy for the purpose of electing a successor to a person appointed to that vacancy. Since the adoption of section 2 $\frac{3}{4}$ of article II of the Constitution the primary election has been, in legal effect, insofar as non-partisan offices are concerned, a general as distinguished from a nominating election. *De Woody v. Belding*, 210 Cal. 461, 464, 292 P. 265; *McClintock v. Abel*, 21 Cal. App.2d 11, 16, 68 P.2d 273.

Under the provisions of section 2 $\frac{3}{4}$ of article II a candidate for a judicial or other non-partisan office who secures a majority of the votes cast for that office at the primary election is elected. Experience has shown that in the large majority of cases a judicial office is filled at the primary election and these elections will, except in the unusual case of an office being created at an extra session of the Legislature in an uneven-numbered year, always be held within 10 months of the effective date of any act creating a new office of municipal judge.¹

It is not reasonable to suppose that when the Legislature said that a successor to an appointee to a vacancy such as that here should not be elected at *any election* held within 10 months of the date of the occurrence of the vacancy that it did not intend to include a primary election which is in legal effect a general election.

It is argued that the Legislature must have intended to exclude the primary election from the prohibition of the last and emphasized sentence of the section because if the office is not placed on the ballot at that election the result will be, what has been aptly termed by Mr. Justice Spence in his concurring opinion in *French v. Jordan*, 28 Cal.2d 765, 771, 172 P.2d 46, 49, a "hit-and-miss, slipshod, irregular election." The argument is that a successor to the appointee must be elected in the year following the creation of the vacancy because under the third sentence of the section the term of the appointee is only until such time as a successor is elected "at the general state election next succeeding the occurrence of the vacancy and qualifies." This being so, the argument goes, the office will have to be placed upon the ballot at the November election and the only persons who can be candidates at that election will be persons who are able to file independent nominating petitions pursuant to the provisions of

1. While it may be possible, it is highly improbable that the Legislature would adjourn at a date which would make it possible for any bill other than an urgen-

cy bill passed by it to become effective more than 10 months before the earliest date upon which a primary election might be held, to wit: June 1 of the next year.

chapter 3 of division V of the Election Code, § 3000 et seq., and those whose names are written in pursuant to the provisions of section 5710 of that Code.

Assuming that the third sentence of the section must be given the meaning and effect that we have just stated, that cannot affect the conclusion we have reached that the office cannot be put upon the primary ballot; for as we have shown the fourth sentence, by its express terms, prohibits the office being placed upon that ballot and if we were to hold otherwise we would be in effect repealing that part of the section. This we have no power to do.

[6] We do not believe, however, that the section read as a whole does require the office to be placed upon the November ballot. The primary election is an integral part of the election process. In re McGee, 36 Cal.2d 592, 597, 226 P.2d 1; Call v. Peterson, 36 Cal.2d 599, 601, 226 P.2d 329, and it should not be held that it was the intent of the Legislature to do away with this part of the election process in the filling of vacancies such as the one involved here, if any other interpretation can be placed upon the section as a whole.

[7] While the inference may be drawn from the third sentence of this section that the Legislature intended that there must be an election for the office at the general election held in November, it does not expressly so provide. On the contrary, we believe that the true meaning of the section read as a whole is, when applied to facts such as those in the pending matter, that the appointee shall hold office until his successor is elected at an election where the full elective processes (i. e.,

both primary and general elections) were available after more than 10 months from the date the vacancy occurred.

[8] We are cognizant that it is the general principle of our democratic method of government that elective offices should be subject to being filled by the people at the earliest practical time; but that principle is qualified by the further principle that the right of suffrage should be exercised through the full elective process in a well-considered and deliberate election. French v. Jordan, 28 Cal.2d 765, 774, 172 P.2d 46; Communist Party of United States of America v. Peek, 20 Cal.2d 536, 542, 127 P.2d 889.²

This construction does not leave the third sentence meaningless but leaves it applicable to all cases where the vacancy is created more than 10 months before the next primary election. Such a vacancy will occur if the Legislature at an extra session held in an uneven-numbered year creates an office of municipal judge, or if such an office is created at a regular session by an urgency measure.

The respondent, Benjamin S. Hite, as Registrar of Voters of the County of Los Angeles, State of California, is ordered to omit from the ballot to be voted on at the presidential primary election to be held on the 5th day of June, 1956, the office of municipal judge for the Whittier Municipal Court District, which office was created by the act amending section 72602 of the Government Code, which act became effective September 7, 1955.

WHITE, P. J., and FOURT, J., concur.

2. That the electors would be very limited in their choice of persons to fill the offices in question here is demonstrated by the fact that an independent nominat-

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ing petition would, in the judicial district involved here, have to contain the signatures of more than 2,500 qualified electors. We are so advised by respondent.

139 Cal.App.2d Supp. 929

H. L. BAUM and Earl Casey, d/b/a Sierra Motor Sales, a co-partnership, Plaintiffs and Appellants,

v.

Zacarius ALEMAN, Defendant and Respondent.

Civ. A. 27.

Appellate Department, Superior Court,
San Bernardino County, California.

Feb. 8, 1956.

Action by seller to recover damages under contract of sale after default and repossession. The buyer filed a cross-action to recover monies paid under the allegedly void contract. The Municipal Court of San Bernardino Judicial District, C. O. Thompson, J., rendered judgment that plaintiffs take nothing by virtue of their complaint and that defendant recover on cross-complaint, and plaintiffs appealed. The Appellate Department of the Superior Court, Coughlin, P. J., held that where contract for sale of automobile did not set forth time price differential or contract balance as required by Civil Code, contract was void and buyer was entitled to recover from seller any damage sustained, but in computing damages account would have to be taken of reasonable value of buyer's use of automobile while it was in his possession.

Judgment upon complaint affirmed and judgment upon cross-complaint reversed with directions.

1. Sales $\S$ 461

Evidence sustained finding that contract for sale of automobile did not set forth time price differential or contract balance, as required by Civil Code. West's Ann.Civ.Code, $\S$ 2982, and (a).

2. Statutes $\S$ 212.1, 223.5(6)

When Legislature amended Civil Code section it was presumed to have had knowledge of interpretation theretofore placed upon such section by Supreme Court and its reenactment of such section by amendment thereof incorporated interpretation

theretofore placed upon same by Supreme Court.

3. Sales $\S$ 461, 481

Where contract for sale of automobile did not set forth time price differential or contract balance as required by Civil Code, contract was void and buyer was entitled to recover from seller any damage sustained; but in computing damages, account would have to be taken of reasonable value of buyer's use of automobile while it was in his possession. West's Ann.Civ.Code, $\S$ 1667, subd. 2, 2982 (c-e).

Norman P. Courtney, Fontana, for plaintiffs and appellants.

Cheleden & Kessler by Ernest A. Kessler, Los Angeles, for defendant and respondent.

COUGHLIN, Presiding Judge.

This is an appeal from a judgment in favor of the defendant and against the plaintiffs adjudging that the plaintiffs take nothing by virtue of their complaint and that the defendant recover from them the sum of \$2,042 on a cross-complaint.

On December 5, 1952, the defendant purchased an automobile from the plaintiffs under a written contract specifying a total cash price of \$2,230.80. This contract recited a total down payment of \$788.80 which consisted of a recited cash payment of \$388.80 and a trade-in allowance of \$400. The evidence showed that the purchaser was unable to make the cash payment of \$388.80 and in lieu thereof paid the sum of \$120 in cash and gave a promissory note in the sum of \$268.80 for the balance. The written contract did not set forth the time price differential or the contract balance as required by law. Civ.Code, $\S$ 2982 (a).

On October 7, 1954, the plaintiffs repossessed the automobile in question, contending that the defendant had defaulted under the contract. After repairing and reselling the automobile the plaintiffs sued the defendant for an alleged balance due.

The defendant joined issue with the material allegations of the complaint; as a special defense set up the unenforceability

of the contract upon the ground that it failed to comply with the provisions of Section 2982 of the Civil Code; and filed a cross-complaint.

The first cause of action in the cross-complaint alleged the failure of the contract to comply with the provisions of the Code Section in question; the transfer of defendant's automobile and the payment of money to the plaintiffs under the terms of the contract; and "that by reason of all the premises alleged, the cross-complainant has suffered damage in the sum of \$2,127.45".

The second cause of action alleged an indebtedness under the common count for money had and received.

The plaintiffs' answer to the cross-complaint contained a denial of the material allegations thereof and specifically denied that "the cross-complainant has suffered damages in the sum of \$2,127.46, or has suffered damage in any sum at all".

[1-3] The evidence adequately sustains the finding of the trial court that the contract did not set forth the time price differential or the contract balance and for this reason failed to comply with the provisions of subdivision (a) of said Section 2982. In the cases of *Carter v. Seaboard Finance Co.*, 33 Cal.2d 564, 203 P.2d 758, and *Estrada v. Alvarez*, 38 Cal.2d 386, 240 P.2d 278, the Supreme Court held that the provisions of the code section under consideration were mandatory and a failure to substantially comply therewith rendered a contract for the sale of an automobile unenforceable. That Court further held that the buyer was entitled to recover any money which he had paid the seller under the contract. The plaintiffs contend that an amendment to the code section in 1949, which was subsequent to the transactions involved in the two cases heretofore considered constitutes a declaration by the legislature of an intention contrary to the interpreted intention of the legislature as set forth in the Supreme Court decisions. Prior to the 1949 amendment, subdivision (e) of said Section 2982 expressly stated that a failure to comply with the provisions of subdivisions (c) and

(d) of said section rendered the contract unenforceable and entitled the buyer to recover from the seller three times the total amount paid under the contract. The 1949 amendment, in substance, retained the language of the code section except that the right of the buyer to recover three times the amount he had paid under the contract was reduced to the exact amount he had paid under the contract. In the two cases referred to, the Supreme Court, in substance, held that even though subdivision (e) of the Code Section declared only that a violation of the provisions of subdivisions (c) and (d) thereof rendered the contract unenforceable, it was the intention of the legislature that the provisions of subparagraph (a) of the Code Section were mandatory and a failure to substantially comply therewith also rendered the contract unenforceable. This conclusion was based upon the provisions of Civil Code, Section 1667, subd. 2, and prior decisions which variously have described contracts failing to comply with somewhat similar statutes as "unenforceable", "illegal", or "void". In permitting a buyer to recover money paid to a seller under a contract which failed to conform to the requirements of Civil Code, § 2982 the Supreme Court, in effect, has declared such a contract to be void. When the legislature amended the Code Section under consideration in 1949, it is presumed to have had knowledge of the interpretation theretofore placed upon the Section by the Supreme Court. If this be so, the reenactment of the Code Section by the amendment thereof incorporated the interpretation theretofore placed upon the same by the Supreme Court. *Harris v. Barlow*, 180 Cal. 142, 179 P. 682; Cal.Jur. 795. Under these circumstances, the conclusion of the Supreme Court, with respect to the effect of a failure to comply with the provisions of said Section 2982, applies to a determination of the issues at hand.

The plaintiffs cite the case of *Millick v. Peer*, 130 Cal.App.2d Supp. 894, 279 P.2d 212, decided by this Court, which held that the contract there under consideration *substantially* complied with the provisions of said Section 2982 and therefore was en-

forceable. However, the plaintiffs rely upon a statement in this decision that the penalty of unenforceability only applied to a failure to comply with the requirements of subdivisions (c) or (d) of said Section 2982 and not to those of subdivisions (a) and (b) of that Section. This statement was in disagreement with the decisions in *Carter v. Seaboard Finance Co.*, 33 Cal.2d 564, 203 P.2d 758, and *Estrada v. Alvarez*, 38 Cal.2d 386, 240 P.2d 278; was not necessary to the decision in *Millick v. Peer*, 130 Cal.App.2d Supp. 894, 279 P.2d 212; and cannot be controlling in the case at bar.

The decision of the trial court holding that the contract at bar was void; denying relief to the plaintiffs who relied thereon; and finding that the defendant was entitled to recover from the plaintiffs any damage sustained as a result of the void contract, must be affirmed.

However, the amount of defendant's damages is not necessarily determined by the amount which he paid to the plaintiffs. Although the defendant paid the plaintiffs \$2,042.25 he was not damaged in this amount. In the case of *United States Credit Bureau v. Sanders*, 103 Cal.App.2d 806, 816, 230 P.2d 849, 855, the Court held that the purchasers under a contract which failed to comply with the provisions of said Section 2982 "were chargeable with the reasonable value of the use of the equipment while it was in their possession." A person who has received money from another under a void contract has been unjustly enriched and for that reason the law permits the latter to recover the amount of the unjust enrichment from the former. *Whyte v. Rosencrantz*, 123 Cal. 634, 638, 56 P. 436. As the contract of sale in the case at bar was void, the payment of money by the buyer to the seller upon the purchase price designated in a contract that did not exist may be recovered. However, when, as in this case, the seller transfers to the buyer the possession and use of an automobile the buyer receives a benefit which should be considered in determining the amount of the seller's unjust enrichment. As the seller delivered possession and use

of his automobile to the buyer, no contract with respect thereto existing, the law implied an agreement upon the part of the user of the automobile to pay the owner thereof the reasonable value of such use. As a consequence, it cannot be held that all of the money paid by the buyer under the circumstances in this case was paid for naught, because payment of a part of that money discharged the obligation which the law imposed upon the buyer to pay the reasonable value of the use of the automobile which he received. Under these circumstances, when the defendant in his cross-complaint alleged that he was damaged in the sum of \$2,127.45 and the plaintiffs in their answer to the cross-complaint deny that the defendant was damaged in that sum or "in any sum at all", an issue was tendered which required the Court to determine not only the amount of money which the buyer had paid to the seller but also the amount of money which the buyer should have paid to the seller for the use of the automobile which he received, and to determine the resultant damage, if any, sustained by the buyer.

The record in this case indicates that the trial court did not give any consideration to the fact that the defendant may have owed the plaintiffs for the use of the automobile in question. Although there was no opinion evidence to guide the Court with respect to the reasonable value of such use, nevertheless there was evidence before the Court from which it could have made a finding as to the reasonable value of such use.

The judgment upon the complaint is affirmed and the judgment upon the cross-complaint is reversed with instructions to the trial court to determine the reasonable value of the use of the automobile by the defendant during the time he was in possession thereof and to offset that amount against the sums paid by the defendant to the plaintiffs.

COUGHLIN, P. J., and HILLIARD and MITCHELL, JJ., concurred.

139 Cal.App.2d Supp. 927

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

John Lloyd WRIGHT, Defendant and
Appellant.

No. 191979.

Appellate Department, Superior Court,
San Diego County, California.

Jan. 24, 1956.

BURCH, Judge.

Defendant was convicted of putting out a sign in violation of the clause of Section 5536 of the Business and Professions Code which makes it a crime to put out a sign that "might indicate to the public that he is an architect". The sign which defendant put out read as follows:

"John Lloyd Wright, A.I.A.
Design
Supervision
Owner's Agent Del Mar"

Our question on this appeal is the sufficiency of the evidence to prove the defendant's guilt.

The case was before us on a former appeal which tested the validity of the phrase quoted above from Section 5536. We decided that the words might reasonably be construed to evidence a legislative intent to prohibit a representation that one who rendered architectural services without a license was, in fact, licensed to do so under the Act. Section 5500. By such construction we decided the constitutionality of the Act was saved. *People v. Wright*, 131 Cal. App.2d Supp. 853, 281 P.2d 384. It is conceded for the purposes of the present appeal that defendant has not violated the Act otherwise, and this includes the giving of written notice to his employer before he rendered the particular services authorized by Section 5537.

The People contend that the initials A.I. A. attached to defendant's name, when used in conjunction with the word "builder," amounted to a false advertisement that defendant was licensed as an architect under the Act. The argument is made that since the initials A.I.A. mean membership in the American Institute of Architects, a designer who makes known the fact of his membership in this American institution is somehow or to some extent representing that he is licensed by the state. Under our federal system each of us is aware that he is a citizen of the nation at large, an American, as well as a citizen of the state where he may be domiciled. The use of word American seems to suggest a national rather than a state institution. There is no

Defendant was convicted of violation of statute making it crime to put out sign that might indicate to public that one not certified as architect was architect. The Municipal Court, Oceanside Judicial District, County of San Diego, L. W. Cottingham, J., entered judgment accordingly, and defendant appealed. The Supreme Court, Burch, J., held that under statute authorizing designers who are not certified architects to draw plans and specifications and render other architectural services for their employer, such designer had right to inform public of his membership in American Institute of Architects and his display of sign which, following his name, stated "A.I.A." did not constitute violation of statute.

Reversed.

Licenses 40

Under statute authorizing designers who are not certified architects to draw plans and specifications and render other architectural services for their employer, such designer had right to inform public of his membership in American Institute of Architects and his display of sign which, following his name, stated "A.I.A." did not constitute violation of statute forbidding one not certified as architect to display card indicating that he was architect. West's Ann.Bus. & Prof.Code, §§ 5500, 5536, 5537.

Louis M. Welsh, Los Angeles, for appellant.

James Don Keller, Dist. Atty., and Arnold O. Steele, Deputy Dist. Atty., San Diego, for respondent.

evidence in the whole or any part of the Architects' Act that the state forbids a designer or owner's agent to be a member of the American Institute, but there is in Section 5537 conditional provision for designers to draw plans and specifications and render other architectural services though not licensed by the state. We hold that with the authority goes the right to inform the public. What the defendant has said in this regard is both true and forthright and constitutes no violation of Section 5536.

Judgment is reversed.

TURRENTINE, P. J., and GLEN, J.,
concur.



139 Cal.App.2d Supp. 923

PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Ann WEST, Defendant and Appellant.
Cr. A. 3385.

Appellate Department, Superior Court,
Los Angeles County, California.

Jan. 12, 1956.

Defendant was convicted of offense of procuring another to patronize prostitutes. From order of the Municipal Court of the Los Angeles Judicial District, Byron J. Walters, J., granting probation, mistakenly denominated judgment of conviction, and other matters, defendant appealed. The Superior Court, Swain, J., held that the evidence raised issue of entrapment and that defendant was entitled to have such defense presented to jury under proper instructions.

Order granting probation reversed and cause remanded for new trial, and appeals from all other matters dismissed.

1. Criminal Law ⇨37

"Entrapment" consists in conception and planning of offense by officer and his

procurement or inducement of commission of offense by one who would not have perpetrated offense except for officer's trickery, persuasion, fraud or inducement.

See publication Words and Phrases, for other judicial constructions and definitions of "Entrapment".

2. Criminal Law ⇨37

The law frowns, not upon the entrapping of a criminal, but upon the seduction of an innocent person into criminal career by officers of the law.

3. Criminal Law ⇨772(6)

Where there is any evidence deserving of any consideration upon the issue of entrapment, jury should be instructed upon the doctrine applicable to such issue.

4. Criminal Law ⇨772(6)

In prosecution of motel manager for procuring another to patronize prostitutes, evidence that officer, posing as a student, repeatedly, over a period of more than a month, requested defendant to procure a prostitute for him and that she finally referred him to a prostitute in effort to get rid of him, raised issue of entrapment and defendant was entitled to have such defense presented to jury under proper instructions.

5. Criminal Law ⇨31

A defendant may present inconsistent defenses.

6. Criminal Law ⇨37

That defendant, as a witness, denied some essential elements of offense charged did not deprive her of the benefit of evidence that she had been entrapped into committing the offense.

On Petition for Rehearing

7. Criminal Law ⇨739(1)

In prosecution for procuring another to patronize prostitutes, conflicting evidence was sufficient to take question of entrapment to jury.

Kenneth E. Matot, Los Angeles, for appellant.

Roger Arnebergh, City Atty., Donald M. Redwine, Asst. City Atty., Philip E. Grey,

Deputy City Atty., Los Angeles, for respondent.

SWAIN, Judge.

Defendant was found guilty by a jury of one count of violation of Section 41.08 of the Los Angeles Municipal Code (procuring) after trial on a four-count complaint. Count IV of the complaint alleges that the defendant did willfully and unlawfully cause, procure, induce, persuade and encourage another person to patronize prostitutes and houses of prostitution, direct and conduct another person to a prostitute, etc. She appeals from the order granting probation (mistakenly denominated the judgment of conviction), contending that the court erred in refusing to instruct the jury as to the defense of entrapment. We agree.

[1-3] As held in *People v. Lindsey*, 1949, 91 Cal.App.2d 914, 916-917, 205 P.2d 1114, 1115: "Entrapment is the conception and planning of an offense by an officer and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer. Persuasion or allurement must be used to entrap. [Citation.] The officer must induce the defendant to commit a crime which he would not have committed without such inducement. [Citation.] It is not the entrapping of a criminal that the law frowns upon but the seduction of innocent persons into a criminal career by its officers. [Citation.]" As the court said in *People v. Alamillo*, 1952, 113 Cal.App.2d 617, 620, 248 P.2d 421, 422. " * * * if there was any evidence deserving of any consideration whatever, upon the issue of entrapment, the court should have instructed the jury upon the doctrine applicable to that issue." In the instant matter, a vice squad officer testified substantially as follows: A bartender handed him a business card, and posing as a college student, he thereupon went directly to the motel managed by defendant. The officer told defendant: "Jess sent me." Defendant replied, "Do you want a room?" He answered: "I am alone." Defendant then said: "Oh, you want a girl?" He replied: "I guess so." Then defendant made two telephone

calls and told him that the two prostitutes she had contacted were unavailable. This incident was the subject of Count I. The officer testified to a similar occurrence on the occasion which was the subject of Count II. On the occasion which was the subject of Count III, defendant gave him a business card with the names "Anne" and "Kay" and "Flower Motel" written thereon, and sent him to the Flower Motel, where he was unable to locate a girl. As to Count IV, on which defendant was convicted, the officer testified that he went to the Flower Motel, located Kay, established the elements of a prostitution charge, arrested her, and then returned to defendant's motel, where defendant told him Kay had been arrested but that she knew of another prostitute in a bar. These four incidents took place over a period of five weeks. However, according to defendant's testimony, it was the officer, not defendant, who first broached the subject of obtaining a girl for immoral purposes. She testified that he came to her motel about ten times during a two-month period, importuning her each time to find a girl for him. She repeatedly told him that she didn't have any girls and to stop bothering her. After the officer had come back seven or eight times, defendant sent him to see Kay at the Flower Motel, "thinking maybe she could help him; that I didn't know anybody * * * I wanted to get rid of him."

[4] In the light of this evidence, it was clearly erroneous for the court to refuse to instruct the jury as to the defense of entrapment. Whether or not defendant's story was true is beside the point. Her testimony tended to show that the procuring scheme originated with the officer, that she resisted constant pressure from the officer for over a month to procure a prostitute for him, and that she yielded to the officer's insistence only in an effort to get rid of him. This, if believed by the jury, would constitute a defense to the charge, and defendant was entitled to have that defense presented to the jury under proper instructions. *People v. Gallagher*, 1930, 107 Cal.App. 425, 290 P. 504; *People v. Reed*, 1954, 128 Cal.App.2d 499, 275 P.2d 633.

[5, 6] Not only did the trial court fail to give the requested instruction on entrapment, which the evidence plainly warranted, but it made this statement to the jury: "The defendant in this case, having denied any of the acts, doing of any of the acts alleged in Count * * * IV, has no valid defense as to entrapment and I will not define the law of entrapment for you because it is not applicable." The law is not as declared by the trial court. A defendant may present inconsistent defenses (see discussion in *People v. Keel*, 1928, 91 Cal.App. 599, 604-606, 267 P. 161; and *People v. Reese*, 1944, 65 Cal.App.2d 329, 338-341, 150 P.2d 571, 576-577). We find nothing in any of the cases cited, or read, which raises a doubt in our minds that a defendant who, as a witness, denies some essential element of an offense charged, may nevertheless have the benefit of evidence that she was entrapped into committing the offense.

The order granting probation is reversed, and the cause remanded for a new trial. The appeals from all other matters are dismissed.

BISHOP, P. J., and PATROSSO, J., concur.

Order Denying Rehearing

BY THE COURT.

The petition of respondent for a rehearing after judgment of this court on appeal, in the above entitled matter, having been filed, and having been duly considered,

Said petition is hereby denied.

Memorandum

In an endeavor to safeguard against a misinterpretation of our opinion, we add that we are not holding that entrapment was established as a matter of law, but only that it was sufficiently proven to require that the question—Was the defendant entrapped?—should have been submitted to the jury under proper instructions.

[7] Where a ground of appeal is that the jury had not been adequately informed relative to a defense, appellant's contention is not answered by pointing to evidence that tended to disprove the defense. With respect to the evidence, the question is: Was it sufficient to go to the jury?

46 Cal.2d 132

Ray A. BAILEY, Mildred L. Bailey, Muri L. Boruff, Peggy Boruff, George Capaci, Rose Capaci, Roy Capaci, Georgia M. Capaci, Job S. Chester, Hortense Chester, Marshall D. Collins, Rose A. Collins, Harold V. Crowley, Ella S. Crowley, Celdon Evensen, Lillie B. Evensen, M. P. Frost, Mrs. M. P. Frost, Geo. L. Humphreys, Pearl C. Humphreys, Edwin A. Kist, Mary G. Kist, Kenneth W. Kuehl, Hedwig M. Kuehl, Robert E. MacMillan, Alta E. MacMillan, James W. McClain, Lucy M. McClain, Raymond Olenyn, Katheryn Olenyn, Richard L. Parkes, Betty J. Parkes, Howard Phillips, Freda Phillips, Herbert W. Prentice, Ruth C. Prentice, John Rosa, Rita Rosa, James H. Ross, Mrs. James H. Ross, Richard J. Schulte, Betty J. Schulte, Marlin G. Wells, Wilma L. Wells, Israel C. Wilson, Cobie V. Wilson, L. Acquis, Harriet I. Brown, George W. Brown, Gerald H. Bruce, Ruth Ann T. Bruce, George Caskey, Mrs. George Caskey, Vincent Chadez, Rachel Chadez, Winnie O. Comstock, C. A. Culwell, Ersula M. Culwell, Mrs. H. J. Ebert, Eugene F. Girdner, Lila Girdner, Ivon F. Girdner, Ethyl A. Girdner, Jesus M. Hermosillo, Petra M. Hermosillo, A. L. Hoffman, Mrs. A. L. Hoffman, Mrs. A. Mushegain, Bonnie J. Petyus, Alex K. Petyus, Joan H. Reynolds, M. Lucille Reynolds, Fredrick Robinson, and Mrs. Fredrick Robinson, Plaintiffs and Appellants,

v.

COUNTY OF LOS ANGELES, a body corporate and politic, John Anson Ford, Roger Jessup, Kenneth Hahn, Burton W. Chace, Herbert C. Legg, as members of and constituting the Board of Supervisors of the County of Los Angeles, State of California; James Stafford, Victor H. York, Lucy Baca, Arthur J. Baum, Robert S. Groman, Roy N. Clayton, Hugo M. Burgwald, as members of and constituting the Regional Planning Commission of the County of Los Angeles, State of California, Defendants and Respondents.

L. A. 23659.

Supreme Court of California,
In Bank.

Feb. 7, 1956.

Action to declare an amended county zoning ordinance permitting location of juvenile hall in single family use residential

zone invalid. From an order of the Superior Court, Los Angeles County, Arnold Praeger, J., vacating a temporary restraining order, denying a preliminary injunction, and discharging an order to show cause, plaintiffs appealed. The Supreme Court, Carter, J., held that provision of amended ordinance, recommended to County Board of Supervisors by Regional Planning Commission, that property in any residential zone might be used for any governmental uses after obtaining permit therefor was broad enough to encompass use of land for juvenile hall, so that amendment passed by Board was not a new ordinance initiated thereby, but merely a change in amendment proposed by Commission, and no further public hearing by Commission was required on its receipt of proposed change.

Order affirmed.

Opinion, 286 P.2d 819, vacated.

1. Counties $\approx 21\frac{1}{2}$

The fact that certain action was taken or recommendation made by Regional Planning Commission and County Board of Supervisors raises presumption that existence of necessary facts warranting such action or recommendation was ascertained and found.

2. Counties $\approx 21\frac{1}{2}$

A finding by Regional Planning Commission that proposed amendment of zoning ordinance, authorizing county officials to locate juvenile hall in single family use residential zone, was necessary for general public welfare and interest, may be presumed from Commission's recommendation of such amendment to County Board of Supervisors. West's Ann.Gov.Code, § 65653.

3. Appeal and Error ≈ 991

In action to declare amended county zoning ordinance authorizing county officials to locate juvenile hall in single family use residential zone invalid conflicting affidavits of plaintiffs and defendant members of County Board of Supervisors and Regional Planning Commission as to whether subject of juvenile hall was discussed at public hearing before Commission in matter of proposed amendment to permit any gov-

ernmental use of property in any zone after obtaining permit therefor raised fact question, as to which Superior Court's decision against plaintiffs will not be disturbed on appeal. West's Ann.Gov.Code, § 65657.

4. Appeal and Error ⇐1008(1)

An appellate court will not disturb trial court's implied fact findings supporting order appealed from.

5. Appeal and Error ⇐931(3)

When evidence is conflicting, Supreme Court will presume, on appeal, that trial court found every fact, necessary to support order appealed from, that evidence would justify.

6. Appeal and Error ⇐1008(1, 3)

The trial court's implied fact findings are conclusive on appeal in so far as it passed on weight of evidence, whether evidence was oral or documentary.

7. Appeal and Error ⇐996, 1011(2)

When issue is tried on affidavits, rule on appeal is that affidavits favoring prevailing party's contention established not only facts stated therein, but all facts which may be reasonably inferred therefrom, and when there is substantial conflict in facts stated, trial court's determination of controverted facts will not be disturbed.

8. Counties ⇐21½

A provision in proposed zoning ordinance amendment, recommended to County Board of Supervisors by Regional Planning Commission, that property in any residential zone might be used for any governmental uses, was broad enough to encompass use of land in single family use residential zone for county juvenile hall, so that board's ordinance authorizing such use was not a new ordinance initiated by board, but merely a change in amended ordinance proposed by Commission, and no further public hearing was required before Commission on its receipt of board's proposed change in amendment so recommended. West's Ann.Gov. Code, §§ 65655-65657.

9. Counties ⇐21½

An urgency clause in amended zoning ordinance passed by County Board of Supervisors was void and ineffective as enacted without legislative authority, but such

fact did not invalidate balance of ordinance. West's Ann.Elections Code, § 1651; West's Ann.Gov.Code, § 25123.

10. Counties ⇐21½

An amended county zoning ordinance authorizing location of county juvenile hall in single family use residential zone was not invalid as special legislation favoring one class.

11. Counties ⇐21½

Since a county may exempt itself from provisions of its basic zoning ordinance, County Board of Supervisors may amend such ordinance to permit use of residential property for governmental purposes deemed advisable and beneficial to general public welfare.

Holbrook, Tarr, Carter & O'Neill, W. Sumner Holbrook, Jr., and Francis H. O'Neill, Los Angeles, for appellants.

Harold W. Kennedy, County Counsel, Edward H. Gaylord and Lloyd S. Davis, Deputy County Counsel, Los Angeles, for respondents.

CARTER, Justice.

Plaintiffs, Ray A. Bailey and others, appeal from an order of the Superior Court of Los Angeles County which vacated a temporary restraining order, denied a preliminary injunction and discharged an order to show cause in an action brought to declare invalid an amendment to a Los Angeles County zoning ordinance.

Rancho Los Amigos, the land in question, located in Los Angeles County, was zoned R-1 for single family use. County officials desired to locate a juvenile hall in the Rancho Los Amigos area, but in order to do so it was necessary to amend the basic zoning ordinance of the county.

The controlling procedure to be followed in amending such an ordinance is found in the Government Code, §§ 65500-65805.

Section 65804 provides: "Except as otherwise provided in this article, an amendment to a zoning ordinance which amendment changes any property from one zone to another or imposes any regulation listed in Section 65800 not theretofore imposed

or removes or modifies any such regulation theretofore imposed shall be initiated and adopted in the same manner as required for the initiation and adoption of the original zoning ordinance."

Section 65650 provides: "Before recommending a precise plan or regulation to the legislative body or any amendment to it, for adoption, the planning commission shall hold at least one public hearing."

On July 27, 1954, pursuant to section 65651, the Regional Planning Commission gave ten days' published notice that a public hearing would be held relative to recommending to the Board of Supervisors certain amendments to the zoning ordinance. At the public hearing on July 27, 1954, the proposed amendments were discussed. One of these amendments proposed that property in any residential zone might be used for any governmental purpose if a permit were first obtained in accordance with established procedures.

On August 18, 1954, the planning commission transmitted to the Board of Supervisors its recommendation of the proposed amendments together with copies thereof, a copy of the notice of hearing, and a list of the persons who testified at the hearing.

Section 65654 provides that the legislative body may adopt the plan proposed by the commission by ordinance or resolution, but must first hold at least one public hearing. Upon receipt of the proposed amendments the Board of Supervisors published notice of a hearing to be held on September 23, 1954. This meeting was held and various persons were heard. The matter was then continued until October 5, 1954, at 11:00 A.M.

On October 5, 1954, the Board of Supervisors met at 9:00 A.M. At that time it was proposed that the board enact an ordinance adding two sections to the zoning ordinance which would permit the use of property in any zone for a juvenile hall or juvenile detention facilities after public hearings at which the applicant must affirmatively prove that such use would not endanger the public health, safety, or general welfare. This proposed ordinance was then forwarded to the planning commission

which was in session a short distance away. While the board was still sitting, a communication was received from the Regional Planning Commission. This communication related that the commission had considered and approved the proposed ordinance. The proposed ordinance was read to the members of the public present and approximately fifteen minutes thereafter the board ordered that the public hearing be closed in the matter of the proposed amendments to the zoning ordinance to permit governmental use of property in any zone after a permit was obtained. The board then passed the amendments which related only to juvenile halls, and later made application to the Regional Planning Commission for a special permit to use the Rancho Los Amigos land for a juvenile hall. A hearing date was set and notice of hearing published, but prior to the time set for the hearing, plaintiffs, who were property owners protesting the amendments, instituted this action and the superior court issued an order restraining the holding of the meeting pending the hearing of an order to show cause. At the hearing of the order to show cause, the restraining order was vacated and the preliminary injunction denied. This appeal followed.

[1, 2] Plaintiffs contend first that section 65653 of the Government Code, which requires a "report of findings, summaries of hearings, and recommendations of the planning commission", was not complied with and that such section is mandatory. In the instant case, copies of the proposed amendments to the ordinance were transmitted by the commission to the board with a letter stating that the proposed amendments had been approved by the commission. There was also a copy of the published notice of the public hearing, a statement that such hearing had been held, and a list of the persons who there testified. A similar contention was raised in *Cantrell v. Board of Supervisors*, 87 Cal.App.2d 471, 479, 197 P.2d 218, 223, where the court said:

"It is appellant's contention that two things are required of the zoning board, viz., (1) that it shall transmit findings, and (2) that it shall transmit recom-

mendations. That only the latter was done.

"After consideration of all the factual data and testimony presented at the hearing, the commission determined that the operation of the hog ranch and dump were detrimental to the health and general welfare of the community.' This was followed by the recommendation to respondent board that appellant's permit be revoked.

"The foregoing language must be held to imply that the commission had found that detriment and injury to the health and general welfare of the community ensued from the operation of the hog ranch in question. And in connection with the action of such commission and board, composed usually of laymen, the fact that a certain action is taken or recommendation made raises the presumption that the existence of the necessary facts had been ascertained and found. *Bartholomae Oil Corp. v. Seager*, 35 Cal.App.2d 77, 80, 94 P.2d 614; *Lindell Co. v. Board of Permit Appeals*, 23 Cal.2d 303, 323, 144 P.2d 4; *North Side, etc., Ass'n v. County of Los Angeles*, 70 Cal.App.2d 598, 608, 609, 161 P.2d 613. We cannot perceive wherein appellant has been prejudiced by the absence of formal findings under the facts here present."

The only finding which could here have been made was that the proposed ordinance was necessary for the general public welfare and interest. Since there is nothing to the contrary in the record before us, this finding may be presumed from the recommendation made. *Swars v. Council of City of Vallejo*, 33 Cal.2d 867, 872, 206 P.2d 355.

[3-7] Plaintiffs next contend that the ordinance relating only to juvenile halls enacted by the legislative body was a new and different ordinance than the amendments recommended by the planning commission and that it therefore should have been sub-

ject, under the provisions of section 65657,¹ to a public hearing held by the planning commission. Defendants, on the other hand, contend that the following section is applicable: "The legislative body shall not make a change in any proposed precise plan, regulation, or amendment thereto recommended by the planning commission until the proposed change has been referred to the planning commission for a report and a copy of the report has been filed with the legislative body." Gov.Code, § 65655. Defendants argue that a juvenile hall comes within the purview of the words used in the approved amendment—a "governmental use of any kind"—and that the change was referred to the planning commission which reported its approval thereof. If defendants' position is correct, the statute, section 65655, does not require a public hearing. Plaintiffs' argument is two-fold: they contend that the subject of a juvenile hall was not considered at the public hearing held by the planning commission, and that the juvenile hall ordinance was a new and different one requiring a public hearing under the provisions of section 65657. In support of their first argument they rely upon affidavits in which it is averred that the subject of a juvenile hall was not discussed at the public hearing held by the planning commission. The affidavits produced by defendants are to the contrary. This was a question of fact decided adversely to plaintiffs by the trial court. "An appellate court will not disturb the implied findings of fact made by a trial court in support of an order, any more than it will interfere with express findings upon which a final judgment is predicated. When the evidence is conflicting, it will be presumed that the court found every fact necessary to support its order that the evidence would justify. So far as it has passed on the weight of the evidence, its implied findings are conclusive. This rule is equally applicable whether the evidence is oral or documentary." *Murray v. Superior Court*, 44 Cal.2d 611, 619, 284 P.2d 1, 6. "When an issue is tried on affi-

1. "The legislative body shall first refer such proposal to establish such precise plan or regulation to the planning commission for a report. Before making a

report the planning commission shall hold at least one public hearing in the same manner as heretofore prescribed in this article." Gov.Code, § 65657.

davits, the rule on appeal is that those affidavits favoring the contention of the prevailing party establish not only the facts stated therein but also all facts which reasonably may be inferred therefrom, and when there is a substantial conflict in the facts stated, the determination of the controverted facts by the trial court will not be disturbed." Hayutin v. Rudnick, 115 Cal. App.2d 138, 140, 251 P.2d 707, 708; People v. Western Meat Co., 13 Cal.App. 539, 110 P. 338; Maselli v. E. H. Appleby & Co., Inc., 117 Cal.App.2d 634, 256 P.2d 618; Jones v. Lindsey, 114 Cal.App.2d 237, 250 P.2d 153; Schreiber v. Hooker, 114 Cal. App.2d 634, 251 P.2d 55; Paulekas v. Paulekas, 117 Cal.App.2d 73, 254 P.2d 941; Globe Dairy Lunch Co. v. Joint Executive Board of Culinary Wkrs., 117 Cal.App.2d 190, 255 P.2d 94.

[8] Plaintiffs' second argument that the juvenile hall ordinance passed by the board required a public hearing before the planning commission is supported by a statement in the case of Johnston v. Board of Supervisors, 1947, 31 Cal.2d 66, 187 P.2d 686. There it was said, 31 Cal.2d at page 76, 187 P.2d at page 693: "Before any ordinance is adopted, the local planning commission must hold public hearings at which interested parties may appear. (State Planning Act, sec. 5.) A proposed plan is then submitted to the local legislative body, which also holds public hearings. *Any change in the proposed ordinance must be submitted to the commission for additional public hearings.* (Ibid. sec. 6.)" (Emphasis added.) The italicized sentence in the quotation appears to be incorrect. Section 6, Stats.1929, ch. 838, p. 1809, reads in pertinent part as follows: "No change or addition to said master plan, or any part of it as adopted by the planning commission, shall be made by the legislative body until the said proposed change or addition shall have been referred to the planning commission for report thereon and an attested copy of said report thereon filed with the legislative body by the planning commission * * *." Section 6, Act 5211b, Deering's Gen.Laws, pp. 1773-1774, provides also "No change in or addition to the master plan or

any part thereof, as adopted by the planning commission, shall be made by the legislative body in adopting the same until the said proposed change or addition shall have been referred to the planning commission for a report thereon and an attested copy of such report shall have been filed with the legislative body." The present section 65655, heretofore quoted in full, requires only that the proposed change be referred to the planning commission for a report and that such report be filed with the legislative body. The legislative history of the present section added by Stats.1953, ch. 1355, § 2, based on former § 65334, as added by Stats.1951, ch. 334, § 1, p. 687, Stats.1947, ch. 807, § 72, p. 1920, Stats.1929, ch. 838, § 6.6, as added by Stats.1937, ch. 665, § 15, p. 1825, shows that if the juvenile hall ordinance in question is considered merely as a "change" in an ordinance recommended to the legislative body by the planning commission rather than an entirely new subject matter proposed and initiated by the legislative body, Gov.Code, §§ 65656, 65657, at no time has the applicable statute required a further public hearing by the planning commission after referral by the legislative body of the proposed change in the recommended ordinance to the planning commission. The crucial question is, therefore, whether or not the juvenile hall ordinance is something new initiated by the legislative body, or whether it is merely a change in an amendment to an ordinance proposed by the planning commission. Defendants' argument appears the more logical one: that the phrase used by the planning commission in the proposed ordinance that property in any residential zone may be used for "governmental uses of any kind" is broad enough to encompass use of the land for a juvenile hall and that the ordinance passed by defendants was merely a part of the whole, or an ordinance of lesser scope than that which they might have enacted. It follows, therefore, that no further public hearing was required to be held by the planning commission upon receipt of the proposed change in the amendment recommended by that body. Anything to the contrary in Johnston v. Board of Supervisors, 31 Cal.2d 66, 187 P.2d 686, is hereby disapproved.

Plaintiffs also rely on the case of *Simpson v. Hite*, 36 Cal.2d 125, 222 P.2d 225. We were there concerned with a different problem. We said there, in speaking of the Planning and Conservation Act, 2 Deering's Gen.Laws, Act 5211c, that "The legislative body shall not change the *plan* without referring the proposed change to the planning commission for a report (§ 72) and the planning commission must hold public hearings on such proposed changes (§ 74)." Emphasis added; 36 Cal.2d at pages 134, 135, 222 P.2d at page 231. Section 72 is the predecessor of the section under consideration, 65655, and has been heretofore commented upon. Section 74 refers to a *change or addition in the master plan initiated by the legislative body*. In the case under consideration, the change in the master plan originated, by way of proposed amendments to the ordinance, *with the planning commission*, not with the legislative body. The change in the proposed amendment was made by the legislative body. The case of *Simpson v. Hite*, supra, is therefore inapplicable.

[9] Plaintiffs contend that the urgency clause of the ordinance in question was improperly enacted without statutory authority therefor. Plaintiffs cite section 25123 of the Government Code which provides: "Except as provided in Division 4, Chapter 2 of the Elections Code, no ordinance passed by the board shall take effect within less than 30 days after its passage." Section 1651 of the Elections Code setting forth the ordinances which may take effect immediately refers to initiative and referendum measures which are not here involved. That section further provides: "*All other ordinances * * ** shall become effective 30 days from the date of final passage." (Emphasis that of the Legislature.) The urgency provision of the ordinance was enacted without legislative authority and is, therefore, void and of no effect. This, however, does not invalidate

the balance of the ordinance. In *People v. Phillips*, 76 Cal.App.2d 515, 521, 173 P.2d 392, 396, the court said "Under the general rule if no emergency existed or the urgency declaration were invalid that would not impair the validity of the remainder of the statute which would take effect at the regular time appointed by law." See, also, *Michelson v. City of Sacramento*, 173 Cal. 108, 109, 159 P. 431; *In re Hoffman*, 155 Cal. 114, 120, 99 P. 517; *Morgan v. City of Long Beach*, 57 Cal.App. 134, 139, 207 P. 53; *Klassen v. Burton*, 110 Cal.App.2d 539, 543, 243 P.2d 28.

[10, 11] There is no merit to plaintiffs' contention that the ordinance involved here is special legislation favoring one class. It is conceded by plaintiffs that the county could have exempted itself from the provisions of its basic zoning ordinance. See, *Sunny Slope Water Co. v. City of Pasadena*, 1 Cal.2d 87, 98, 33 P.2d 672; *Jardine v. City of Pasadena*, 199 Cal. 64, 76, 248 P. 225, 48 A.L.R. 509. Since it could have exempted itself, there appears to be no sound reason why it should be prohibited from amending its basic zoning ordinance to permit residential property to be used for governmental purposes if such uses are deemed advisable and beneficial to the general public welfare.

For the foregoing reasons we conclude that the ordinance in question was validly enacted, with the exception of the urgency clause, and that the order of the trial court vacating the temporary restraining order, denying a preliminary injunction and discharging an order to show cause must be affirmed. Because of this conclusion we find it unnecessary to consider the argument of defendants that plaintiffs were not entitled to relief by way of injunction.

The order is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, SPENCE, and McCOMB, JJ., concur.

46 Cal.2d 241

William HIGGINS, Petitioner,
v.

The STATE BAR OF CALIFORNIA,
Respondent.
S. F. 19366.

Supreme Court of California.
In Bank.
Feb. 21, 1956.

sional Conduct, rules 2, 3, West's Ann.Bus. & Prof.Code following § 6076.

Paul J. Philbin, Jr., San Francisco, for petitioner.

Garrett H. Elmore, San Francisco, for respondent.

PER CURIAM.

This is a proceeding to review a recommendation of the Board of Governors of The State Bar that petitioner William Higgins be suspended from the practice of law for a period of six months.

Disciplinary proceeding. Attorney petitioned for review of recommendation by Board of Governors of State Bar. The Supreme Court held that evidence supported finding that attorney had violated Rules of Professional Conduct in solicitation of professional employment through use of lay persons, and that these persons' activities were carried on with attorney's knowledge, acquiescence and consent in pursuance of an established scheme or design.

Order in accordance with opinion.

Petitioner was charged with the violation of his oath and duties as an attorney at law in that he engaged others to solicit professional employment for him, commonly referred to as "ambulance chasing," in violation of rules 2 and 3 of the Rules of Professional Conduct. 33 Cal.2d 27. After hearing, the local administrative committee found petitioner guilty as charged and recommended to the board his suspension from practice for four weeks. Petitioner failed to appear before the board and after a consideration of his case, the board made its own findings, which were in substantial agreement with the committee's but added that the improper "activities of the lay persons" acting on petitioner's behalf "were carried on with [petitioner's] knowledge, acquiescence and consent and were part of a scheme and design by [petitioner] to solicit professional employment." The board recommended a six months' suspension period, with three dissenting on the ground that "the degree of discipline recommended [was] too severe."

1. Attorney and Client ⇨57

In a disciplinary proceeding, findings of Board of Governors of State Bar are not binding on Supreme Court, which will itself pass upon sufficiency and weight of evidence, but petitioner for review has burden of showing wherein decision of Board is erroneous or unlawful.

2. Attorney and Client ⇨53(2)

Evidence in disciplinary proceedings supported finding that attorney had violated Rules of Professional Conduct in solicitation of professional employment through use of lay persons, and that these persons' activities were carried on with attorney's knowledge, acquiescence and consent in pursuance of an established scheme or design. Rules of Professional Conduct, rules 2, 3, West's Ann.Bus. & Prof.Code following § 6076.

3. Attorney and Client ⇨58

Attorney's violation of rules prohibiting solicitation of professional employment through lay persons warranted suspension from practice for six months, irrespective of harm or damage to clients obtained through the solicitation. Rules of Profes-

[1] Petitioner, who is 32 years of age, was admitted to practice in January, 1951. He contends that the evidence is insufficient to sustain the board's findings and that, in any event, its disciplinary recommendation is too severe. While such findings are not binding on this court, which will itself pass upon the sufficiency and weight of the evidence, *Fall v. State Bar*, 25 Cal.2d 149, 159, 153 P.2d 1; *Clark v. State Bar*, 39 Cal.2d 161, 165, 246 P.2d 1, petitioner has the burden of showing wherein the decision of the board is erroneous or unlawful. *Alkow*

v. State Bar, 38 Cal.2d 257, 258, 239 P.2d 871. He has not met that burden.

It appears that petitioner improperly solicited professional employment in two instances: one in September, 1953, from Mrs. Loma Porter following injuries to her child as the result of an automobile accident; and the other in January, 1954, from Mr. and Mrs. Henry Augustus following injuries to their child, also as the result of an automobile accident.

With respect to the first charge, Mrs. Porter testified that about a week after her child was injured, two men called at her home, introduced themselves as investigators, gave her one of petitioner's professional cards, interviewed her at length about the accident, and had her sign a statement as well as a contract employing petitioner as her attorney but left no copy of either document with her. She further testified that petitioner called upon her about a week later, identified himself as "Mr. Higgins" and the two men who had previously visited her as "his investigators"; that she signed another contract with him; that he also interviewed her and took notes with regard to the accident; and that at no time between the interview by the two investigators and petitioner's visit had she undertaken to communicate with petitioner. Petitioner professed to be unable to remember any of these related events but claimed that he called on Mrs. Porter because a former client had told him of the accident to the Porter child, and that the mother "wanted some legal counsel." Mrs. Porter denied knowing the person who allegedly gave petitioner her name, and he was not called as a witness at the hearing. The Porter case was handled by petitioner and a settlement was concluded.

With respect to the second charge, Mrs. Augustus testified that on the day after her child was injured a "Mr. Jacobs" and another man came to her home, introduced themselves, one as an attorney and the other as an investigator, had contract blanks with them, had her sign one though she did not remember the attorney's name on it, told her she should employ Mr. Higgins to handle her case, and gave her about

30 of the latter's professional cards. She further testified that the next day a man identifying himself as Mr. Higgins telephoned her, told her to take her child to a certain doctor, and cautioned her not to give out any information until he told her; that she thereupon stated to petitioner that she already had a lawyer, whom she named and whom petitioner said that he did not know; that she then described the persons who had called on her the preceding day in petitioner's behalf, but petitioner disclaimed any knowledge of or connection with them. She also testified that some few days later petitioner came to her home, at which time her lawyer happened to be there; that petitioner talked with her husband in the front room while she was talking to her lawyer in the kitchen; that petitioner then met her lawyer in the hall, that the two went outside to talk a few minutes, and that she did not see or hear from petitioner again. Mr. Augustus substantially corroborated his wife's account of the visit by the two men in petitioner's behalf. He added that they identified themselves as "members of Mr. Higgins' firm," gave him one of petitioner's cards, and told him that "all references in the case were * * * to be referred to [petitioner]" when they had his wife sign an agreement and took notes as to the happening of the accident. Mr. Augustus also corroborated his wife's account of petitioner's later visit to their home, adding that petitioner said "he came out to discuss the accident with [him]" and that he thereupon gave petitioner a statement because he took it for granted that petitioner was his attorney. Mr. Augustus likewise corroborated his wife's statement as to petitioner's meeting with the other lawyer in their home, and that after the conversation between the two, which he did not hear, he did not see petitioner again. The other lawyer testified that he had represented the Augustuses in some prior litigation; that on the day following the accident here in question, Mrs. Augustus telephoned to him, saying that if there were any legal problems involved, she wanted him to handle them; that nothing further was done in the matter until some ten days later, when he received an-

other call from Mrs. Augustus, wherein she said that "something funny was happening" in that some other attorney was trying to handle the case, that she wanted him [the witness] to handle the case, and that he thereupon went that evening to the Augustus home, where he met petitioner as previously related by both Mr. and Mrs. Augustus. He further testified that in his conversation with petitioner outside the Augustus home, petitioner stated that he did not know that the Augustuses had an attorney, and that a friend of the Augustuses had referred him to them; and that after some conversation about the doctor whom petitioner had recommended in the case, petitioner left. This lawyer also testified that he then returned to the Augustus home, asked them if they knew the alleged friend whom petitioner had identified as making the reference of his name to the Augustuses, and that both expressed ignorance of such person.

At the outset in testifying with respect to this charge, petitioner stated that his uncertainty on many points stemmed from the fact that a long period of time had elapsed between the questioned occurrences and the date of his examination in these proceedings (about 10½ months), and that he had meanwhile handled a lot of litigation. He then testified that it was his "recollection" that Mrs. Augustus had first called him about the accident (which was directly contrary to the testimony of both Mr. and Mrs. Augustus that petitioner had first called her), and that she asked to see him about the accident. Petitioner testified to his later visit to the Augustus home for the purpose of getting the facts from Mr. Augustus, admitting the private talk between himself and the previously mentioned lawyer, and that he [petitioner], upon being advised of the former's employment in the case, left the Augustus home and "forgot about the matter." Petitioner denied knowing the persons whom the Augustuses described as first coming to their home in petitioner's behalf. Petitioner also stated that he had always practiced alone; that during the almost three years intervening between his admission to practice and the matters here in question, he had circulated

between 7,000 and 8,000 of his professional cards, which number he later called only "an estimate," with the correction that he ordinarily ordered about 500 cards every six months, which he gave to "friends" and to those who came to his office for legal advice, suggesting that they keep him in mind. When asked about his employment of "investigators" at the time here in question, petitioner stated that for the purpose of checking police reports and interviewing witnesses, he had hired various persons, "part-time people," who "would do the work" for him "in the evening after they finished their regular occupations" but he could not recall any of their names. He characterized the whole matter of his investigating requirements as a "hit-and-miss affair," depending on what work had to be done, and sometimes he would "go out and make the investigation" himself. When asked whether his office records would show the names of the persons he had hired as investigators, petitioner stated that he was "not sure" because he did not keep records on such matters and usually just paid them in cash.

[2] From the above summary of the record, it appears that the principal point of conflict in the evidence concerned the matter of whether petitioner had knowledge of the identity of the investigators and whether he had authorized their activities. However, there was abundant credible evidence that in both instances here in question a definite pattern was followed, wherein two men called at the respective homes soon after the accidents, interviewed the parents, had them sign contracts, left some of petitioner's professional cards, and indicated that petitioner would communicate with them later, which he did. While petitioner denied any wrongdoing in these cases, maintaining that the referrals had come to him rather than his initiating the original contacts, his explanations appear vague and unconvincing, coupled with a professed inability to recall any of the essential points in relation to his admitted hiring of investigators as the occasion might demand. Such conduct, evasive testimony and lack of candor are not consistent with the high degree of fidelity to his pro-

fessional duties owed by petitioner as an attorney at law. *Burns v. State Bar*, 45 Cal. 2d 296, 288 P.2d 514. Under the circumstances, the record amply supports the board's finding that in both instances petitioner violated rules 2 and 3 of the Rules of Professional Conduct in the solicitation of professional employment through the use of lay persons, and further justifies the board's added finding that these lay persons' activities were carried on with petitioner's knowledge, acquiescence and consent in pursuance of an established scheme or design.

While the record thus clearly shows petitioner's misconduct, there remains the question of the extent to which petitioner should be disciplined. In this connection petitioner claims that so far as he was concerned, no harm or damage was done to the clients in either instance, citing his termination of the Porter case through ultimate settlement (disregarding Mrs. Porter's stated dissatisfaction with the terms of the contract signed with petitioner) and his withdrawal from the Augustus case as soon as he learned that another lawyer was handling it. He further argues that any wrongdoing that might have occurred in these matters on his part was unintentional, attributable in the main to his inexperience and the "excitement of a young attorney" at the prospect of obtaining a case, causing him to overlook the proprieties in seeking professional employment. He also notes that there is no evidence in the record of any past misconduct on his part.

[3] The controlling question, however, is not whether any harm or damage resulted to the particular clients from petitioner's handling of their affairs after he had obtained the contracts of employment. The rules which petitioner violated are primarily designed to prohibit unprofessional conduct in obtaining such contracts of employment regardless of the quality of the work which may be performed thereunder. Petitioner's conduct in obtaining such contracts appears to have constituted an intentional, flagrant violation of the rules; and under all the circumstances, it further appears that the recommended discipline is

appropriate and should not be reduced by this court.

It is ordered that William Higgins be suspended from the practice of law for a period of six months, commencing thirty days after the filing of this opinion.



46 Cal.2d 208

**Erle Roger PIANKA, by and through his
guardian ad litem Walter Planka,
Plaintiff and Appellant,**

v.

**STATE of California and National Guard
of the State of California, Defendants
and Respondents.**

S. F. 19361.

**Supreme Court of California,
In Bank.**

Feb. 10, 1956.

Guardian's action against State and National Guard for injuries received by minor from explosion of a shell left by the National Guard on a public firing range at the conclusion of a public demonstration. The Superior Court, City and County of San Francisco, *H. A. van de Zee, J.*, granted defendant's motion for dismissal on ground of sovereign immunity and guardian appealed. The Supreme Court, *Gibson, C. J.*, held that where defendants' affidavit supporting their speaking motion for dismissal alleged that a firing demonstration was conducted by the National Guard "solely for the purpose of gaining recruits", it served only to controvert an allegation of guardian's complaint that the demonstration was conducted for entertainment of the public generally, and therefore disclosed the existence of a question of fact which could

not be decided on affidavits but must be tried in the usual manner.

Judgment reversed.

Opinion, 285 P.2d 372, vacated.

1. States ⇐112

The state and its agencies are immune from liability for tort in the discharge of governmental duties and activities, but liability exists for negligence in connection with proprietary activities such as the operation of an industrial or business enterprise.

2. States ⇐191(2)

Governmental immunity turns on the nature of the particular activities that led to an injury, and not on the identity of the governmental subdivision or agency carrying on the enterprise.

3. States ⇐112

A state may be acting in a proprietary capacity when it enters into activities designed to amuse and entertain the public, and therefore would be liable for negligence in connection with such activities.

4. States ⇐208

Complaint against a state and its national guard for injuries received by minor from explosion of a shell left by the national guard on a public firing range at the conclusion of a public demonstration, stated a cause of action on the theory of negligence in carrying on a proprietary activity.

5. Motions ⇐2

A speaking motion although not authorized by statute may be permitted by the court in the exercise of its inherent power to prevent an abuse of judicial process.

6. Motions ⇐1

Nonstatutory speaking motions have been superseded by procedure governing motions for summary judgment. West's Ann.Code Civ.Proc. § 437c.

7. Judgment ⇐181(2), 183

Under statute governing motions for summary judgment, a motion supported by affidavit of a person having knowledge of the facts may be made after answer

whenever it is claimed that the action has no merit, and the complaint may be dismissed unless the other parties show facts sufficient to present a triable issue. West's Ann.Code Civ.Proc. § 437c.

8. Motions ⇐1

Remedy afforded by statute governing motions for summary judgment covers all situations in which speaking motions have been employed, and therefore there is no need for such nonstatutory procedure. West's Ann.Code Civ.Proc. § 437c.

9. Judgment ⇐183

In the interests of orderly and efficient administration of justice, a litigant should be required to employ the procedure set forth by statute governing motions for summary judgment, and a speaking motion to dismiss should be treated as a motion for summary judgment in order to preserve the safeguards provided by such statute. West's Ann.Code Civ.Proc. § 437c.

10. Appeal and Error ⇐863

Where statute governing motions for summary judgment did not expressly state that such statute was intended to supersede speaking motions, and the parties did not consider its applicability, Supreme Court on appeal would test propriety of granting of a speaking motion for dismissal under rule laid down by decisions involving speaking motions. West's Ann. Code Civ.Proc. § 437c.

11. Judgment ⇐185.2(5)

It is error to grant a speaking motion for dismissal of a complaint where a supporting affidavit does not do more than controvert a material allegation of the complaint and create an issue of fact which cannot be properly tried on affidavits. West's Ann.Code Civ.Proc. § 437c.

12. Judgment ⇐185.3(1)

Where defendants' affidavit supporting their speaking motion for dismissal alleged that a firing demonstration was conducted by the national guard "solely for the purpose of gaining recruits", it served only to controvert an allegation of guardian's complaint that the demonstration was conducted for entertainment of the public generally, and therefore dis-

closed the existence of a question of fact which could not be decided on affidavits but must be tried in the usual manner. West's Ann.Code Civ.Proc. § 437c.

Hoberg & Finger and Ingemar E. Hoberg, San Francisco, for appellant.

Bronson, Bronson & McKinnon, E. D. Bronson, Jr., San Francisco, Edmund G. Brown, Atty. Gen., John E. Fourt and Richard S. F. Roddis, Deputy Attys. Gen., for respondents.

GIBSON, Chief Justice.

Plaintiff, a minor, is seeking damages for personal injuries resulting from the explosion of a shell which was left by the National Guard on a public firing range of the city of Yreka at the conclusion of a public demonstration. Defendants, without filing an answer, raised the defense of sovereign immunity by means of a motion to dismiss supported by an affidavit. The court granted the motion, and plaintiff has appealed from the judgment of dismissal.

The complaint alleges that the firing demonstration was held for the entertainment of the public generally, that it was widely advertised in the local newspapers and that all members of the public were invited to attend. It is further alleged that defendant negligently left an unexploded shell on the public firing range where it would be attractive to young children and that, as a proximate cause of such negligence, plaintiff was injured. A claim, which was duly served and filed pursuant to section 16041 of the Government Code,¹ was denied.

The affidavit in support of the motion to dismiss stated that the firing demonstration had been conducted solely for the purpose of gaining recruits for the National Guard and that no admission charge was made.

[1-3] The state and its agencies are immune from liability for tort in the discharge of governmental duties and activities, but liability exists for negligence in connection with proprietary activities such as the operation of an industrial or business enterprise. Gov.Code, § 16041; Guidi v. State of California, 41 Cal.2d 623, 625 et seq., 262 P.2d 3; People v. Superior Court, 29 Cal.2d 754, 757 et seq., 178 P.2d 1, 40 A.L.R.2d 919, and cases cited. Governmental immunity turns on the nature of the particular activity that led to the injury, not on the identity of the governmental subdivision or agency carrying on the enterprise, and it has been held that the state may be acting in a proprietary capacity when it enters into activities designed to amuse and entertain the public. Guidi v. State of California, 41 Cal.2d 623, 627, 262 P.2d 3; Cf. Chafor v. City of Long Beach, 174 Cal. 478, 163 P. 670, L.R.A.1917E, 685; Rhodes v. City of Palo Alto, 100 Cal.App.2d 336, 223 P.2d 639; Sanders v. City of Long Beach, 54 Cal. App.2d 651, 129 P.2d 511.

[4] The complaint states a cause of action on the theory of negligence in carrying on a proprietary activity, and, so far as appears from the face of the pleading, there is no lack of personal or subject matter jurisdiction.

[5-9] Defendant raised the defense of sovereign immunity by means of a procedure commonly called a "speaking motion" which, although not authorized by statute, has been permitted by the courts under certain circumstances in the exercise of their inherent power to prevent an abuse of judicial process. Crowley v. Modern Faucet Mfg. Co., 44 Cal.2d 321, 324-325, 282 P.2d 33; McKenna v. Elliott & Horne Co., 118 Cal.App.2d 551, 555, 258 P.2d 528; Cunha v. Anglo California Nat. Bank, 34 Cal.App.2d 383, 388-389, 93 P.2d 572; see Witkin, California Procedure (1954) 1500-

1. Section 16041 of the Government Code provides: "Any person who has a claim against the State * * * (2) for negligence * * * shall present the claim to the [State Board of Control] in accordance with Section 16021. If the claim

is rejected or disallowed by the board, the claimant may bring an action against the State on the claim and prosecute it to final judgment, subject to the conditions prescribed by this chapter."

1501. However, nonstatutory speaking motions have now been superseded by the procedure governing motions for summary judgment contained in section 437c of the Code of Civil Procedure.² This section was originally very limited in scope, but it has been broadened by a series of amendments and now applies "in any kind of action" and provides that the "word 'action' * * * shall be construed to include all types of proceedings." Under this section a motion supported by affidavit of a person having knowledge of the facts may be made after answer whenever it is claimed that the action has no merit, and the complaint may be dismissed unless the other party shows facts sufficient to present a triable issue. The remedy afforded by this section is broad enough to cover all situations in which speaking motions have been employed, and there is therefore no longer any need for the nonstatutory procedure. In the interests of orderly and efficient administration of justice the litigant should be required to employ the statutory remedy, and a speaking motion to dismiss should be treated as a motion for summary judgment in order to preserve the safeguards provided by the statute.

[10-12] The procedure followed by defendants here wholly failed to meet the requirements of section 437c. However, the statute does not expressly state that it was intended to supersede speaking motions, and the parties did not consider its

applicability in this proceeding. Accordingly, since this is the first time the question has been decided, we have tested the propriety of the judgment under the rules laid down by the decisions involving speaking motions. It has been uniformly held that it was error to grant such a motion where the affidavit did no more than controvert a material allegation of the complaint and create an issue of fact which could not be properly tried on affidavits. *Arnold v. Hibernia Savings & Loan Soc.*, 23 Cal.2d 741, 744-745, 146 P.2d 684; see *Saunders v. Hibernia Savings & Loan Soc.*, 23 Cal.2d 738, 740, 146 P.2d 683; Chance, *Some Practical Suggestions on Defense Motions and Other Procedures Before Trial* (1952), 40 Cal.L.Rev. 192, 197, 199. In the present case the averment in the supporting affidavit that the firing demonstration was conducted by a unit of the National Guard "solely for the purpose of gaining recruits" at most serves only to controvert the allegation of the complaint that the demonstration was conducted for the entertainment of the public generally, and thus discloses the existence of a question of fact which may not be decided on affidavits but must be tried in the usual manner. See *Arnold v. Hibernia Savings & Loan Soc.*, 23 Cal.2d 741, 744-745, 146 P.2d 684. Cases involving nonstatutory speaking motions which held that a plaintiff was under a duty to file a counteraffidavit when the moving party had alleged what ap-

2. Section 437c of the Code of Civil Procedure, as amended in 1953, provides that "when an answer is filed in any kind of action if it is claimed that * * * the action has no merit, on motion * * * after notice * * * supported by affidavit of any person or persons having knowledge of the facts, * * * the complaint may be dismissed and judgment may be entered, in the discretion of the court unless the other party, by affidavit or affidavits shall show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact. * * * The word 'action' as used in this section shall be construed to include all types of proceedings.

"The affidavit or affidavits in support of the motion must contain facts sufficient to entitle plaintiff or defendant to a judgment in the action, and the facts stated

therein shall be within the personal knowledge of the affiant, and shall be set forth with particularity, and each affidavit shall show affirmatively that affiant, if sworn as a witness, can testify competently thereto.

"The affidavit or affidavits in opposition to said motion shall be made by the plaintiff or defendant, or by any other person having knowledge of the facts, and together shall set forth facts showing that the party has a good and substantial defense to the plaintiff's action (or to a portion thereof) or that a good cause of action exists upon the merits. The facts stated in each affidavit shall be within the personal knowledge of the affiant, shall be set forth with particularity, and each affidavit shall show affirmatively that the affiant, if sworn as a witness, can testify competently thereto. * * *"

peared to be incontrovertible grounds for dismissal are not in point. See *Crowley v. Modern Faucet Mfg. Co.*, 44 Cal.2d 321, 324, 282 P.2d 33; *Cunha v. Anglo California Nat. Bank*, 34 Cal.App.2d 383, 391-392, 93 P.2d 572.

The judgment is reversed.

SHENK, CARTER, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.



139 Cal.App.2d 372

Richard COE, Helen Coe, a minor, Martha Coe, a minor, and Robert Condee Coe, a minor, by and through their guardian ad litem, Richard Coe, Plaintiffs and Appellants,

v.

KINGS COUNTY TRUCK LINE, a corporation, and Leland William Becker, Defendants and Respondents.

Civ. 21259.

District Court of Appeal, Second District, Division 1, California.

Feb. 21, 1956.

Rehearing Denied March 12, 1956.

Hearing Denied April 18, 1956.

Action by surviving husband and minor children to recover damages for death of automobile driver in collision with defendants' truck and trailers. The Superior Court of Los Angeles County, John J. Ford, J., entered judgment on a verdict for defendants and an order denying motion for new trial, and plaintiffs appealed. The District Court of Appeal, Doran, J., held that prejudicial error did not appear in the instructions given or in refusal of trial court to give requested instructions.

Judgment affirmed.

1. Appeal and Error ⇨1062(2)

Automobiles ⇨246(58)

In action for death of driver of automobile in collision with defendants' truck

and trailers at signal-controlled intersection in a business district, trial court's instructions as to contributory negligence were comprehensive, and with relation to the evidence were correct as a matter of law and refusal to submit question of willful, wanton or reckless misconduct of defendants precluding reliance on defense of contributory negligence was not prejudicial to plaintiffs.

2. Automobiles ⇨244(35), 246(56)

In action for death of motorist in collision with defendants' truck and trailers at signal-controlled intersection in a business district, evidence disclosed that section of Vehicle Code fixing prima facie speed limits had no application, and hence refusal to give requested instructions on subject of prima facie speed limit was not error. Vehicle Code, § 511.

3. Trial ⇨260(8)

In action for death of motorist in collision with defendants' truck and trailers at signal-controlled intersection in a business district, instructions given fully covered the law applicable to the situation involved, and refusal to give requested instructions explaining and expounding rights and duties at a signal-controlled intersection did not result in error prejudicial to plaintiffs. Vehicle Code, § 476.

4. Appeal and Error ⇨1067

A judgment will not be reversed for failure to give instructions unless it affirmatively appears that there has been a miscarriage of justice.

5. Appeal and Error ⇨1064(1)

Mere fact that meticulous analysis of instructions given may disclose some technical error does not result in prejudicial error, unless it appears that jury was or could have been misled thereby.

6. Trial ⇨229, 240

Instructions that are repetitious or argumentative or which would only serve to confuse are properly refused.

Raoul D. Magana, Henry F. Walker, Los Angeles, for appellants.

Crider, Tilson & Ruppé, Joe Crider, Jr., Los Angeles, for respondents.

DORAN, Justice.

Dr. Marie Condee Coe was killed at a signal-controlled intersection, within a business district, in a daylight collision between a Dodge sedan being operated easterly by her and defendants' heavy 65,500-pound and lengthy, approximately 60-foot, equipment which consisted of a truck-tractor and a large semi-trailer and a converter gear with another semi-trailer attached being operated by defendant in a southerly direction.

The action is for damage by the surviving husband and minor children of deceased. Following a jury trial the verdict and judgment were for defendant. A motion for a new trial was denied and the appeal herein is from the judgment.

As stated in appellant's brief, "Although the answer technically denied that death resulted from the accident, the evidence showed that the force of the impact threw Dr. Coe from the sedan and under the wheels of defendants' equipment where she was observed by defendant driver, and it was stipulated that she died as a result of this accident. As an affirmative defense, the answer pleaded that the deceased had been guilty of contributory negligence 'in that at the time and place of said alleged accident said Marie Condee Coe so negligently drove said automobile as to cause the same to collide with the truck.'"

The accident occurred at the intersection of South Alameda and 41st Street in Los Angeles. Alameda Street at this point is a four-lane highway.

"At the place of the accident and for some distance to the north and south thereof, Alameda Street runs north and south and is divided by a railroad private right-of-way which also runs north and south. Thus, one portion of Alameda runs north-south on the west side of the railroad right-of-way and the other portion of Alameda does the same but on the east side of said right-of-way. Both the west portion and the east portion of Alameda carry both northbound and southbound vehicular traffic. The city of Los Angeles is west and

the city of Vernon is east, the boundary between them being about the middle of the railroad right-of-way, so that south-bound tracks are in Los Angeles and north-bound tracks are in Vernon. The east-west street, which crosses Alameda and the tracks at the place here involved, is known as 41st Street in Los Angeles and as 38th Street in Vernon.

"The evidence without contradiction showed that defendant driver was operating the truck and trailers southerly on the Vernon side of Alameda (i. e., east of the railroad) and that the decedent was operating the Coe car in an easterly direction on the 41st-38th east-west street and that the collision occurred on the Vernon side of the intersection east of the railroad tracks." The intersection was controlled by traffic signals.

As recited in appellants' brief, "The evidence was conflicting as to defendant's speed". Also, "The evidence was conflicting as to whether decedent stopped on the railroad tracks and, when the signal was green for north-south traffic, followed a black sedan forward into the east portion of Alameda to be struck by defendants' truck or whether decedent was in the intersection and at the westernmost railroad track when the traffic signal was amber for east-west traffic and was moving in an easterly direction at all times and was struck by defendants' truck." "The evidence was conflicting as to whether the Coe car was the only eastbound vehicle in the intersection or whether there was other such traffic therein."

"The evidence in important respects was highly conflicting. Appellants do not claim that the evidence would be insufficient to support a judgment for respondents. Appellants herein do claim that the trial court erred prejudicially in instructing the jury."

It is contended on appeal that,

"I. The trial court erred in refusing instructions explaining and expounding rights and duties at a signal-controlled intersection."

"II. The trial court erred in refusing to give plaintiffs' requested instruction on prima facie speed limit."

"III. The trial court erred in refusing to submit, as a question of fact, whether defendant driver had been guilty of conduct under which contributory negligence would not be a defense."

The intersection where the accident occurred was not the usual crossing. As described in appellants' brief, "Both 41st Street (L.A.) and 38th Street (Vernon) are 40 feet wide. The approximate width of the southbound traffic lane of the portion of Alameda east of the railroad was 14'-6" and of the northbound traffic lane thereof was 12' making a total of about 26'-66". The width of the railroad right-of-way was approximately 37' or roughly room for two cars bumper to bumper. The width of the portion of Alameda west of the railroad was 48'-8".

[1] With relation to the instructions on contributory negligence appellants argue that, "It thus is seen that the given instructions negated any possible basis for determination that defendants' conduct was so reprehensible as to preclude them from relying on contributory negligence as a defense; and that the trial court refused to submit one of plaintiffs' theories, i. e., that defendants were guilty of willful, wanton or reckless misconduct, as above defined which, if found, would preclude contributory negligence from being operative as a defense." The trial court's instructions on this subject were comprehensive and with relation to the evidence were correct as a matter of law. The prejudice claimed by appellants with regard to this subject lacks support in the record.

[2] With regard to appellants' argument relating to the requested instructions on the subject of "Prima Facie speed limit", the failure of the trial court to give these instructions was, in the light of the record, not error.

An examination of the evidence reveals that section 511 of the Vehicle Code had no application. Incidentally, there was no evidence of wilful misconduct on the part of the truck driver.

With regard to appellants' contention that the court erred in refusing instructions relating to rights and duties at signal-controlled intersections appellants urge that, "The given instructions did not cover, adequately or correctly, the rights and duties of motorists at signal-controlled intersections. The various requested-but-refused instructions, above noted, plaintiffs sought to have the jury instructed thereon. But the court refused these requests, thereby leaving the jury without any proper guidance upon these obviously most important matters."

[3] An examination of the instructions given reveals that they fully and adequately cover the law applicable to the situation involved. No prejudicial error resulted in the failure of the court to add to the instructions those requested by appellants. In this connection the court read section 476 of the Vehicle Code.

[4] It is well established that a judgment will not be reversed for the failure to give instructions unless it affirmatively appears that there has been a miscarriage of justice. *Moise v. Fairfax Markets, Inc.*, 106 Cal.App.2d 798, 236 P.2d 216; *Luis v. Cavin*, 88 Cal.App.2d 107, 198 P.2d 563.

[5, 6] "It must appear that the jury was or could have been misled, *Cannis v. Di Salvo Trucking Co.*, 111 Cal.App.2d 893, 245 P.2d 365, and the mere fact that some technical error may appear on meticulous analysis does not create prejudicial error. *Popejoy v. Hannon*, 37 Cal.2d 159, 231 P.2d 484. Instructions that are repetitious or argumentative or which would only serve to confuse, are properly refused. *Dodds v. Stellar*, 77 Cal.App.2d 411, 175 P.2d 607."

An examination of the record reveals no prejudicial errors.

The judgment is affirmed.

FOURT, J., concurs.

WHITE, P. J., concurs in the judgment.

139 Cal.App.2d 376

Raymond J. BUSH and Madonna L. Bush,
Plaintiffs and Appellants,

v.

Elwin LANE, Dorothy I. Lane and Leonard
Nix, Defendants and Respondents.

Civ. 8638.

District Court of Appeal, Third District,
California.

Feb. 21, 1956.

Rehearing Denied March 22, 1956.

Hearing Denied April 18, 1956.

Action to recover value of goods. The Superior Court, Mendocino County, Curtiss E. Wetter, J., rendered judgment for defendants and plaintiffs appealed. The District Court of Appeal, Peek, J., held that evidence sustained finding that defendants, repossessing premises, had neither asserted a dominion over goods of plaintiffs found on such premises nor prevented plaintiffs from taking possession of their property.

Affirmed.

1. Trover and Conversion ⇨4

One rightfully in possession of real property does not, when he removes to warehouse, or other place, chattels found on it belonging to another, assert ownership or control over them to extent of making him liable for conversion.

2. Trover and Conversion ⇨35

To establish a conversion, it is incumbent upon plaintiff to show an intention or purpose to convert goods, to exercise ownership over them, or to prevent owner from taking possession of his property.

3. Trover and Conversion ⇨40(4)

Evidence sustained finding that vendors, repossessing premises, had neither asserted a dominion over goods of purchasers found on such premises nor prevented purchasers from taking possession of their property.

4. Trover and Conversion ⇨11

One who merely receives goods for storage or transportation, in ignorance of fact that they are lost or stolen, does not thereby become a converter, since there is no assertion of an adverse dominion.

5. Appeal and Error ⇨1056(1)

Exclusion of affidavit relative to telephone conversation could not have been prejudicial, where content of affidavit could in no way have affected final outcome of trial. West's Ann.Code Civ.Proc. § 1881, subd. 2.

6. Appeal and Error ⇨1056(2)

Exclusion of testimony as to immaterial conversation would not require reversal.

Broaddus & Golden, Ukiah, and Wilmer W. Morse, Sacramento, for appellants.

Preston, Falk & Johnson, and Thomas F. Cleland, Ukiah, for respondents.

PEEK, Justice.

By their second amended complaint plaintiffs sought to recover from defendants the value of goods sold and delivered to defendants. Following a hearing before the court sitting without a jury, judgment was entered in favor of defendants. Plaintiffs' motion for a new trial was denied, and they now appeal. It is our conclusion that the judgment and order must be sustained.

The record shows that defendants, by a contract of sale, sold to plaintiffs certain real property known as Lane's Riverdale Resort. As a part of the transaction, plaintiffs executed a quitclaim deed to defendants which, together with other documents, was deposited with a bank as escrow holder. Plaintiffs took possession of the premises in February, 1950, bringing with them various items of personal property. They made payments under the contract until November 1, 1951, when the last payment was made. On December 22, 1951, they closed the resort for the winter, left and returned on January 8, 1952. Immediately thereafter they left for Seattle where they stayed until April when they received word that defendants were repossessing the premises. The quitclaim deed previously mentioned was recorded on April 7, 1952. On the following day defendants entered the premises after obtaining a key from plaintiffs' caretaker and began the taking of an inventory of plaintiffs' personal prop-

erty then on the premises. On April 10, defendants through their attorneys, mailed a letter to plaintiffs at the resort address which stated in part that plaintiffs' personal property at the resort would be held for them without expense if claimed before April 19, but if plaintiffs failed to remove such effects before the 19th, they would be delivered into the possession of the defendant Nix for packing and transporting to his warehouse at plaintiffs' expense. In accordance with instructions plaintiffs had left with a friend, the letter was forwarded to their attorneys on April 14. Plaintiffs returned on April 17 and without further contact with defendants immediately filed an action for forcible entry against them. That evening plaintiffs called on defendants and demanded the property—whether the realty or personalty does not clearly appear. Assuming that it was the personalty, there is testimony that they could not take it with them at that time. Defendants testified that they did not refuse to deliver the property but only requested that the same be taken in an orderly fashion. On April 18 defendants inspected the storage facilities of defendant Nix, and two days later plaintiffs' goods were stored with him. Thereafter, on July 31, plaintiffs filed the present action.

It is plaintiffs' contention that the evidence established a conversion of their goods by defendants as a matter of law. This the defendants deny and contend in support of the judgment that since their removal of the goods to the warehouse was without intent either to assume control over or to deprive the plaintiffs of their possession of the goods, it could not be a conversion; or if it could be said that the failure of plaintiffs to remove the goods and their charging defendants with responsibility for the property made defendants involuntary bailees for hire, then their acts were strictly in accordance with Civil Code, § 1503.

Although at the trial plaintiffs made no claim to the realty, they now so contend.

We conclude, as did the trial court, that there is no evidence that defendants re-entered without right. There is no evidence that the quitclaim deed was improp-

erly delivered to defendants or improperly recorded. Additionally it should be noted that prior to filing their second amended complaint in the present action, plaintiffs voluntarily dismissed their action¹ of forcible entry against defendants.

[1] Under such circumstances our courts have held that “* * * one rightfully in possession of real property who removes, to a warehouse or other place, chattels found on it belonging to another, does not assert ownership or control over them to the extent of making him liable for conversion.” *Zaslow v. Kroenert*, 29 Cal.2d 541, 550-551, 176 P.2d 1, 7. See also 131 A.L.R. 173, and cases cited therein; *Prosser on Torts*, pp. 102, 103.

[2, 3] “To establish a conversion, it is incumbent upon the plaintiff to show an intention or purpose to convert the goods and to exercise ownership over them, or to prevent the owner from taking possession of his property.” 29 Cal.2d 550, 176 P.2d 7. Here the trial court found upon ample evidence that the defendants neither asserted a dominion over the goods of plaintiffs nor prevented them from taking possession of their property. It necessarily follows that the facts amply support the findings of the court that defendants were not converters of plaintiffs' property.

[4] Furthermore, as regards the defendant Nix, it is the rule that “* * * one who merely receives the goods for storage or transportation, in ignorance of the fact that they are lost or stolen, does not thereby become a converter, because there is no assertion of an adverse dominion.” (*Prosser on Torts*, p. 103, and cases cited therein.)

[5] Plaintiffs' next contention, that the trial court erred in refusing to admit the testimony of an attorney relative to a telephone conversation he had with the defendant Nix in the presence of plaintiffs, is also without merit. Whether under the facts it was or was not a privileged communication under subsection 2 of section 1881, Code of Civil Procedure, appears entirely immaterial. The substance of the conversation was set forth in an affidavit in support of plaintiffs' motion for a new

trial. We are entirely in accord with the observation of the trial court in its order denying the same. The content of the affidavit could in no way have affected the final outcome of the trial, and hence the court could not have erred in its exclusion.

[6] Also without merit is plaintiffs' final contention that the trial court also erred in refusing to admit testimony of Mrs. Bush concerning certain remarks made by her to plaintiffs. The substance of the conversation was immaterial in any event and hence it cannot be said that the court erred in refusing to accept the same.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



139 Cal.App.2d 364

Charles H. BERGER, Plaintiff and Appellant,
v.

SEQUOIA UNION HIGH SCHOOL DISTRICT, Board of Trustees of Sequoia Union High School District, Defendants and Respondents.

Civ. 16618.

District Court of Appeal, First District,
Division 2, California.

Feb. 21, 1958.

Action by contractor against school district on claim under a contract for excavation. The Superior Court, San Mateo County, Edmund Scott, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Devine, J. pro tem., held that where contract for excavation of portion of school site, which provided that contractor was to become owner of material removed, entitled district to reduce amount of work, and district engineer assigned part of contractor's ex-

cavation to second contractor and later permitted first contractor to remove an equivalent amount from second contractor's portion of site, first contractor was not entitled to recover from district on account of allegedly lower grade of material removed from second contractor's site.

Judgment affirmed.

1. Schools and School Districts ⇨84

Where contract for excavation of school site provided that it applied only to excavated material which was removed from site, and that such material should become property of contractor, contractor did not acquire virtual ownership of materials in situ before its removal.

2. Schools and School Districts ⇨84

Where contract for excavation of school site, which provided that contractor should become owner of material removed, stated that quantities given in notice, proposal and contracts were approximate only, and that school district did not agree that amount of work corresponded therewith, district preserved right to increase or decrease amount of work, and could decrease amount of contractor's work by assigning part of it to another contractor.

3. Schools and School Districts ⇨84½

Where contractor obtained written contract based on competitive bids for excavation of portion of school site, school district engineer had no authority to modify contract and provide for contractor's work upon a different portion of school site under different terms. West's Ann.Education Code, § 18051.

4. Schools and School Districts ⇨84

Contract with school district for excavation on school site was construed against contractor. West's Ann.Civ.Code § 1654.

5. Schools and School Districts ⇨86(2)

Where contract for excavation of portion of school site, which provided that first contractor was to become owner of material removed, entitled district to reduce amount of work, and district engineer assigned part of first contractor's excavation to second

contractor and later permitted first contractor to remove an equivalent amount from second contractor's portion of site, first contractor was not entitled to recover from district on account of allegedly lower grade of material removed from second contractor's site.

Antonio J. Gaudio, South San Francisco, for appellant.

Keith C. Sorenson, Dist. Atty., of San Mateo County, Lyle R. Edson, Chief Civil Deputy Dist. Atty., Redwood City, for respondents.

DEVINE, Justice pro tem.

Plaintiff has appealed a judgment in which it was decided that defendant school district was not responsible for certain claims made by plaintiff under a contract for grading land. Plaintiff had bid on the grading of a hillside site for the San Carlos-Belmont High School. The contract called for removal of earth from the hillside, the terms being payment to the contractor of 17 cents per cubic yard, with the provision that contractor could dispose of it as he saw fit. The estimate set forth in the contract was that 71,000 cubic yards of material would be removed.

The work was to be done chiefly on the southwest quadrant of the school site, as appears more specifically below. After plaintiff had made some progress with the work, another contractor, whose work was to have been mainly on the southeast quadrant, came upon the southwest quadrant, at the direction of the district's engineer, and removed some 25,255 yards of material from the southwest quadrant. The reason for directing the other contractor to do this was that the school district had not yet acquired title to some of the land in the southeast quadrant, and additional material was needed for fills in that area. Plaintiff's basis of complaint is that he was deprived of a large quantity of material which he could have excavated, hauled away and sold at a profit.

When plaintiff protested to the engineer, he was told to remove material in amounts

equal to that of which he was deprived from the southeast quadrant, for the title matter now had been settled. That he obtained an equivalent amount of material is stipulated, but plaintiff contends, and to a certain extent it is admitted by defendant's witnesses, that the earth in the southwest quadrant was more easily excavated and was suitable for sale, while that in the southeast quadrant consisted largely of boulders which were expensive to excavate and were of little or no value for sale. Plaintiff testified that he was told by the district's engineer to keep track of his costs for the work on the southeast quadrant, and that he would recover his costs; but defendant's engineer testified that there was no agreement for extra compensation, that he was without authority to make such agreement and that it was possible he had told plaintiff to keep records and that "it was up to the Board", but he did not even recall that.

Under the pleadings, the sole issue before the court was an alleged breach of contract in allowing the removal of the 25,225 cubic yards by the other contractor. (In the complaint this was stated as 50,814 cubic yards, but the actual amount was agreed upon at the trial.)

The trial court found that plaintiff was not deprived of any excavated material which, under the terms of the agreement, he was privileged to sell, and it is this finding which appellant attacks as unsupported by the evidence.

The proposal form which appellant signed reads: "Schedule B-1. Estimated quantity 71,000 cu. yds. Excavation, all classes of material removed from site, at seventeen cents per cubic yard \$0.17. \$12,070.00". As plaintiff actually received \$12,495.32 at \$.17 per cubic yard, he cannot, of course, complain of any breach up to this point.

Appellant relies largely on the following paragraph entitled "Special Provisions" in the contract: "Schedule B. The work covered by Schedule B of the Proposal Form accompanying these plans and specifications shall include only that excavated material which is removed from the site. Such material shall become the property of the contractor and may be disposed of as he sees fit. In general the areas to be

excavated under this schedule will be those under future buildings and adjoining areas in the southwesterly quadrant of the site."

It is appellant's contention, to quote his brief, that this "gave him virtual ownership of that material underlying the location of future buildings which were to be constructed in the southwesterly quadrant and adjoining areas." Thus, appellant reasons that there was a breach in the removal by the other contractor which was not compensated by requiring plaintiff to excavate the inferior southeast quadrant.

[1] In the first place, the words "in general" indicate that the material was not necessarily to be taken entirely from the southwest quadrant. About 65% of the earth removed by plaintiff was taken from that quadrant. However, we need not decide whether or not approximately two-thirds of a sum satisfies the requirements of the term "in general". The quoted part of the contract provides that the work covered by Schedule B "shall include only that excavated material which is removed from the site," and such material, the contract states, becomes the property of the contractor; that is, such material as is removed. Thus, "virtual ownership" of the material in situ was not given to plaintiff.

Moreover, the contract provides that "The quantities given in the notice to contractors, proposal and contract forms are approximate only, being given as a basis for comparison of bids, and the District does not expressly, or by implication, agree that the actual amount of work will correspond therewith, but reserves the right to increase or decrease the amount of any class or portion of the work, or to omit portions of the work, as may be deemed necessary or expedient by the District Engineer."

[2] This permitted a reduction of the work which was contained in the estimate. No doubt it is true, as plaintiff testified, that he based the unit price of 17 cents by estimating his costs on a probable 71,000 cubic yards of material, and believing that material would be from the southwest quadrant; but he was working under a very flexible contract which he had chosen to sign. When the engineer directed the other

contractor to take a quantity from the southwest quadrant he was, in effect, decreasing the portion of the work to be done by plaintiff.

[3] Plaintiff complains that the court should have made a segregation of "the performance by appellant as to Schedule 'A' (southeast quadrant of the job site)", under the clause of the contract which states "The Contractor shall cooperate with the Engineer in maintaining a clear division between excavation removed under Schedule A and that removed under Schedule B to the end that accurate measurements may be made covering material moved under each schedule." That clause plainly was to be applied if a single contractor had been awarded the performance of both schedules, under one of the possible ways of bidding. Plaintiff bid only for Schedule B; he was to be paid only under that schedule; and his written contract based on competitive bids could not have been modified by the engineer. Education Code, § 18051; *Strauch v. San Mateo Junior College District*, 104 Cal.App. 462, 286 P. 173; *Bear River Sand & Gravel Corp. v. County of Placer*, 118 Cal.App.2d 684, 689, 258 P.2d 543.

[4] If some of the quite elastic provisions of the contract are uncertain, then, the contract, being one with a public body is to be construed against the private contractor. Sec. 1654, Civil Code; *Johnston v. Joint Highway District No. 12*, 138 Cal. App. 450, 32 P.2d 681.

[5] The officers of the district had decreased the work to be done by plaintiff in the southwest quadrant as they were entitled to do under the contract, and whether or not plaintiff was forced, as he asserts, to work on the other quadrant under terms of the contract calling for general cooperation, and under the engineer's direction, is not material under the pleadings. Plaintiff attempts to bring the additional costs to which he says he was put within the terms of the first count of the complaint. That count states that plaintiff removed 119,855½ cubic yards from the project (a figure admittedly excessive because it was agreed he removed 73,502, yards) at the unit price of

17 cents. Nothing at all is said anywhere in the complaint about any compulsion to do work for which a higher unit price should be paid.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J.,
concur.



139 Cal.App.2d 278

Bertha L. KEY, Plaintiff and Respondent,
v.

James A. KEY, Defendant and Appellant.
Civ. 5093.

District Court of Appeal, Fourth District,
California.

Feb. 16, 1956.

Wife's divorce action. The husband prayed that property settlement agreement be rescinded and that deed effectuating same be declared null and void. The Superior Court, Orange County, Kenneth E. Morrison, J., rendered interlocutory decree of divorce, and the husband appealed. The District Court of Appeals, Barnard, P. J., held that evidence would not sustain husband's contention that consideration for agreement had been wife's promise to live with him for one year without his assuming obligations and responsibilities of marriage.

Affirmed.

1. Husband and Wife ⇨278(1)

In wife's divorce action, wherein the husband prayed that property settlement agreement be rescinded and that deed effectuating same be declared null and void, evidence would not sustain husband's contention that consideration for agreement had been wife's promise to live with him for one year without his assuming obligations and responsibilities of marriage.

2. Husband and Wife ⇨278(1)

Fact that parties to settlement agreement recognized the possibility of future reconciliation, and declared their intention that in event of such reconciliation settlement of their property rights should remain in full force and effect, did not make contract illegal insofar as property was concerned.

John Martell, Yucca Valley, for appellant.

Martell Thompson, Orange, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an interlocutory decree of divorce. The parties were married in 1941. Prior to the marriage the plaintiff owned a small house and lot, and another lot. In 1943, the parties acquired, as joint tenants, the premises involved in this action known as 9561 South Shaffer Street, Orange, California. This property was vacant and they paid \$1,500 for it, only \$300 being paid down. Thereafter, they built a small house on the premises, building first a "shell" and later improving it as they were able to do so. Old material was largely used and the parties did much of the work themselves. During this time the plaintiff sold the properties which she had owned before the marriage for \$2,800 and part of the proceeds were used in paying for and improving the Shaffer Street property. Each of the parties worked outside and their earnings, and the monies received from the sale of the plaintiff's other properties, were put in a joint account in the bank, and used in part in paying for and improving the Shaffer Street property.

Early in 1949 the plaintiff brought this action for divorce against the defendant. Thereafter, on March 15, 1949, while they were living separate and apart they entered into a property settlement agreement. This agreement recites that it is the desire of the parties to finally determine their property rights, and states that each party waives and releases as to and against the other all right to support, alimony, or suit money in any action that may then or later

be pending, to any property or earnings possessed or acquired by the other, or to inherit from or make any claim in or under the estate of the other. It then provides that the defendant "grants, assigns and releases to the wife as her separate property" the real property here in question, together with the household furniture and certain separate property; and that the plaintiff "grants, assigns and releases to the husband as his separate property" certain enumerated personal property. The agreement then contains this paragraph:

"It is understood and agreed that this agreement is made by the husband and wife while living separate and apart and is executed in consideration of the mutual covenants herein contained and for the purpose of finally adjusting and settling all rights, present and future, including property rights or rights of the wife to support and maintenance and any other rights of whatsoever kind or nature arising out of the marital status of husband and wife irrespective of whether there may be a subsequent reconciliation, suit for separate maintenance or divorce. Specifically recognizing the possibility of a future reconciliation, the parties declare their intention to be that a reconciliation, either temporary or permanent, or a restoration of the former relations of said parties or a further separation, temporary or permanent, after any reconciliation, shall not render this agreement or any portion thereof invalid, inoperative, rescinded or revoked."

On the same day, March 15, 1949, the defendant executed a deed conveying the property here in question to the plaintiff "as her sole and separate property", which deed was recorded on March 16, 1949. Each of the parties was represented by an attorney when the property settlement agreement and this deed were executed. At some time thereafter, the exact time not appearing in the record, the parties went back to live together. They continued to have difficulties and several separations thereafter occurred. They finally separated on

November 8, 1953, and on November 17, 1953, the plaintiff brought this action.

The complaint alleged, among other things, the execution of the property settlement agreement of March 15, 1949, and that the plaintiff is the owner of the property in question. The defendant in his answer denied that the plaintiff is the owner of this real property and alleged that on January 27, 1954, he gave notice to the plaintiff that he rescinded the property settlement and deed under which he had conveyed the property to the plaintiff. His prayer was that the plaintiff take nothing by reason of her complaint; that the property settlement agreement be rescinded and declared to be of no force and effect; that the deed conveying the real property to the plaintiff be declared null and void; and that this real property be declared to be the community property of the parties.

After a trial, the court found in all respects in favor of the plaintiff finding, among other things, that on March 15, 1949, the parties executed an agreement whereby they settled their respective property rights and interests in property; that the defendant granted and conveyed his interest in this real property to the plaintiff by a deed voluntarily made and delivered; that the plaintiff is the owner of this real property; that this real property is her separate property; and that the plaintiff is the owner of the household furniture and furnishings located on the premises in question. An interlocutory decree of divorce was entered adjudging and decreeing, among other things, that the plaintiff is the owner of this real property and of the household furniture. The defendant has appealed from that decree.

The appellant contends that as a consideration for his executing the agreement and deed of March 15, 1949, the respondent promised to live with him as his wife for a period of one year; that the respondent moved out before the expiration of the year; that he received no consideration for the deed; and that he later rescinded the agreement upon the ground of failure of consideration. It is further contended that the agreement of March 15, 1949, is nei-

ther a separation agreement nor a property settlement agreement; that it was made in contemplation of the parties living together as man and wife for the period of one year without assuming the obligations and responsibilities of marriage; that the consideration for this agreement was illegal and contrary to good morals and public policy; and that it appears from the paragraph of the agreement which is above quoted that the whole agreement is null and void, and contrary to public policy. It is argued that this was not a property settlement agreement for the reason that it did not contemplate the parties assuming the relation of husband and wife, but merely living together as husband and wife for the period of one year, after which the wife was free to discontinue the relationship; and that the appellant's testimony that he conveyed his interest in the property to the respondent on her promise to live with him as his wife for one year was not denied by the respondent.

[1,2] Insofar as it affects the title to this real property we find nothing in the quoted paragraph of the agreement of March 15, 1949, which sustains these contentions. The agreement itself was a settlement of their rights with respect to this property, and the property was conveyed to the respondent by a deed which was promptly recorded. The fact that the parties recognized the possibility of a future reconciliation and declared their intention that in the event of such a reconciliation this settlement of their property rights should remain in full force and effect did not make the contract illegal insofar as this property is concerned. Assuming that a reconciliation might create new marital obligations of support we find nothing in the record which would compel a conclusion that the conveyance was null and void as against public policy. The respondent's testimony was amply sufficient to refute appellant's testimony to the effect that the consideration for the agreement was the respondent's promise to live with him for one year. He testified that this promise was made in a conversation between them immediately before the contract was signed. She testified that no such conversation took

place, and that she never told him that she would not go back to live with him unless he signed the property over to her. No more than a conflict appears, at best, and good reasons appear why the court did not accept all of appellant's testimony as true. The appellant's answer set forth no grounds for his notice of rescission of the agreement and conveyance, and the record supports the implied finding that the facts did not justify a rescission.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



139 Cal.App.2d 255

George BETTENCOURT, Plaintiff and Appellant,

v.

**STATE of California et al., Defendants,
C. G. Kellett and Walter Berg, Defendants
and Respondents.**

No. 16578.

**District Court of Appeal, First District,
Division 1, California.**

Feb. 16, 1956.

As Modified on Denial of Rehearing

March 16, 1956.

Hearing Denied April 11, 1956.

Motorist brought action against toll taker and bridge tender, who were employed by the state, for injuries sustained by motorist, when toll taker and bridge tender lifted span of draw bridge in face of oncoming automobile. The Superior Court, County of San Mateo, A. R. Cotton, J., entered a judgment of nonsuit based on motorist's opening statement, and the motorist appealed. The District Court of Appeal, Bray, J., held that section of the Government Code providing that no officer of the state is liable for any damage or injury to person or property resulting from defective or dangerous condition of public property unless certain matters appear, does not evidence any intention of the Legislature to relieve an officer of the state from

his common law liability for negligence merely because the defective condition was a contributing cause rather than the proximate cause, and that if toll taker and bridge tender knowingly and without warning lifted span of bridge in the face of oncoming automobile, they became liable for common-law negligence, though defective condition of warning devices was a contributing cause of the accident.

Judgment reversed.

1. Officers ☞119

One injured by the act of public officers or employees can sue them in their private and individual capacity after complying with section of the Government Code dealing with presentment of claims, or he can sue them in their official capacity as officers or employees after filing claim under that section of the Government Code, but he must allege and prove compliance with requirements of section of the Government Code dealing with damage or injury from defective or dangerous condition of public property. West's Ann. Gov.Code, §§ 1953, 1981.

2. States ☞79

Section of the Government Code providing that no officer of the state is liable for any damage or injury to person or property resulting from defective or dangerous condition of public property unless certain matters appear, does not evidence any intention of the Legislature to relieve an officer of the state from his common law liability for negligence merely because the defective condition was a contributing cause rather than the proximate cause. West's Ann.Gov.Code, § 1953.

BRAY, Justice.

Plaintiff's appeal from a judgment of nonsuit based upon his opening statement raises the question of whether his complaint alleged a cause of action for negligence against defendants.¹

The Complaint.

The complaint primarily charged the State of California and defendants as officers, agents and employees of the state, with maintaining the Dumbarton Bridge in a dangerous and defective condition in failing to provide adequate lighting and warning devices to warn persons driving their vehicles over the bridge of the elevating of the draw. It alleged all of the conditions required to bring the case within Government Code, § 1953 (dangerous or defective condition of public property). Additionally it alleged that while plaintiff was operating his automobile over the bridge defendants, who were working in the scope of their employment by the state and in control of the bridge, without any warning or notice to plaintiff and knowing of the defective and dangerous condition aforesaid, raised the center section of the bridge, thereby causing plaintiff's automobile to smash into the elevated portion of the bridge roadway; that thereafter defendants lowered the bridge on the automobile, further smashing said automobile, thereby causing plaintiff serious personal injuries; that his injuries were caused by the "negligence and carelessness of the defendants * * * and as a direct result of the defective and dangerous condition described." The complaint alleged the filing and service upon all defendants of the claim required by section 1981, Government Code.

The Opening Statement.

Plaintiff stated that he would prove that while he was crossing the bridge defendants (one of whom was toll taker and the other bridge tender) raised the center section of the bridge without warning, causing plaintiff's car to crash into it;

as a defendant, on the grounds of the state's sovereign immunity. "Defendants", as used throughout refers to defendants Kellett and Berg.

6. In *Bettencourt v. State*, 123 Cal.App. 2d 60, 266 P.2d 201, 43 A.L.R.2d 545, this court affirmed a judgment sustaining without leave to amend the demurrer of the State of California, originally joined

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Cal. Rep. 293-294 P.2d—13

Jacobsen & Tobin, San Francisco, for appellant.

Ropers & Majeski, Redwood City, for respondents.

that at the time none of the protective devices such as the barrier, wigwag, etc., which normally were used to give warning of the raising of the bridge, were in operation, which fact was known to defendants. Notwithstanding that fact and without taking any precautions to warn plaintiff, defendants raised the bridge. "The issues raised by the complaint are the negligence of the defendants Berg and Kellett in raising this bridge at a time when they knew these conditions existed, and failing to take proper steps to warn or protect the public, and that that conduct on their part was not the conduct of the ordinarily prudent person and that that conduct was negligent and that that negligence on their part proximately contributed to the injuries received by Mr. Bettencourt."

Defendants then moved for a nonsuit primarily upon the ground that the action was one under section 1953 and plaintiff had not offered to prove all the requirements of that section (for example, that defendants had authority and funds with which to repair the defective condition). Plaintiff then pointed out that he was not attempting to establish a liability under that section but under the common law liability of a person for negligence. The court granted the motion.

Negligence Cause of Action.

[1] Generally speaking a plaintiff can bring two types of actions for tort against public officers or employees: (1) He can sue them in their private and individual capacity. This is the normal common law tort action against an individual. (See 21 Cal.Jur. 908.) This type of action requires as additional to the pleading of negligence, compliance only with section 1981 (the filing of a claim). (2) He can sue them in their official capacity as municipal officers or employees. This type of action requires not only the filing of a claim under section 1981 but the requirements of section 1953 must also be alleged and proved.

While it is true that the complaint was drawn to bring defendants and the State of California under the provisions of sec-

tion 1953, it also was broad enough to include a charge of negligence against defendants on the ground of raising the bridge in the face of plaintiff's oncoming car without warning and knowing that the warning devices were defective or not in operation. The complaint is reasonably susceptible to the interpretation that it set forth two causes of action, one under section 1953 in which it attempted to include the state, and one of general negligence against defendants acting as individuals and not within the scope of their employment by the state. The complaint is not a model of pleading and would have been subject to a special demurrer because of not separately stating the causes of action. But no such demurrer was interposed. See *Oppenheimer v. City of Los Angeles*, 104 Cal.App.2d 545, 549, 232 P.2d 26 (surplus allegations must be disregarded as against a general demurrer); *McCargar v. H. G. Bittleston Law & Collection Agency*, 75 Cal.App. 770, 244 P. 110. See also *Blodgett v. Darby*, 201 Cal. 639, 642, 258 P. 373, 374: " * * * if the pleadings allege facts which might constitute two or more causes of action a liberal construction of the pleadings directed by section 452 of the Code of Civil Procedure would impel the conclusion that the causes of action defectively averred may be discarded as surplusage * * *." " * * * a plaintiff may recover if his complaint 'states any cause of action entitling the plaintiff to any relief at law or in equity.' *Hayden v. Collins*, 1 Cal.App. 259, 261, 81 P. 1120, 1121." *Zellner v. Wassman*, 184 Cal. 80, 88, 193 P. 84, 87.

[2] Defendants contend that if a negligent or defective condition of public property contributes in any way to the negligence of a state employee section 1953 relieves the employee of any liability unless the conditions of that section apply. Thus here, say defendants, they are excused from liability because no matter how negligent in the operation of the lift they may have been, the lack of operating warning devices contributed to plaintiff's injury. Section 1953 states that no "officer" of the state² is liable for any damage or injury to person or property "re-

sulting from the defective or dangerous condition of any public property" unless all of the matters set forth appear. The first requirement is "The injury sustained was the direct and proximate result of such defective or dangerous condition." Does this evidence any intention of the Legislature to relieve an officer of the state of his common law liability for negligence merely because the defective condition was a contributing cause rather than the proximate cause? We do not believe so and we have been cited to no case so holding.

In *Bauer v. County of Ventura*, 45 Cal. 2d 276, 289 P.2d 1, the court construed the complaint as it affected the defendant members of the board of supervisors as one for the construction and maintenance of a system of ditches and levees in a dangerous and defective condition and held that the matters required by section 1953 had not been proved. It pointed out that there was no allegation that any of these defendants had exceeded his authority under the Storm Drain Maintenance District Act, West's Ann. Water Code, App. § 42-1 et seq., or that the complaint in any wise attempted to allege a cause of action other than one under section 1953. Thus the cause of action was entirely different from the one proceeded on in our case.

Burnett v. Boucher, 108 Cal.App.2d 37, 238 P.2d 1, is not in point. There the plaintiff, in an action for personal injuries sustained in an automobile accident alleged that the defendants, father and son, both owned the car and also that the son was acting as the agent of the father. In his opening statement the plaintiff offered to prove only that the son was driving the car with the consent of the father. The trial court denied the plaintiff permission to amend his complaint, holding that the cause of action stated therein could not be changed into one of statutory liability since more than one year had elapsed

after the occurrence of the accident. Here there is no change of cause of action, but merely the election to abide by one of two causes of action in the complaint.

Nor is *Shannon v. Fleishhacker*, 116 Cal.App. 258, 2 P.2d 835, in point. There the defendants were sued as officers of the City and County of San Francisco and charged with negligently maintaining and operating a defective and dangerous ferris wheel. A boy employee, who had been warned not to enter the enclosure behind the wheel, disobeying this instruction and without the knowledge of the operator, entered and was struck by some portion of the wheel. While the case points out that there was no defective or dangerous condition ("All the evidence demonstrates that the wheel was guarded by every known safeguard * * *", 116 Cal.App. at page 267, 2 P.2d at page 839), the decision holds that a failure to prove all of the elements required in *Deering's General Laws*, 1923, Act 5618 (the predecessor of Gov. Code, § 1953), was fatal to a recovery because the negligence charged was in maintaining and permitting to be operated said wheel without its being equipped with a guard to protect persons from coming in contact with it. In our case it is not the maintaining and the operating of the bridge lift in its alleged dangerous condition that is the gravamen of the offense stated in the opening statement, but it is the operating of the lift span, knowing the condition, in the face of the oncoming car without giving any warning whatever. Here there was charged a negligence additional to the mere use of defective property.

The judgment is reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; SHENK, J., dissenting.

2. We are assuming for the purposes of this question that a bridge tender and a toll taker are "officers" of the state under

section 1953. Actually, it is very doubtful that they are.

139 Cal.App.2d 289

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Herbert NEWTON, Defendant and
Appellant.

Cr. 5434.

District Court of Appeal, Second District,
 Division 2, California.

Feb. 17, 1956.

Prosecution for rape. The Superior Court, Los Angeles County, Herbert V. Walker, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Ashburn, J., held, *inter alia*, that complaining witness' testimony was not rendered inherently improbable by her account of the postural positions of defendant and herself during the alleged rape.

Affirmed.

1. Rape $\S$ 51(1)

In prosecution for rape, complaining witness' testimony was not rendered inherently improbable by her account of the postural positions of defendant and herself during the alleged rape. West's Ann.Pen.Code, $\S$ 261, subd. 4.

2. Criminal Law $\S$ 1144(13)

A duty is imposed upon a reviewing court to assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence.

3. Witnesses $\S$ 270(2)

In prosecution for rape which occurred on a Saturday night, a question directed to complaining witness when under cross-examination as to an episode of Friday night had no probative value, sought to elicit immaterial matter, and objection to such question was properly sustained. West's Ann.Pen.Code, $\S$ 261, subd. 4.

4. Criminal Law $\S$ 680(1)

In criminal cases, the order of proof lies in the discretion of trial judge.

5. Criminal Law $\S$ 693(1)

In prosecution for rape, testimony of police officer that defendant told him that defendant had intercourse with complain-

ing witness, after defendant in his testimony admitted to such intercourse but denied telling police officer of such act, had no effect other than impeachment and was proper rebuttal. West's Ann.Pen.Code, $\S$ 261, subd. 4.

Jefferson & Jefferson, Bernard S. Jefferson and Martha Malone Jefferson, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., W. B. Thayer, Deputy Atty. Gen., for respondent.

ASHBURN, Justice.

Defendant appeals from conviction of rape of one Annie C. L. It was charged and impliedly found (after a non-jury trial) that defendant had sexual intercourse with Annie without her consent and against her will in that she was prevented from resisting by threats of great and immediate bodily harm accompanied by apparent power of execution. Pen.Code, $\S$ 261, subd. 4. Defendant in testifying admitted the fact of intercourse, but claimed that it was had with Annie's full consent and cooperation.

[1] Appellant's first point is that the complaining witness' testimony was inherently improbable because "no act of sexual intercourse could have taken place if appellant and the complaining witness were in the respective positions testified to by the complaining witness." Examination of the transcript establishes that this claim is without substance, as the trial judge impliedly found. Appellant himself, while admitting the act, gives no postural account which differs from that of the complaining witness. What constitutes inherently improbable evidence is discussed in *People v. Headlee*, 18 Cal.2d 266, 267, 115 P.2d 427; *People v. Stephens*, 66 Cal.App.2d 755, 757, 152 P.2d 1019.

[2] Annie testified that defendant choked and hit her and caused her to injure her knee immediately before the raping and that she was afraid to resist. Defendant denies this, but her story is in this respect supported by the testimony of her sister-in-law and the police, who saw the effects of

the violence, which effects were photographed by the officers. The court is thus confronted with a substantial conflict in the evidence. The duty is imposed upon a reviewing court to "assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence." *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778, 780.

[3] Appellant's next contention is that the court erred in sustaining an objection to the following question put to the complaining witness when under cross-examination: "Q. Now, Miss * * * on Thursday before this party did you go somewhere with the defendant and some other people and have a few drinks? A. That was Friday before the party. Q. Friday before the party. Where did you go?" The rape occurred on Saturday night. This question, relating to an innocuous episode of Friday night, had no probative value and therefore sought to elicit immaterial matter. Defendant's attorney made no offer of proof and in his brief counsel concedes that "in the case at bar there is no showing by appellant that he intended to establish, by the cross-examination of the complaining witness, acts of unchastity on her part." This renders *People v. Pantages*, 212 Cal. 237, 262, 297 P. 890, inapplicable and appellant cites no authority to the effect that the ruling under consideration was erroneous. The contrary has been decided in *People v. Mangum*, 31 Cal.App.2d 374, 379, 382, 88 P.2d 207; *People v. Burnette*, 39 Cal.App.2d 215, 226, 102 P.2d 799; *People v. Kuches*, 120 Cal. 566, 570, 52 P. 1002.

[4, 5] Lastly, appellant complains of rebuttal testimony of Police Sergeant Kudlac, saying it was mere reiteration of the People's main case, not proper rebuttal and prejudicial. In criminal cases, as in civil, the order of proof lies in the discretion of the trial judge. Pen.Code, § 1093, subd. 4; *People v. Mehaffey*, 32 Cal.2d 535, 547-548, 197 P.2d 12; *People v. Griffin*, 98 Cal.App. 2d 1, 47, 219 P.2d 519. But the practice of permitting the prosecution to withhold a part of its case for use on rebuttal has been severely condemned. *People v. Leach*, 137 Cal.App. 753, 757, 31 P.2d 449; *People v. Rodriguez*, 58 Cal.App.2d 415, 419, 136

P.2d 626; *People v. Avery*, 35 Cal.2d 487, 491, 218 P.2d 527. In the *Avery* case the court said, 35 Cal.2d at page 491, 218 P.2d at page 530: "The practice of allowing the district attorney to withhold a part of his case in chief and to offer it after the defense had closed was properly condemned in *People v. Rodriguez*, 58 Cal.App.2d 415 at page 419, 136 P.2d 626. While the order of proof rests in the sound discretion of the trial court, Penal Code, sections 1093, subd. 4, 1094, an abuse of that discretion might well result from such practice." In *People v. Rodriguez*, supra, Mr. Presiding Justice Shinn said, 58 Cal.App.2d at page 419, 136 P.2d at page 628: "When the case of the People is closed and the defense is in, the remainder of the People's case is limited to evidence in rebuttal of that produced by the defense and should be so limited by the court, except where a proper showing is made for reopening the case in chief for the receipt of further evidence. The People have no right to withhold a material part of their evidence which could as well be used in their case in chief, for the sole purpose of using it in rebuttal. * * *

The alleged confession was offered to establish facts constituting guilt; the impeachment feature was incidental and comparatively unimportant. It was no more proper for the District Attorney to offer the evidence as rebuttal after defendant's denial of the alleged statements, under the pretense that it was offered to impeach the defendant, than it would have been to offer it in rebuttal if the defendant had not been questioned about it at all. It makes no difference here that the testimony as to the confession, aside from being evidence of the fact of guilt, also tended to impeach the defendant."

The situation at bar does not disclose unfair practice by the district attorney or abuse of discretion by the court. The People's case was submitted by stipulation upon the transcript of the preliminary examination. Officer Mitchell there testified that defendant shortly after his arrest told him and officer Galindo that he had had intercourse with Annie which was voluntary on her part. Officer Furlong also testified at the preliminary that on the same day de-

fendant, in the presence of Sergeant Kudlac, said that he did not have intercourse with Annie and that he did not tell Mitchell and Galindo that he had done so; that the police report was then read to defendant who then said that he did tell that to Mitchell and Galindo. Defendant did not testify at that hearing. In the superior court the district attorney offered that transcript and immediately rested his case. Up to that point he could not know that defendant would admit the fact of intercourse or that impeachment in that respect would be necessary or desirable. As soon as the prosecution rested defendant took the witness stand and testified that he and Annie did have intercourse, voluntary on her part. On cross-examination he said he had not told Mitchell and Galindo that he had had; also that he later talked to Furlong and Kudlac but did not tell them that he had told Mitchell and Galindo that he had had intercourse; in this connection foundation for impeachment was laid by the prosecutor. It is to be noted that after defendant testified on direct examination that he had had intercourse with Annie, any question as to whether he had told anyone that he had done so could go only to his credibility as a witness. The cardinal fact had been established by his own testimony and the remaining questions were whether his denials of choking and beating and his claim of consent on Annie's part were to be believed. After defendant's cross-examination the

district attorney asked and obtained leave to call a witness in rebuttal. Thereupon Sergeant Kudlac was called, time and place of defendant's conversation with him and officer Furlong was fixed, and he was asked: "At that time and place, did the defendant tell you and Mr. Furlong, in substance, that he had told the arresting officers to wit: Mr. Mitchell and Mr. Galindo, that he had had intercourse with an Annie * * *?" The witness answered "he did," without any objection having been interposed, and no motion to strike was made. The answer was followed by this: "Mr. Schutz: May it please the Court, I don't think this is proper rebuttal. It is all contained in the evidence of Officer Furlong. The Court: That is not a proper objection. He is refuting a statement. * * * That objection will be overruled anyway." We do not deal with a confession as the court did in *Rodriguez*, supra. This evidence had no purpose and could have no effect other than impeachment. In that respect this case differs materially from *Rodriguez*, where the evidence of the confession was actually used in proof of the facts contained therein but was offered and received under the guise of impeachment. In the present instance no prejudicial error appears.

The judgment is affirmed.

MOORE, P. J., and FOX, J., concur.

139 Cal.App.2d 275

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Edward E. SHIVERS, Defendant and
Appellant.

Cr. 5502.

District Court of Appeal, Second District,
Division 3, California.

Feb. 16, 1956.

Prosecution for robbery. On jury finding of guilty of robbery of second degree, the Superior Court, Los Angeles County, Charles W. Fricke, J., entered judgment of conviction, and defendant appealed. The District Court of Appeal, Vallée, J., held that evidence was sufficient to sustain the verdict.

Affirmed.

1. Robbery ☞24(3)

Evidence identifying defendant as person who committed offense was sufficient to sustain conviction for second degree robbery of service station.

2. Criminal Law ☞1159(4)

The fact that there were slight discrepancies between testimony of victim of service station robbery at preliminary hearing and his testimony at trial was not ground for reversal as matter of law, but effect, if any, of discrepancies on credibility of victim was for trier of fact.

3. Criminal Law ☞739(2)

In prosecution for robbery of service station, where defendant's alibi that he was in theater was controverted by testimony of station attendant who identified him as robber and by testimony of theater manager that picture defendant claimed to have seen did not start until some time after robbery, resolution of conflict was for trier of fact.

4. Criminal Law ☞553, 554

Jury did not have to believe testimony of defendant or that of his witness, but jury could reject all or believe part and disbelieve remainder.

Harrison M. Dunham, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Arthur L. Martin, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

A jury found defendant guilty of robbery and that it was of the second degree. He appeals from the judgment. His only point is that the evidence was insufficient to support the verdict.

On April 12, 1955 Yokata worked as an attendant at a service station at 42nd and Figueroa streets in Los Angeles. His hours were from 4:30 p.m. until 10 p.m. About 8:30 p.m. he was approached by a man who said, "This is a stick-up," or words to that effect. The place was brightly illuminated by floodlights. There was nothing covering the man's face. He was dressed in a matching tan outfit. Yokata testified defendant was the man. Defendant told Yokata to act natural and walk to the cash box without looking back. Defendant had his right hand in his coat pocket in a manner which kept his coat pointed up and out about waist-high.

Defendant took about \$130 or \$140, largely in \$1, \$5, and \$10 bills, from the cash box and the safe; and told Yokata to go into the rest room, which he did. He stayed there about three minutes and then called the police. Yokata testified he believed defendant had a gun, that he (Yokata) was frightened and "had a small tied knot in the bottom of * * * [his] stomach."

A witness for the People testified he saw and had a short conversation with defendant in a bar at 4210 South Figueroa Street in the early evening "shortly after 7:30" on April 12, 1955. He left the bar before 8 o'clock. Defendant was there when he left. The service station was across an alley from the bar. A police officer, who arrested defendant in his room on the night of April 12, testified defendant had 31 dimes and 22 \$1 bills in his wallet and on a night stand. Defendant told the officer the money was what he had left of \$200 he had borrowed from a friend; that he had borrowed the money

two days before, sent his mother \$50 and paid \$35 room rent.

The defense was an alibi. Defendant denied the robbery. He testified he left the bar about 7:45, walked north on Figueroa Street, entered the Figueroa theater about 8:05, met "Lucky" Beaushane in the lobby, with "Lucky" bought some peanuts and Coca-Cola; he and "Lucky" went into the theater; the picture "Battle Cry" was on; he saw the picture and remained in the theater until about 10 or 10:15, when he left in the middle of the second picture, "Captain Lightfoot"; he left "Lucky" in the theater, went to his room in a hotel on Santa Barbara Avenue just off Figueroa Street, telephoned his mother in Nebraska, paid his rent, went to the room of a friend of his, left and made some purchases, returned to his room and let the officers in about 12:10 a.m.; he had previously owned the service station which was robbed; he knew the construction of the safe; he had previously been convicted of a felony. Beaushane testified defendant was in the Figueroa theater on April 12, 1955 from about 8:10 p.m. until 10 or 10:15; "Battle Cry" was on when they went in; he left about 11:35; he saw "Battle Cry," then "Captain Lightfoot," and another part of "Battle Cry."

In rebuttal the manager of the theater testified that on April 12, 1955 "Captain Lightfoot" started at 7:08 p.m. and ran continuously until 8:39, followed by an intermission, coming attractions, and a newsreel; "Battle Cry" started at 8:56, ran continuously until 11:22, and was followed by "Captain Lightfoot" until 1 a.m.; "Battle Cry" was a very long feature which ran 2 hours and 26 minutes.

[1-4] The evidence supports the verdict. The fact that there were slight discrepancies between the testimony of Yokata at the preliminary hearing and at the trial is not ground for reversal as a matter of law. *People v. Miller*, 134 Cal.App.2d 792, 796, 286 P.2d 415. The effect, if any, of such discrepancies on the credibility of Yokata was for the trier of fact. *People v. Connelly*, 195 Cal. 584, 593, 234 P. 374. The alibi was not uncontroverted, as defendant asserts. It was directly controvert-

ed by the testimony of Yokata and by that of the theater manager. Resolution of the conflict was also for the trier of fact. *People v. Murieta*, 1 Cal.App.2d 727, 728, 37 P.2d 158. The jury did not have to believe the testimony of defendant or that of Beaushane; they could reject all or believe part and disbelieve the remainder. *People v. Batwin*, 120 Cal.App.2d 825, 827, 262 P.2d 88; *People v. Dragoo*, 121 Cal.App.2d 322, 324, 263 P.2d 90. "Battle Cry" was run only once from 8:56 p.m. to 11:22 p.m. If, as defendant and Beaushane testified, defendant entered the theater shortly after the start of "Battle Cry," he arrived after 8:56. The robbery of the service station occurred about 8:30 p.m. The theater was only a short distance from the service station. The jury may fairly have concluded that defendant, after robbing the station, went directly to the theater.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.



139 Cal.App.2d 379

B. F. PERRY and Anona Dunbar Perry, his wife, Plaintiffs and Appellants,

v.

The STATE of California and Earl M. Warner, Defendants and Respondents.

Civ. 8651.

District Court of Appeal. Third District. California.

Feb. 21, 1956.

Rehearings Denied March 21, 1956.

Hearing Denied April 18, 1956.

Action was brought to quiet title. The Superior Court of Sacramento County, Malcolm C. Glenn, J., entered judgment adverse to the plaintiffs, and they appealed. The District Court of Appeal, Van Dyke, P. J., held that where existence of source of scientific information was actually unknown to plaintiffs and their counsel, Superior Court should have granted plaintiffs'

motion for new trial, on ground of newly discovered evidence, though the existence of such information was known to one of the defendants, which did not bring it forward to aid the court.

Judgment reversed.

1. Navigable Waters ⇨36(3)

When California on September 9, 1850, was admitted to the Union, she took title as sovereign to lands within the beds of navigable streams and banks, which were portions of the shore lying below mean high tide, and on September 28, 1850, by virtue of the Swamp and Overflowed Land Act, she took title to swamp and overflowed lands along the streams. 43 U.S.C.A. § 982 et seq.

2. Quieting Title ⇨44(3)

In action to quiet title, the defendants themselves were obligated to present to the trier of fact the best evidence available.

3. New Trial ⇨101

Where existence of source of scientific information was actually unknown to plaintiffs and their counsel, trial court should have granted plaintiffs' motion for new trial of action to quiet title on ground of newly discovered evidence, though the existence of such information was known to one of the defendants, which did not bring it forward to aid the court.

Frank K. Richardson, Sacramento, for appellants.

Edmund G. Brown, Atty. Gen., by Paul M. Joseph, Deputy Atty. Gen., for respondents.

Bruce F. Allen, Sacramento, for E. M. Warner.

VAN DYKE, Presiding Justice.

Plaintiffs brought this action to quiet their title as against the State and respondent Warner to a parcel of land described by metes and bounds which presently lies on the river side of a levee erected by a reclamation district along the westerly margin of the Mokelumne River just below its junction with Georgiana Slough in Sacra-

mento County. Plaintiffs claim title by virtue of a quitclaim deed from Golden State Asparagus Company, a corporation, which corporation owned that portion of Swamp and Overflowed Land Survey No. 943 westerly of the junction of Georgiana Slough and the Mokelumne River. If the parcel quitclaimed to plaintiffs formed a part of that survey then plaintiffs' title is good. Judgment went against plaintiffs and from that judgment they prosecute this appeal.

[1] When on September 9, 1850 California was admitted to the Union she took title as sovereign to lands within the beds of Mokelumne River and Georgiana Slough, both navigable streams. That title covered the beds and the banks of the streams, the banks being those portions of the shore lying below mean high tide. On September 28th following, by virtue of the Swamp and Overflowed Land Act she took title to swamp and overflowed lands along said streams. Congressional legislation granting said lands (see 43 U.S.C.A. "Public Lands", 982 et seq.) declared that to enable the several states to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein the whole of such lands "made unfit thereby for cultivation, and remaining unsold on or after the 28th day of September, A. D. 1850", were granted and belonged to the several states respectively, in which said lands are situated. Although the act was construed to be a grant in praesenti it was apparent that the general description contained in the legislation would not serve to specifically describe such tracts of land as might in fact come within the general description. Accordingly, it was provided that it would be the duty of the Secretary of the Interior to make accurate lists and plats of all such lands and to transmit the lists to the Governors of the several states in which such lands might lie; and at the request of the Governor of any state to cause patents to be issued to said state for such lands, conveying thereby the fee-simple title to said land. Other provisions were contained in the legislation to aid in the segregation of such lands from the general body of lands owned by the federal

government and to confirm title to the states. The act did not apply to nor convey title to land within the beds of navigable streams, including the banks thereof, below mean high tide, for such lands were held by the state as an attribute of its sovereignty and the title thereto originated with the admission of the State to the Union. The foregoing propositions are well decided and reference may be made to the language of the act and to the case law developed after the passage of the act, a partial, but sufficient, reference being as follows: *Rogers Locomotive & Machine Works v. American Emigrant Co.*, 164 U.S. 559, 17 S.Ct. 188, 41 L.Ed. 552; *Owens v. Jackson*, 9 Cal. 322; *Summers v. Dickinson*, 9 Cal. 554; *Kernan v. Griffith*, 27 Cal. 87; *Sacramento Valley Reclamation Co. v. Cook*, 61 Cal. 341; *Tubbs v. Wilhoit*, 73 Cal. 61, 14 P. 361; *Foss v. Johnstone*, 158 Cal. 119, 110 P. 294; *Ferry Pass Inspectors & Shippers' Ass'n v. White River Inspectors & Shippers' Ass'n*, 57 Fla. 399, 48 So. 643, 22 L.R.A., N.S., 345.

In 1868 Survey No. 943 of Swamp and Overflowed Lands, covering land lying westerly of Georgiana Slough and Mokelumne River, was made by the County Surveyor of Sacramento County, and in 1873 patent to lands within the survey, comprising something over 2,000 acres, was issued by the state. The description began at a described point and, so far as material here, proceeded by metes and bounds to "the west bank of Georgiana Slough * * * thence downstream * * * to the Mokelumne River, thence downstream" to a point on the river, where the survey left the river and went to the point of beginning. It is claimed by plaintiffs that this swamp land survey included the land to which they herein seek to quiet title. Whether or not it did was the sole issue between the parties. At the point of junction between Georgiana Slough and Mokelumne River and extending downstream from or off the point of junction the record is clear that from beyond the memory of living witnesses there existed a body of land narrow but extending down river for a considerable distance which may have been at the critical date, September 28,

1850, a part of the westerly bank of the Mokelumne River. If it was then it was included within the swamp and overflowed lands survey and plaintiffs should have had their title quieted. If, on the contrary, it lay offshore from the westerly bank and within the banks of the river, then it was not included in the swamp land survey and the judgment of the trial court which quieted title in the state must be affirmed. The testimonial evidence introduced came from witnesses whose acquaintance with the locale went back to the early 1900's. These witnesses testified from memory as to the elevation of the land above mean high tide and as to the contiguity or lack thereof with the land to the west. It appeared from this evidence that, beginning with the point of confluence of the two streams, the land was above mean high tide, the elevation gradually lessening downstream until the lower end of the parcel lay below mean high tide. As to the juncture of the parcel with the mainland, the evidence of these witnesses was in conflict, some stating positively that prior to the raising of the old levee along the Mokelumne the parcel was annexed to and a part of the mainland, while others testified that most, if not all, of the parcel was separated from the mainland by a water channel that was not produced by dredging, but by nature. In so far as such testimony could afford an inference as to the condition existing in 1850 it was admissible, but obviously it was of little value and that it was conflicting was to be expected. The westerly river levee was raised by dredger action in 1907 and 1908, which time marked about the limit that the witnesses attempted to go back to in memory. This evidence left a gap of more than half a century between the time these witnesses made their observations to which they testified and the critical point of time when title passed to the state, including or excluding the parcel, according to whether or not it was then a part of the mainland or lay within the river. These witnesses variously described the growth of vegetation upon the parcel. Some said that in the early 1900's they observed willow and alder trees of considerable size growing upon the parcel, while others said that it was to a

great extent covered only with tules, indicating, as they said, that in such portions it lay below mean high tide. But quick-growing trees and vegetation of the kind described seen 50 years after the critical date make weak evidence upon which to base an inference as to the condition of the parcel a half century before.

United States geodetic surveys of the area, including the junction of the Georgiana Slough and the Mokelumne River, which were introduced in evidence, and of which courts take judicial notice, indicate that the general level of the land lying westerly of the streams, which we have called the mainland, was below what the surveys designate to be "sea level" and since there is no dispute but that these lands, though swamp and overflowed, were not, save in flood times, under water, it is apparent that the stream banks, by stream action, were above the general level of the land lying landward from them. This is a common phenomenon in the area.

The testimony taken clearly showed that there was a difference between the elevation of the northern end of the tract, beginning at the point of stream confluence, and the elevation of the southern end. Plaintiffs' parcel, as definitely described in their complaint, constitutes the more southerly portion of the entire parcel and as to it there was testimony that, within the memory of the witnesses, parts of it, the more northerly parts, were covered with brush and trees and lay above the tides, whereas increasingly as one went south to the southern tip of the parcel the elevation lowered until the southern tip was covered only with tule growth and emerged only when the high tides receded.

In the hundred years elapsing between the federal grant to the state and the trial of this action many floods have descended the river and have overflowed its banks and the lands lying without them. What the effect of these violent intrusions of flood waters may have been is not shown in the record, but common sense tells us that significant changes may have occurred. When one attempts at this date or at any time covered by the official surveys and plats and the testimony of witnesses to reconstruct

those past conditions the task proves to be practically impossible of performance. The earliest surveys are the geodetic surveys we have mentioned and they go back to, 1906, 56 years after the critical date.

The trial court found that the land owned by plaintiffs had never been a part of the mainland westerly of the western bank of the Mokelumne River, but that it was part and parcel of the river bed itself; that it had lain below the level of mean high tide in the river; that this situation existed in 1850, and that, therefore, the parcel had never been a part of Swamp and Overflowed Land Survey No. 943; that the parcel was part and parcel of the river bed between its banks, and title thereto had vested in the state upon the state's admission in the Union and had not been conveyed away by the swamp land patent.

We have been at some pains to depict the situation presented by the record in the way of evidence upon which the court could base its conclusions as to whether or not plaintiffs' land had passed from the state by the swamp land patent. We have done this because we have concluded that in ruling upon the motion for new trial made after the decision of the cause the trial court erred in not granting the motion or at least in not setting aside its findings, conclusions and judgment to receive and consider the evidence then known to be available. Plaintiffs moved the court for a new trial, alleging that they had discovered evidence not before known to them which would compel a judgment in their favor. In support of the motion plaintiffs presented affidavits of two proposed witnesses. We will refer to one of these affidavits at some length. Substantially, and so far as material here, the two affidavits were identical. Walter W. Weir averred as follows: He is a registered Civil Engineer and a Drainage Engineer in the Department of Soils, College of Agriculture, University of California, and since 1915 has been a member of the faculty of the University and a member of the staff of its Agricultural Experiment Station; since 1915 also he has devoted his entire time to the study of California soils; he has made numerous and extensive study of soils in the delta area of

California, has traveled through the area extensively and is thoroughly familiar with it from his years of experience and familiar also with the topography and the soil formation of the area; he has published monographs concerning delta conditions and containing soil survey reports generally in California; he has studied the composition and formation of soils, particularly in the delta area, having begun his delta area studies in 1921; he has visited the so-called "Perry Berm" or "Perry Island" (the parcel of land with which we are concerned here), situate on the westerly side of the Mokelumne River just south of its confluence with Georgiana Slough and on at least two occasions has made an examination and tests of the soil on the berm by making test borings. He has also made test borings of and examined the soil of Andrus Island (which we have called the "mainland") and he has for a considerable period of time studied the berm and its relation to the Mokelumne River and to Andrus Island; basing his opinion upon his acquaintance with the delta area with the berm and upon his examination of the soils and topography aforesaid and upon his examination of the property in controversy, and upon maps and photographs of the area he states it to be his opinion that the berm has "from time immemorial been a part of and affixed to Andrus Island"; that in his opinion the westerly bank of the Mokelumne River from time immemorial has been in the present location of the easterly bank of the so-called Perry Berm and that from time immemorial the berm has been a part of Andrus Island situate to the west of the westerly bank of the Mokelumne River; in his opinion the ground surface of Perry Berm and adjacent Andrus Island were before reclamation at about the level of mean high tide which was also the general level of unreclaimed delta land in the area generally; the position of the berm is on the outer perimeter of a bend of the river at its confluence with Georgiana Slough and is on the opposite side of the river from that on which any accretion would naturally occur; the natural action of the river at the berm would be one of cutting rather than accretion and that "the only scientifically ac-

countable way to explain the presence of said Berm is that it has been from time immemorial a part of Andrus Island and that it is highly improbable that any such Berm could have been formed in the location of said Berm by the accretion action of the Mokelumne River." He says these conclusions are scientifically confirmed by the nature of the soil of the berm, which is identical with the soil on Andrus Island immediately to the west of the berm; that the soil is Columbia silt loam and that such soils are characteristically found adjoining the banks of rivers and sloughs generally throughout the delta area; that it is apparent to him the so-called slough separating the present berm and Andrus Island is artificial and man-made and is in fact a dredger cut and not a natural watercourse formed in its length and shape by the action of the river; that it is equally apparent from an examination of the early maps, including the quadrangle map of the geological survey easterly of the critical point on the river that the said slough was cut by dredger and the separation of the berm from Andrus Island is and was artificial and not caused by any act of nature; that such works of reclamation whereby strips of land are left riverward from the levee is common in the area and is done for the purpose of protecting the levees from the force of wave action by the waters of the rivers and streams and to protect against the cutting and eroding force of streams on the outer banks of bends and curves in the rivers. He concludes that for the foregoing reasons it appears to him that no other conclusion than as stated can be scientifically supportable.

The other affidavit presented was that of Lloyd N. Brown, a scientist of standing and experience comparable to the standing and experience of Mr. Weir, who states that he also has made special studies of the delta area, including examination and making of test borings on the berm and the adjacent mainland, and he agrees fully with Mr. Weir that from time immemorial the berm has been a part of the mainland and westerly of the bank of the Mokelumne River.

We see no reason, and think there can be no reason, to doubt that the only really

valuable evidence that can now be obtained as to conditions existing in 1850 must proceed from scientists who by application of their special skills can tell the triers of fact what conditions existed at that time. This is so because that point in time is far beyond the memory of living men; and far beyond the dates of existing documentary evidence of investigations made by public agencies such as the United States Geological Survey. Such reading of the rocks and soils has been developed to a high point of accuracy. Surely such scientists can tell us whether or not the parcel of land in controversy formed a part of the western bank of the Mokelumne River in 1850. The two affiants whose statements we have related have no hesitancy in saying that they can and have determined from their named sources of information what the truth is concerning the location of the western bank of the Mokelumne River in 1850. Their affidavits do not go into such detail as they might go into upon direct and cross-examination, but there seems no reason to doubt that these men believe they can find the truth that is at issue here.

[2, 3] Respondents argue that the scientists' evidence was not newly discovered and that the court was fully justified in refusing to reopen the case and permit its introduction. They say that expert testimony is always known to exist. Perhaps in strict theory this argument may be sound, but in practical effect it may well be that the existence of this source of scientific information was actually, as appellants declare it was, unknown to them and their counsel. On the other hand, by the argument of the State the existence of this information was known to the State and instead of bringing it forward in aid of the court the State chose to depend upon the failing memory of aged men and such conclusions as their own expert witnesses could draw from the existing maps and photographs of the general area which on so fine a point as was in issue here must have amounted in the main to nothing more than generalizations. Respondents themselves were obligated to present to the trier of fact the best evidence available. In the last analysis we are not

so much concerned with technical rules as to who shall present evidence and as to who shall be charged with failure to produce the best evidence as we are with the right decision of issues presented in actions which involve to the parties concerned values far greater than those which lie within strict subservience to the rules of procedure. By the decision appealed from appellants lose the property which they have expensively improved. They testified that they bought their land after making what seemed to them reasonable inquiries as to whether it was owned by their predecessors in interest; that they concluded that it was so owned and then proceeded to develop their parcel as a fishing resort and yacht and boat harbor. They say they employed a dredger to erect a substantial levee entirely around the parcel, built their home on the northerly part of it and established a bridge from the mainland to it across what they claim to be the dredger cut, built slips for boats, and a drydock for their repair, and made other installations, all in the belief that they owned the property they were thus improving. Their home and their business they say have been created during the six years intervening between the date they took their deed and the date when, in the face of a challenge as to their ownership, they began this action, during which interval of time, they testified, no protest was made by the State of California to their activities. There may, of course, be an adequate answer to all this which is frankly argumentative, and we set it out only to emphasize the point we make that it is important that parties' causes be decided by the use of qualified evidence, and that the best available. This cause has not been tried to a jury and upon the motion for new trial it would have been a simple matter to set aside the findings, conclusions and judgment in order to receive the evidence offered. In our view it was error to refuse to do so.

The judgment is reversed.

PEEK and SCHOTTKY, JJ., concur.

Hearing denied; TRAYNOR and McCOMB, JJ., dissenting.

139 Cal.App.2d 424

H. R. BUCY, doing business as Bucy Manufacturing Company, Plaintiff,

v.

NEW AMSTERDAM CASUALTY COMPANY, a corporation, and Schmel Arms Corporation, a corporation, Defendants.

New Amsterdam Casualty Company, a corporation, Appellant.

Civ. 21577.

District Court of Appeal, Second District,
Division 1, California.

Feb. 24, 1956.

Action wherein an appeal was taken and appellee moved to dismiss appeal. The District Court of Appeal, White, P. J., held that under circumstances presented by affidavits on motion to dismiss appeal on account of delay in filing statement, including circumstance that appellant's attorney allegedly understood that appellee's attorney was acquiescing in delay, motion to dismiss was denied and appellant was relieved of default.

Motion denied; appellant relieved of default; trial court directed to settle proposed settled statement.

1. Appeal and Error ⇌ 356

Courts favor determination of litigation upon merits and that all parties should have their day in court at all stages of proceedings, and are reluctant to dismiss an appeal on account of delays in filing.

2. Appeal and Error ⇌ 628(3)

Under circumstances presented by affidavits on motion to dismiss appeal on account of delay in filing statement, including circumstance that appellant's attorney allegedly understood that appellee's attorney was acquiescing in delay, motion to dismiss was denied and appellant was relieved of default. West's Ann. Rules on Appeal, rule 7(a, b), 53(b).

Eugene S. Ives, Los Angeles, for appellant.

Stanley G. Pearson, Burbank, for respondent.

WHITE, Presiding Justice.

Respondent moves to dismiss this appeal on the ground that appellant has failed to complete the filing of the record on appeal in that the condensed statement in narrative form of all or such portions of the oral proceedings deemed material to the determination of the points on appeal has not been filed as provided by Rule 7(a), Rules on Appeal.

Appellant resists the motion on the ground that the delay in filing said settled statement was due to inadvertence and excusable neglect on the part of the attorney employed to prepare such statement for appellant; "that said Proposed Settled Statement of Appellant has been filed with the Court and copies served on plaintiff and respondent together with a copy of the transcript of the proceedings relied on by appellant in the Proposed Settled Statement." Appellant has also filed a motion pursuant to Rule 53(b), Rules on Appeal, to be relieved from default in failing to file its settled statement on appeal within the time prescribed by Rule 7(a) of Rules on Appeal. This motion is grounded on the same reasons advanced in opposition to the aforesaid motion to dismiss the appeal.

The record reflects that on March 4, 1954 plaintiff (respondent herein) filed his complaint (on undertaking given for claim and delivery). The relief prayed for was "for judgment against the defendants in the sum of \$3,871.08, together with interest at the legal rate from December 9, 1952, and for such further relief as to the Court may seem proper.

That a Cross-Complaint for Indemnity (on behalf of New Amsterdam Casualty Company) was filed March 30, 1955. That the relief prayed for was for any sums which might be awarded to plaintiff and against cross-complainant in this action; for all costs including attorney fees incurred by cross-complainant by reason of this action; for costs of this action in cross-complaint; and for further relief as may be proper in the premises.

That judgment, entered June 8, 1955, orders that plaintiff H. R. Bucy, doing business as Bucy Manufacturing Company,

have judgment against defendant New Amsterdam Casualty Company, in the sum of \$3,871.08 principal, and \$654.86 interest, together with interest on the whole thereof at the rate of 7% per annum until paid; that plaintiff have judgment against defendant New Amsterdam Casualty Company for his costs of suit taxed at \$46.30; that cross-complainant New Amsterdam Casualty Company have judgment against cross-defendant Schimel Arms Corporation in the sum of \$3,871.08 principal, and \$654.86 interest thereon, attorneys' fees together with interest thereon at the rate of 7% per annum until paid, and for costs of suit. Notice of entry of judgment was served July 1, 1955. No notice of intention to move for a new trial was filed. On August 4, 1955, notice of appeal on behalf of defendant New Amsterdam Casualty Company (appellant herein) was filed. Notice to clerk to prepare clerk's transcript on appeal was filed August 15, 1955, and on the same day notice to proceed under Rule 7 of Rules on Appeal (by a settled statement in lieu of a reporter's transcript) was filed. On August 22, 1955, plaintiff (respondent herein) filed with the clerk a notice for additional record on appeal. On September 12, 1955 the trial judge signed an order extending the time to file said settled statement on appeal to October 12, 1955. The clerk's transcript on appeal was filed October 21, 1955. No engrossed settled statement on appeal was filed up to December 20, 1955 when the certificate of the county clerk was issued. In support of its motion to dismiss the appeal respondent relies upon the foregoing facts.

In opposing the motion to dismiss and in support of its motion to be relieved of default, appellant, through one of its counsel has filed an affidavit wherein said counsel avers that upon expiration of the extension of time allowed by the trial judge, a further extension was required, and "that the trial judge was on vacation during the month of October, 1955; that thereupon affiant telephoned Stanley G. Pearson, attorney for plaintiff and respondent; that said Stanley G. Pearson granted said extension of time; that affiant stated that she was busy with other matters; that said

Stanley G. Pearson informed affiant to take her time, 'that he would not do anything that would embarrass affiant or Mr. Ives' in regard to said appeal; that relying upon said statement of Mr. Pearson, affiant assumed that it would be agreeable to Mr. Pearson that said settled statement not be filed until after the first of the year; that said Stanley G. Pearson never contacted affiant at any time prior to the filing of a Motion to Dismiss said Appeal received on January 3, 1956 and noticed for January 24, 1956; that said Settled Statement was not prepared prior to the first of the year due to the intervention of the Christmas Holidays and due to the pressure of other work". It is further averred that the proposed settled statement on appeal has been filed with the trial court; that the appeal raises two issues, one of which will be determined on the judgment roll; the other upon the testimony of respondent herein, and that a copy of the transcript of respondent Bucky's testimony, together with a copy of appellant's proposed settled statement, have been forwarded to respondent's counsel.

In opposing appellant's motion for relief from default and supporting its motion to dismiss, respondent's counsel, Stanley G. Pearson, has filed an affidavit in which he sets forth that at no time did he grant an extension of time to appellant, that "The most that can be said for the conversation between affiant and Prudence Thrift (one of counsel for appellant) is that your affiant agreed to sign a written stipulation, to be prepared by Miss Thrift, that the trial court might grant an extension. Your affiant's conversation with Miss Thrift on about October 13, 1955, was to this effect. The discussion was that Miss Thrift was encountering some delay in getting the transcript of Mr. Bucky's testimony, and that the Burbank Court was not in regular session during most of October. Miss Thrift stated that she had secured one 30-day extension from the judge and wanted another. Your affiant told her to prepare a written stipulation to that effect, send it to him and he would sign it so the judge could extend the time. Your affiant heard no more from Miss Thrift or appellant

until approximately January 13, 1956, after the motion to dismiss the appeal had been filed. Upon not receiving the stipulation, or hearing from appellant for over two and one-half months, your affiant, in good faith, believed the appeal had been abandoned, as inconsequential. * * *

"Your affiant never told Miss Thrift to take her time in preparing the Proposed Statement, or any words having that effect. As a matter of fact, your affiant advised her that his client, the respondent, was very anxious to get this matter settled as soon as possible, but that your affiant would grant her the 30-day extension of time above mentioned, because of the delay in getting the transcript, and because Judge Dawson was on vacation. There was absolutely nothing said by affiant that could have been interpreted as an indefinite or unlimited extension of time." Attorney Pearson then sets forth his reasons why, in his opinion, the appeal is without merit.

[1, 2] No citation of authority is necessary for the statement that the courts favor a determination of litigation upon the merits and that all parties should have their day in court at all stages of the proceedings. In consonance with this announced policy, courts are reluctant to dismiss an appeal for delays of the nature here involved, unless, not to do so would result in manifest injustice or prejudice to the moving party. In the instant proceeding we do not regard the delay as flagrant. By order of the trial court, appellant was granted until October 12, 1955 to file the settled statement, and counsel for respondent, with commendable fairness, concedes he was willing to allow an additional 30-day extension to November 12, 1955. The settled statement is now on file. As to any detriment ensuing to respondent should the appeal be determined upon the merits, it appears that this case involves a money judgment, and that there is on file an undertaking on appeal which provides for payment of the principal judgment as well as interest thereon. Viewing the facts and circumstances present in the matter now engaging our attention, we are disposed to allow the appeal herein to be presented on the merits.

The motion to dismiss the appeal is denied; appellant is relieved of default for failure to file settled statement on appeal within the time prescribed by Rule 7(a) of Rules on Appeal, and the court below is directed to proceed to settle said proposed settled statement in accordance with Rule 7(d) of Rules on Appeal.

DORAN and FOURT, JJ., concur.



139 Cal.App.2d 333

William FRIEDMAN, Plaintiff and Appellant,

v.

Rudolph L. DRESEL, Defendant and Respondent.
Civ. 16504.

District Court of Appeal, First District,
Division 1, California.

Feb. 20, 1956.

Rehearing Denied March 21, 1956.

Hearing Denied April 18, 1956.

Malpractice action by patient against doctor for doctor's alleged negligence in making faulty diagnosis of fractured hip, prescribing wrong treatment, and failing to take x-rays of the injured area. The Superior Court, City and County of San Francisco, Theresa Meikle, J., entered judgment upon a defense verdict, and patient appealed. The District Court of Appeal, Peters, P. J., held that giving of instruction, which told jury to ignore testimony of patient and his wife, that patient had told doctor of pain in area of hip, but that doctor had scoffed at such complaints and refused to inspect such area, and which instructed jury to consider only evidence of the experts, constituted prejudicial error.

Judgment reversed.

I. Physicians and Surgeons — 18(8)

Generally, standard of care of a doctor and question whether he exercised such

care can be established only by testimony of experts in the field, but, where doctor's negligence is demonstrated by facts which can be evaluated by resort to common knowledge, expert testimony is not required, since scientific enlightenment is not essential for the determination of an obvious fact.

2. Physicians and Surgeons ⇨15(16)

Failure to take x-rays of a fractured limb does not constitute negligence under all circumstances.

3. Physicians and Surgeons ⇨18(8)

In action by patient against doctor for malpractice based on doctor's alleged negligence in making faulty diagnosis of a fractured hip, prescribing the wrong treatment, and failing to take x-rays of the injured area, patient's evidence, which asserted that patient had told doctor of pain up his leg into his hip but that doctor had scoffed at such complaints and that examination of hip would have disclosed unmistakable physical evidence of hip fracture, proved a prima facie case and would have been sufficient to have sustained a verdict for patient.

4. Appeal and Error ⇨1064(1)

Trial ⇨234(9)

In malpractice action by patient against doctor for doctor's alleged negligence in making faulty diagnosis of fractured hip, prescribing wrong treatment, and failing to take x-rays of the injured area, giving of instruction, which told jury to ignore testimony of patient and his wife, that patient had told doctor of pain in area of hip, but that doctor had scoffed at such complaints and refused to inspect such area, and which instructed jury to consider only evidence of the experts, constituted prejudicial error.

5. Evidence ⇨20(1)

Where, if evidence of plaintiff in malpractice action was to be believed, fact that due care had not been exercised was a matter of common and judicial knowledge, fact that expert evidence was offered as to failure to exercise due care did not make such fact any less a fact of common or judicial knowledge.

Lewis, Field & DeGoff, Marvin E. Lewis, Martin E. Field, Sidney F. DeGoff, San Francisco, for appellant.

Peart, Baraty & Hassard, George A. Smith, San Francisco, for respondent.

PETERS, Presiding Justice.

In this action for malpractice the plaintiff charged the defendant doctor with negligence in making a faulty diagnosis of a fractured hip, in prescribing the wrong treatment, and in failing to take X-rays of the injured area. The jury returned a defense verdict. Plaintiff appeals, directing his main attack on certain instructions.

The plaintiff, William Friedman, was 57 years of age in November of 1951. At that time he was a buyer for Granat Brothers for whom he had worked for some 34 years. In March of 1951 plaintiff was hospitalized and it was determined by Dr. O. W. Jones, Jr., a neurosurgeon, that plaintiff had a brain tumor. This evidenced itself partly by a weakness and awkwardness of the left side of his body. This included a mild weakness of the left leg. Dr. Jones operated and removed the tumor on March 9, 1951, and plaintiff was discharged from the hospital on April 14, 1951, in good condition, and improving all the time. Thereafter, in May of 1951 plaintiff suffered an epileptic convulsion. Dr. Jones then found that the convulsion left plaintiff with a marked weakness on the left side of his body, the left arm and leg being stiff and weak. Dr. Jones prescribed the usual treatment—heat, massage, use of walkers and other physiotherapy. Such convulsions are a frequent aftermath of a brain tumor operation. After this first convulsion, plaintiff was released from the hospital on June 8, 1951, and thereafter suffered several other epileptic seizures.

Plaintiff, and several of his witnesses, testified that by November 21, 1951, plaintiff's condition was good; that he could walk everywhere he wanted without a cane or other assistance; and that he had only a slight hindrance of the left leg. On November 21, 1951, plaintiff, while at work, tripped and fell, landing on the left side of his buttocks. He was unable to get up, and had what he described as "terrific pain"

from above the left knee up the leg to the hip. He was taken to the hospital by ambulance where he was put under the care of Dr. Davis, who had been called in by plaintiff's employer. At this time Dr. Davis had an X-ray of the knee taken. No X-ray of the hip was taken. Several days later Dr. Davis called in the defendant doctor, who is a qualified orthopedic surgeon. Dr. Davis told the defendant about the past history of the case, including the brain operation and subsequent convulsions, and also told him about the fall. Dr. Davis also told defendant that plaintiff had "point tenderness" on the side of the left knee and probably had some ligament damage to that knee. The defendant testified that he then examined plaintiff at the hospital on November 26, 1951, and found him very irritable and tense. Defendant first read the history and the chart, and then asked plaintiff to point out where it hurt. According to defendant, the plaintiff pointed to a spot directly over the internal lateral ligament of the knee. Defendant testified that he then asked if it hurt anywhere else, to which plaintiff replied: "No, this is the only point of pain." Defendant stated that he then examined plaintiff and found that plaintiff's left arm was in "flexion and adduction," similar to the condition after a stroke. "Flexion" is a binding of the joint, while "adduction" is a motion towards the center. Plaintiff's hip was also in flexion and adduction and his knee was in flexion. The defendant testified that he then "splinted" the knee with his hands and asked plaintiff to flex his hip, but plaintiff again complained of pain in the knee; that he had plaintiff hold his leg out at 30 degrees and plaintiff made no complaint of any pain in the hip; that he then examined the left knee and saw that it was swollen; that he noted that there was a tenderness directly over the internal lateral ligament of the knee; and that after various strain tests found a moderate tear in the internal lateral ligament of the knee. The defendant also noted that the hip muscles were tight and rigid, which corroborated a condition of spasticity caused by the brain condition.

Dr. Davis, before calling in the defendant, had prescribed a walker for plaintiff,

gentle massage and active motion. Defendant testified that after he had examined plaintiff and had diagnosed the condition as a moderately severe sprain of the inner ligament of the knee, he recommended the continuation of this treatment. Defendant continued to see plaintiff from time to time until December 29, 1951, when plaintiff was discharged from the hospital. According to defendant, plaintiff at no time made any complaint of pain in the left hip.

During this period defendant also consulted Dr. Jones and had him examine plaintiff on December 7, 1951. Dr. Jones tested and manipulated plaintiff's extremities, tested his cranial nerves and reflexes, and had plaintiff move about. Plaintiff complained of pain in the back of his left knee and no other pain. Specifically, he did not complain of pain in the hip. According to Dr. Jones there was nothing in plaintiff's condition that suggested any injury to the hip. Plaintiff's left extremities were weak, and his left knee slightly flexed, even when standing.

Dr. Davis testified that when he was called in on November 21, 1951, he ordered an X-ray of the knee because the patient complained of pain in that area. Neither from complaints nor from his examination did Dr. Davis find anything to suggest any involvement of the hip. Dr. Davis diagnosed the condition as a contusion of the left knee, with probable involvement of one of the ligaments of that knee. The knee, when first observed by Dr. Davis, was swollen and discolored and plaintiff complained of pain upon its manipulation. Dr. Davis was in complete accord with the diagnosis later made by defendant. Dr. Davis saw plaintiff quite frequently up to January 31, 1952, and during this period made periodic examinations. During this period he did not observe plaintiff's leg in a position of external rotation, which would have indicated a hip fracture. He did notice this condition on January 31, 1952, when plaintiff was re-admitted to the hospital, and X-rays of the hip then taken disclosed a fracture in that area.

The discovery of the hip fracture was made by Dr. Jones, who, while examining plaintiff on January 31, 1952, for the first

time, noted that there were indications of a hip fracture—external rotation, and a shortening of the leg. Dr. Jones had last examined plaintiff on December 7, 1951, and at that time did not notice these conditions. Dr. Jones recommended that X-rays be taken, and the fracture was discovered. Dr. Jones opined that the fracture of the hip occurred as a result of the fall of November 21, 1951.

The X-ray report rendered on January 31, 1952, indicated a fracture of the left neck of the femur; that the shaft was displaced upward; and that there was a moderate rotation of the shaft. Because of the condition of the bony structure which was set forth, the report concludes that "These findings are suggestive of Paget's disease."

After the X-ray of the hip was taken defendant again examined plaintiff. He discovered that spasticity was less than it had been, that plaintiff was able to extend his left leg, and that that leg was now about one inch shorter than the right. He also discovered that the left leg had rotated so as to indicate a fractured hip. No such rotation had been observed prior to January 31, 1952. There was now no complaint of knee pain, nor was there any complaint of hip pain, even when the hip was pumped. Defendant, at the trial, testified that, based on his many examinations, he was of the opinion that plaintiff did not sustain the hip fracture as a result of the fall of November 21, 1951. However, in a letter to the Industrial Indemnity Company prior to trial defendant had given the opinion that the fracture of the hip did occur at the time of the fall.

Another orthopedic surgeon, Dr. Jergesen, was called in to examine plaintiff, which he did on February 2, 1952. He also consulted defendant. He found that plaintiff had a fracture of the neck of the left femur and was suffering from Paget's disease, a disease which causes a weakening of the bones. There was a displacement and a demineralization of the left thigh. When Dr. Jergesen first examined plaintiff the patient did not complain of pain, but when examined on March 12, 1952, he did complain to Dr. Jergesen of pain on the inner side of the lower left thigh. Dr.

Jergesen thought it quite unusual that plaintiff had not complained of pain in his hip. Dr. Jergesen could not fix the date of the fracture, simply stating that it could have occurred any time between November of 1951, and January of 1952. He also stated that a fracture may occur to a person suffering from Paget's disease without trauma, or as a result of a very minimal trauma. When he took over the case he prescribed a continuation of the exercising and physiotherapy. Between March 12, 1952, and June 29, 1952, plaintiff was mobile in the sense that he could and did get around with the help of a cane. But, because plaintiff failed to progress properly, Dr. Jergesen advised surgery, and plaintiff entered the hospital for this purpose on June 29, 1952. Thereafter, Dr. Jergesen performed two operations on plaintiff. In the last operation he removed the head of the femur and replaced it with a metal prosthesis. A pathological examination of the removed bone confirmed the diagnosis that plaintiff had Paget's disease in the hip area.

Dr. Jergesen also testified that it is the general practice of orthopedic surgeons to order X-rays of any particular part of the body whenever the doctor's examination or the history of the case discloses that such part of the body might be involved—that is, when there is something in the case that directs the doctor's attention to that part of the body and so makes him think an X-ray would be of value. An X-ray is not taken unless there is a good valid reason for doing so. If a patient suffers a fall and complains of pain in his left knee and the clinical examination does not disclose hip involvement, no X-ray of the hip would be ordered. Dr. Jergesen was further of the opinion that the fracture here involved was a pathological one, that is, one that occurs in a diseased area of the bone, causing a structural failure of the bone. Such could occur as the result of Paget's disease, with or without trauma. He also testified that he had never seen a case of referred pain in a knee from a hip fracture without pain also in the hip.

Defendant made some admissions which are emphasized by plaintiff. He stated that

he knew that plaintiff had fallen on his buttocks and that an orthopedic specialist always thinks about the possibility of a fractured hip when a person over 50 has a fall, because a hip fracture is a common occurrence with such people. He admitted that where there is a fracture of the hip, pain can be referred along certain nerves to a spot above the knee on the inner side, and, in rare cases, to the lower two-thirds of the thigh. He also admitted that the pain described by plaintiff was more severe than is normal with a sprained knee. He conceded that where a fracture occurs the bones should be immobilized as far as possible to allow the bones to knit. In his deposition defendant stated that, had he known of the hip fracture, he would not have ordered mobilization, but on the trial he stated that immobilization would not have been the best treatment for plaintiff.

Dr. Gorham, a general practitioner with some experience in the orthopedic field, was called as an expert for plaintiff. He testified, in response to a hypothetical question, that, in his opinion, under the circumstances, an X-ray should have been taken of plaintiff's hip. He also was of the opinion that failure to reduce the fracture and immobilize the hip caused serious damage to the plaintiff.

Plaintiff and his wife told stories sharply conflicting, in several respects, with that of defendant and his witnesses. Plaintiff testified that when he fell on November 21, 1951, he had a "terrific" pain extending from above his knee up to his hip; that when he arrived at the hospital, Dr. Davis, without examination, ordered the X-ray of the knee; that neither then nor at any other time did he ever tell Dr. Davis or defendant that he had pain in the knee; that, although Dr. Davis and defendant frequently visited him at the hospital, they never examined his leg; that defendant would customarily come into his hospital room, pat him on the head and tell him that he was getting along fine; that he kept telling defendant and the nurses that he was in terrific pain, but defendant paid no attention to these complaints; that defendant never pulled the covers back to look at the leg, nor did he ever measure it, or manipulate it;

that about a week after his arrival at the hospital defendant directed that he use the walker, and also that he be walked by the nurses; that such treatments were given daily; that he frequently screamed with pain during such treatments; that he noticed his leg was getting shorter before he left the hospital on December 29, 1951, and also noted that the leg was turned out; that after he came home from the hospital defendant visited him at his home and stated that he could not understand why he could not walk, and ordered a built-up shoe for the left foot; that since the hip operation he has been unable to work; in fact, unable to walk, unassisted.

Mrs. Friedman corroborated most of her husband's testimony. She also testified that, after her husband was in the hospital for some time and did not seem to be getting any better she consulted defendant and told him that her husband suffered terrific pain; that defendant told her there was nothing wrong with her husband's leg; that all his trouble was in his head; that if there were a fire in the hospital her husband would be the first one to run out; that when she suggested she retain a private nurse defendant said: "Get him a blonde and he'll chase her all over the hospital"; that she visited her husband daily when he was being exercised in the walker, and her husband always complained of great pain; that she told defendant of this fact and defendant agreed to meet her at the hospital to discuss the matter; that at this meeting she told defendant that while in the walker her husband's left foot could not reach the floor, and that she thought that the left leg was shorter than the right; that she asked the doctor to have her husband placed in a walker so that she could show him these facts, but he refused to do so, saying it was unnecessary. She also then asked defendant to take some more X-rays, but he refused, saying that it was unnecessary; that after her husband came home from the hospital on December 29, 1951, defendant ordered her husband to wear a shoe with a raised heel on his left foot; that at that time she told defendant she thought the left leg was shorter than the right but defendant stated that this was not so, that

it was just the way plaintiff held his leg; that after the X-ray of the hip was taken defendant told her "I must admit he must have had a fracture, but it was a clean one and broke through by walking on it"; that defendant said nothing when she stated that he had advised walking on the injured leg; that she had heard defendant at the hospital order the walking exercises; that her husband's complaints were always of pain above the knee and running up to his hip.

It is obvious from this summary that the evidence was highly conflicting, and that a finding either for or against the defendant finds support in the record. If the evidence produced by the defense is believed, we have a patient who suffered a fall and complained of pain in his left knee. The left knee was swollen and discolored. X-rays disclosed no fracture of the knee, but examination disclosed a torn ligament which was properly treated. There was nothing to indicate to a reasonably competent doctor that the hip was fractured or in any way involved. The prior brain operation explained many of plaintiff's symptoms. There was evidence that the hip fracture was not the result of the fall of November 21, 1951, but occurred as the result of disease.

On the other hand, if the evidence produced by the plaintiff is to be believed, the plaintiff at no time complained to any one of any pain in his knee, always indicating that the pain went up his leg to his hip; that defendant evidenced no interest in his complaints, but assumed that they were the neurotic complaints of a man with an injured brain; that in spite of the fact the left leg was shorter than the right and turned outwards, sure indicia of a hip fracture, and although these facts were called to defendant's attention, he refused and failed to examine the leg and to have further X-rays taken; that in spite of pain complaints which even defendant admitted were much more severe than would be present with a knee sprain, defendant made no examination but ordered treatment that was proper for a knee sprain but highly dangerous for a man with a fractured hip. In other words, if plaintiff's testimony is believed, it is a reasonable inference that, although defend-

ant had knowledge of facts and complaints that would have placed any reasonably competent doctor on notice that there was a hip involvement, he, without taking the precaution of having an X-ray taken or of examining the injured area, ordered treatment that resulted in serious damage.

On this state of the record the trial judge gave the following challenged instructions:

"In determining whether defendant Dr. Rudolph L. Dresel's learning, skill and conduct fulfilled the duties imposed on him by law, as they have been stated to you, you are not permitted to set up arbitrarily a standard of your own. The standard, I remind you, was set by the learning, skill and care ordinarily possessed and practiced by others of the same profession in good standing, in the same locality, at the same time. It follows, therefore, that the only way you may properly learn that standard is through evidence presented in this trial by physicians and surgeons called as expert witnesses."

"The testimony of lay witnesses in this case, including the plaintiff, who are not members of the medical profession, is not to be and cannot be considered by you upon any question relating to the skill and care, or want of it, possessed and exercised by the defendant Dr. Rudolph L. Dresel.

"In this case there has been a conflict in the testimony of expert witnesses concerning the nature, extent, and cause of the injuries, if any, sustained by plaintiff.

"You must resolve that conflict. To that end, you must weigh one expert's opinion against that of another, the reasons given by one against those of another, and the relative credibility and knowledge of the experts who have testified. Thereupon you shall find in favor of that expert testimony which, in your opinion, is entitled to the greater weight."

[1] These instructions correctly state the general rule that ordinarily the standard of care of a doctor, and whether he exercised such care, can be established only by the testimony of experts in the field. *Lawless v. Calaway*, 24 Cal.2d 81, 147 P.2d 604; *Engelking v. Carlson*, 13 Cal.2d 216, 88 P.2d 695; *Trindle v. Wheeler*, 23 Cal.2d 330,

143 P.2d 932; Callahan v. Hahnemann, Hospital, 1 Cal.2d 447, 35 P.2d 535; Bel-landi v. Park Sanitarium Ass'n, 214 Cal. 472, 6 P.2d 508. But to that rule there is an exception that is as well settled as the rule itself, and that is where "negligence on the part of a doctor is demonstrated by facts which can be evaluated by resort to common knowledge, expert testimony is not required since scientific enlightenment is not essential for the determination of an obvious fact." Lawless v. Calaway, 24 Cal.2d 81, 86, 147 P.2d 604, 606; see also Ales v. Ryan, 8 Cal.2d 82, 64 P.2d 409; Barham v. Wid-ing, 210 Cal. 206, 291 P. 173; McCollum v. Barr, 38 Cal.App. 411, 176 P. 463; McBride v. Saylin, 6 Cal.2d 134, 56 P.2d 941; Rankin v. Mills, 207 Cal. 438, 278 P. 1044.

There can be no doubt but that if plain-tiff's evidence was believed, the exception to the rule and not the general rule was ap-plicable. A case directly in point is Agnew v. City of Los Angeles, 82 Cal.App.2d 616, 186 P.2d 450. In that case, after plaintiff had fallen, a doctor, without examining the patient, accepted the diagnosis of the re-ceiving hospital, and, in spite of complaints by the patient, failed to examine her or have an X-ray taken. She had a fractured hip. The plaintiff was unable to produce expert testimony that the doctor had failed to use that degree of skill and learning ordinarily possessed by physicians of good standing practicing in the community. The trial court granted a nonsuit for that reason. The appellate court reversed. In so doing, the following statements of law and fact were made in 82 Cal.App.2d at page 619, 186 P.2d at page 451:

"General Rule. The law requires that a physician shall have that degree of skill and learning ordinarily possessed by physicians of good standing practicing in the same locality, and that he shall use the same care and diligence in applying that learning to the treatment of a patient. It is likewise the general rule that whether he has done so in a particular case is a question for experts and can be established only by their testimony. [Citing a case.]

"General Exception. To the above gen-eral rule there is this well recognized ex-ception, to wit, where the question of the

propriety of the treatment is a matter of common knowledge of laymen, expert tes-timony is unnecessary in order to establish liability in a malpractice case.

"Specific Exception. The use of the X-ray as an aid to diagnosis in cases of fracture or other indicated cases is a matter of common knowledge, and the failure to make use thereof in such a case amounts to a failure to use that degree of care and diligence ordinarily used by physicians of good standing practicing in this community. The court in the absence of expert testi-mony may take judicial notice of this fact. [Citing cases.]

"It is evident in the present case that when plaintiff fell a possible fracture was indicated, and under the foregoing rules it is likewise apparent that it was a matter of common knowledge of which the trial court should have taken judicial notice that the ordinary physician of good standing in this community in the exercise of ordinary care and diligence would have had X-ray pictures taken of plaintiff's body when a fracture might have resulted from the fall. In failing to do so defendant did not ex-ercise the degree of learning and skill or-dinarily possessed by physicians of good standing practicing in this community. De-fendant Larson thus failed to use ordinary care and diligence in his treatment of plain-tiff with the result that plaintiff suffered personal injury. Therefore the evidence which plaintiff introduced before the trial court established a prima facie case and it was error to grant defendant's motion for a nonsuit." See also McBride v. Saylin, 6 Cal.2d 134, 56 P.2d 941; Reynolds v. Stru-ble, 128 Cal.App. 716, 18 P.2d 690; Rankin v. Mills, 207 Cal. 438, 278 P. 1044; Agnew v. City of Los Angeles, 97 Cal.App.2d 557, 218 P.2d 66; McCollum v. Barr, 38 Cal. App. 411, 176 P. 463.

[2-4] Of course, failure to take X-rays of a fractured limb does not constitute ne-gligence under all circumstances. Bickford v. Lawson, 27 Cal.App.2d 416, 81 P.2d 216; Lawless v. Calaway, 24 Cal.2d 81, 147 P.2d 604. Thus, in the present case, if the tes-timony produced by defendant is believed, we have a man who, by reason of prior illness, had a weakness in the extremities on

the left side who falls on his buttocks. Thereafter, he complains to all the doctors, including defendant, of pain in the knee area, and never complains of pain in the hip. There were physical evidences of injury to the knee. X-rays are taken of the knee. There was no evidence of injury to the hip. To say the least, under those circumstances, it was a matter for expert evidence, as to whether an X-ray should have been taken of the hip. But the difficulty with the challenged instructions is that they told the jury to disregard completely the evidence of plaintiff and his wife on the issue of whether the defendant had exercised due care. According to that testimony, plaintiff consistently told defendant that he was in great pain, not in the knee but above the knee and up the leg to the hip, but defendant scoffed at the complaints, stated that the condition was mental, and even refused and failed to inspect the injured area. The plaintiff's evidence is that, had such an examination been made, it would have disclosed the unmistakable physical evidences of a hip fracture. One does not have to be a doctor to know that, if this evidence is believed, due care was not exercised. According to the cases above cited, such facts proved a prima facie case and are sufficient to sustain a verdict for the plaintiff. But by the instructions the jury was told to ignore all of this evidence and to consider only that of the experts. This was prejudicial error. For cases closely in point see *Byrom v. Eastern Dispensary and Casualty Hospital*, 78 U.S. App.D.C. 42, 136 F.2d 278; *Cornwell v. Sleicher*, 119 Wash. 573, 205 P. 1059.

Defendant argues that the challenged instruction did not tell the jury to ignore plaintiff's evidence, or that negligence could only be proved by experts, but merely told the jury that the standard of care must be established by expert testimony, and that, once that standard is established, then the jury could consider all of the evidence in the case to determine whether that standard had been followed. Here, under plaintiff's evidence, he was entitled to an instruction to the effect that if the jury found the facts in accordance with plaintiff's evidence, then the court takes judicial notice that due care

required that an X-ray should have been taken of the hip. An instruction to that general effect was offered by plaintiff but refused by the court. Moreover, the jury was told to disregard plaintiff's evidence. The jury was told that "The testimony of lay witnesses in this case, including the plaintiff, who are not members of the medical profession, is *not to be and cannot be considered by you upon any question relating to the skill and care, or want of it, possessed and exercised by the defendant.*" (Italics added.) This was clearly prejudicial.

[5] The prejudicial nature of the instruction is not changed by the fact that plaintiff produced an expert to testify on the standard of care. If the evidence of plaintiff is to be believed, the fact that due care was not exercised is a matter of common and judicial knowledge. Although expert evidence was offered as to such fact, it did not make that fact any less a fact of common or judicial knowledge.

The judgment appealed from is reversed.

BRAY and FRED B. WOOD, JJ., concur.



139 Cal.App.2d 146

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Sam GOLDSTEIN, Defendant and Appellant.
Cr. 5476.

District Court of Appeal, Second District,
Division 3, California.

Feb. 9, 1956.

Rehearing Denied Feb. 24, 1956.

Hearing Denied March 8, 1956.

Defendant was convicted of unlawfully keeping and occupying a newsstand with papers for purpose of recording and registering bets on horse races and of unlawfully recording and registering bets on

horse races. From a judgment of the Superior Court, Los Angeles County, and from an order denying a motion for new trial, Kenneth C. Newell, J., the defendant appealed. The District Court of Appeal, Vallée, J., held, *inter alia*, that the failure to give requested instructions on circumstantial evidence did not constitute reversible error, where evidence of guilt was so clear that if instructions would have been given, result would have been the same.

Judgment and order affirmed.

1. Criminal Law Ⓒ552(3)

When the People's case against a defendant rests entirely or chiefly on circumstantial evidence, and in any case before jury may find a defendant guilty basing its finding solely on such evidence, each fact which is essential to complete a chain of circumstances that will establish defendant's guilt must be proved beyond a reasonable doubt.

2. Criminal Law Ⓒ824(1)

In a criminal case trial court must instruct jury of its own motion on law relating to the facts of case and on matters vital to proper consideration of the evidence.

3. Criminal Law Ⓒ552(1)

The terms "indirect evidence" and "circumstantial evidence" are interchangeable and synonymous. West's Ann.Code Civ.Proc. §§ 1831, 1832.

4. Criminal Law Ⓒ552(1)

"Direct evidence" is that which is applied to the fact to be proved, immediately and directly, and without aid of any intervening fact or process, while "circumstantial evidence" is that which is applied to principal fact, indirectly, or through medium of other facts, from which the principal fact is inferred. West's Ann.Code Civ.Proc. §§ 1831, 1832.

See publication Words and Phrases, for other judicial constructions and definitions of "Circumstantial Evidence" and "Direct Evidence".

5. Criminal Law Ⓒ552(1)

The characteristics of "circumstantial evidence" as distinguished from that which is direct, are the existence and pres-

entation of one or more evidentiary facts, and a process of inference, by which these facts are so connected with fact sought, as to tend to produce a persuasion of its truth. West's Ann.Code Civ.Proc. §§ 1831, 1832.

6. Criminal Law Ⓒ559

An "inference" is a conclusion as to existence of a material fact that a trier of fact may properly draw from existence of certain primary facts. West's Ann.Code Civ.Proc. § 1832.

See publication Words and Phrases, for other judicial constructions and definitions of "Inference".

7. Criminal Law Ⓒ559

Inferences drawn from physical facts amount to circumstantial evidence. West's Ann.Code Civ.Proc. § 1832.

8. Criminal Law Ⓒ552(1)

"Circumstantial evidence" as distinguished from direct evidence, is testimony not based on actual personal knowledge or observation of the facts in controversy, but of other facts from which deductions are drawn, showing indirectly the facts sought to be proved. West's Ann.Code Civ.Proc. § 1832.

9. Criminal Law Ⓒ784(1)

In prosecution for keeping place for recording bets and registering of bets, testimony of police officer as expert relative to pieces of paper found in accused's newsstand from which testimony jury was asked to infer ultimate fact that accused occupied newsstand with paraphernalia for purpose of recording bets was circumstantial evidence and hence it was error to refuse to give requested instructions on circumstantial evidence. West's Ann.Pen. Code, § 337a, subs. 2, 4; West's Ann.Code Civ.Proc. § 1832.

10. Criminal Law Ⓒ316

Defendant's failure to deny or explain evidence against him, when he has power to do so, may be considered by jury as tending to indicate truth of such evidence and greater probability of reasonable inferences unfavorable to defendant therefrom.

11. Criminal Law Ⓒ552(4)

In prosecution for keeping place for recording bets and registering of bets, fact that all evidence was circumstantial did not lessen its weight, since circumstantial evidence is as adequate to convict as direct evidence. West's Ann.Pen.Code, § 337a, subs. 2, 4; West's Ann.Code Civ.Proc. §§ 1831, 1832.

12. Gaming Ⓒ98(5)

In prosecution for keeping place for recording bets and registering of bets, that police officers did not observe any activity in the rear room, did not know who any of persons who went into back room were, that six papers were not dated, that neither "owe sheets" nor a "scratch sheet" were found on premises, that no one saw anyone place a bet, and that officer supposed a code of kind indicated by papers could be applied "to a business operation, or purchases, and so forth," did not weaken force of circumstantial evidence on which verdict of guilty rested. West's Ann.Pen.Code, § 337a, subs. 2, 4.

13. Gaming Ⓒ75(1)

The offense charged in count which stated that defendant unlawfully kept and occupied a newsstand with papers for purpose of recording and registering bets on horse races was complete when it was shown defendant occupied a place with paraphernalia for purpose of registering bets on certain date, the offense denounced being occupancy of place with necessary equipment for registering bets, not the actual taking of bets. West's Ann.Pen.Code, § 337a, subd. 2.

14. Gaming Ⓒ98(5)

In prosecution for keeping place for recording bets and registering of bets, evidence that notations on slips of paper admittedly in handwriting of defendant, were records of bets on horses which ran on designated date, together with other circumstances established that defendant registered bets on that day. West's Ann.Pen.Code, § 337a, subd. 4.

15. Criminal Law Ⓒ1173(2)

In prosecution for keeping place for recording bets and registering of bets based upon circumstantial evidence, failure to

give requested instructions on circumstantial evidence was not reversible error where evidence of guilt was so clear that if instructions had been given result would have been the same. West's Ann.Pen.Code, § 337a, subs. 2, 4; West's Ann.Code Civ.Proc. § 1832.

Andrew R. Edwards, Pasadena, for appellant.

Edmund G. Brown, Atty. Gen., and Doris H. Maier, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

Defendant was charged by information in Count I with, on February 16, 1955, unlawfully keeping and occupying a newsstand in Pasadena with papers for the purpose of recording and registering a bet or bets on horse races, Pen.Code, § 337a, subdivision 2, and in Count II with, on February 16, 1955, unlawfully having recorded and registered a bet or bets on horse races. Pen.Code, § 337a, subdivision 4. In a jury trial he was convicted as charged in both counts. He appeals from the judgment and the order denying his motion for a new trial.

In February 1955 defendant operated a magazine newsstand in Pasadena. The newsstand consisted of two rooms—a front room about 15 feet wide and 22 feet deep and a rear room directly back of that about 15 feet wide by 8 feet deep. The front room contained a candy-cigar counter and the usual racks for magazines and newspapers. The rear room contained storage shelves, a small table, boxes of magazines and newspapers, and one window covered by a torn, green blind.

On February 16, 1955 police officers Marshall and Gardner, stationed across the street, watched defendant's premises from 11:45 a. m. to 2 p. m. with glasses. During that time they saw 8 to 10 persons separately enter the front room of the building and proceed immediately to the rear room. A few seconds after a person went into the rear room, defendant followed him into the room. Ten or fifteen seconds later de-

fendant returned to the front room, each time putting his pen into his shirt pocket. The other person then came out of the rear room and left the premises. The officers could not recall that any of the persons who went into the rear room made a purchase in the front room. They did not observe any of the individuals hand any money to defendant, take anything from him, or conduct any activity connected with what may have transpired in the rear room. The officers did not identify any one of the 8 or 10 persons; they did not stop or converse with any one of them. They did not know whether the persons who entered the building were sales people or personal friends of defendant or what connection they may have had with him.

Shortly after 2 p. m. the officers went into the newsstand. One said to defendant, "Hi, Sam, do you mind if I look around?" Defendant said, "Go ahead. You won't find anything here." The two officers proceeded into the rear room. Officer Marshall testified he found a group of six papers on the framing of a partition in the rear room with a series of letters written on them; he asked defendant what they were; defendant said it was a form of double bookkeeping for the purpose of evading taxes; he asked defendant to explain; defendant said, "I can't; you will have to talk to my lawyer."

Officer Marshall, who qualified as an expert on bookmaking, further testified he decoded the six papers and in his opinion they were betting markers; "I also checked as a result of breaking that down, I checked the numerals, say the fifth race, the tenth horse, I checked that against the racing sheet, the entries for Santa Anita for that particular date, and found in fact that there was a tenth horse entered in the fifth race, and so on down through the sheets." The witness purchased a "Daily Racing Form" of February 16, 1955 showing the horses entered at Santa Anita on that day and compared the figures on the six slips with the entries in the racing form. He further testified about the papers: "In the 6th race, Dawn Lark was the horse in the 4th post position at Santa Anita on February 16"; in my "opinion * * * that top entry, 6,

4, 20, indicates that was a \$20 bet on Dawn Lark in the 6th race at Santa Anita" on that date; I would classify the slips of paper "as betting markers, as part of a bookmaker's paraphernalia"; I found "that all the betting markers were subject to the same interpretation as was put on the board there, from Exhibit No. 4"; "I ran into a little bit of a puzzle when I found I had the 20th post position, which is an unusually large number of horses to be running; but in checking the Santa Anita entries I did find that in the 7th race they had as many as 23 horses running. The only other inconsistency would be on marker No. 6, which gave me an additional column, and I broke it down. I had just the letters 'H' or 'S' to the left of this initial column here, and that indicated to me that the 'H' was Hialeah and the 'S' would be Santa Anita. It would just be a classification of the two tracks. Where no 'S' was placed, why—it is common practice with bookmakers, and betting markers, if it is the local track, well they don't indicate by name the local track. If it is an out-of-state track, they indicate by an initial or some symbol that it is a track out of the state. And that is about the only variation I found among these six markers"; "on one of these I found a 9th race. Now, Santa Anita only has 8 races, but Hialeah or the Fair Grounds does have a 9th race, and in checking that out I found that; I don't know whether I can dig that marker up or not, but I did find I had nine races going at Hialeah, so again that was what might have been my only stumbling block in the code and it clarified itself"; I did not "find any number in the second numbers which was larger than the number of horses entered in the particular race"; my "decoding of this and the result and figures were consistent with one of the forms of keeping books used by bookmakers in this county."

On cross-examination officer Marshall testified: when I entered the premises on February 16, 1955 I did not know what the symbols meant; I had never "seen this particular code used in a bookmaking operation"; "I didn't know the meaning of this particular set of symbols at this time"; defendant showed me "one code which re-

ferred to numbers of magazines being returned to dealers" which were symbols of some kind which he explained; I did not see any one making a bet; I did not see any "owe sheets" on the premises; an owe sheet "is the record of the money coming to a better, or that the better owes the book"; "a person who accepts wagers, or makes wagers, ordinarily consults a scratch sheet to see if a particular horse has been scratched"; a person who is accepting bets on horse races should check to see if "he" [the horse] has been past posted; when a horse is scratched from a race it eliminates a post position; there was no racing digest or parlay book in the rear room; there was no date on any of the slips of paper; it is "customary for a person who occupies premises for the purpose of taking wagers on horses to have some record regarding the results of the races or the disposition made of a particular bet"; I cannot say that any particular person placed a bet on defendant's premises; "Q. And you don't know whether or not any of the people who went into the premises on the date you had it under surveillance made a bet there, do you, sir? A. Not any of those particular persons; no"; defendant cooperated fully when we came in and started to search the premises; I do not know when or where any of these writings were made; I do not know whether anyone placed a bet on February 16, 1955 or whether defendant accepted or registered any bet on that date; defendant told me the slips were in his handwriting; I suppose a code of this kind could be applied "to a business operation, or purchases, and so forth." Defendant did

not testify or offer any evidence in his behalf.

The only assigned error is refusal of the court to give two instructions requested by defendant on the subject of circumstantial evidence.¹ The argument is that the case made by the People rested chiefly on circumstantial evidence and in such a case it is prejudicial error to refuse the instructions.

The People concede that with respect to the charge in Count I, keeping and occupying the premises for the purpose of recording a bet or bets, the evidence was entirely circumstantial and that it was error to refuse the instructions as to that count. They urge the error was not prejudicial. With respect to the charge in Count II, recording a bet or bets, the People contend the evidence was not chiefly circumstantial, that the opinion evidence of the expert on bookmaking was direct evidence, and there was no error in refusing the instructions as to that count.

[1,2] When the case which has been made out by the People against a defendant rests entirely or chiefly on circumstantial evidence, and in any case before the jury may find a defendant guilty basing its finding solely on such evidence, each fact which is essential to complete a chain of circumstances that will establish the defendant's guilt must be proved beyond a reasonable doubt. In a criminal case the trial court is required to instruct the jury of its own motion on the law relating to the facts of the case and on matters vital to a proper consideration of the evidence. *People v.*

1. The refused instructions were: "If the evidence in this case [as to any particular count] is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendant's innocence, and reject that which points to his guilt.

"You will notice that this rule applies only when both of the two possible opposing conclusions appear to you to be reasonable. If, on the other hand, one of the possible conclusions should appear to

you to be reasonable and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and to reject the unreasonable, bearing in mind, however, that even if the reasonable deduction points to defendant's guilt, the entire proof must carry the convincing force required by law to support a verdict of guilt."

"Where the guilt of the defendant is predicated upon circumstantial evidence, the character of evidence must be not only be consistent with the hypothesis of guilt but inconsistent with any rational hypothesis of innocence."

Buffum, 40 Cal.2d 709, 724, 256 P.2d 317. In *People v. Yrigoyen*, 45 Cal.2d 46, 286 P.2d 1, 3, the rule is stated:

"In accordance with this rule we declared in *People v. Bender*, 27 Cal. 2d 164, 174 et seq., 163 P.2d 8, that the court on its own motion should have given an instruction embodying the principle that to justify a conviction on circumstantial evidence the facts and circumstances must not only be entirely consistent with the theory of guilt but must be inconsistent with any other rational conclusion. See also *People v. Koenig*, 29 Cal.2d 87, 93, 173 P.2d 1. It is true that in the *Bender* case proof of guilt was entirely circumstantial, whereas in the present case there was direct evidence that defendant issued the check without sufficient funds in or credit with the bank, and circumstantial evidence was relied upon to show his criminal knowledge and intent. However, in the *Bender* case, it is stated that where circumstantial evidence is substantially relied upon for proof of guilt, adequate instructions on the rules governing the application of such evidence must be given. 27 Cal.2d at page 175, 163 P.2d at page 15. And it has been held that the instruction must be given where criminal knowledge is shown only by circumstantial evidence. *People v. Candiotta*, 128 Cal.App.2d 347, 355-356, 275 P.2d 500."

Also see *People v. Hatchett*, 63 Cal.App.2d 144, 155, 146 P.2d 469.

[3-8] "Direct evidence is that which proves the fact in dispute, directly, without an inference or presumption, and which in itself, if true, conclusively establishes that fact." Code Civ.Proc. § 1831. "Indirect evidence is that which tends to establish the fact in dispute by proving another, and which, though true, does not of itself conclusively establish that fact, but which affords an inference or presumption of its existence." Code Civ.Proc. § 1832. The terms "indirect evidence" and "circumstantial evidence" are interchangeable and synonymous. (18 Cal.Jur.2d 434, § 12.) Direct evidence is that which is applied to

the fact to be proved, immediately and directly, and without the aid of any intervening fact or process: as where, on a trial for murder, a witness positively testifies he saw the accused inflict the mortal wound, or administer the poison. Circumstantial evidence is that which is applied to the principal fact, indirectly, or through the medium of other facts, from which the principal fact is inferred. The characteristics of circumstantial evidence, as distinguished from that which is direct, are, first, the existence and presentation of one or more evidentiary facts; and, second, a process of inference, by which these facts are so connected with the fact sought, as to tend to produce a persuasion of its truth. (Burrill on Circumstantial Evidence, 4, 5.) An inference is a conclusion as to the existence of a material fact that a trier of fact may properly draw from the existence of certain primary facts. *Blank v. Coffin*, 20 Cal.2d 457, 460, 126 P.2d 868. Inferences drawn from physical facts amount to circumstantial evidence. *McCready v. Atlantic Coast Line R. Co.*, 212 S.C. 449, 48 S.E.2d 193, 196. It has been said that circumstantial evidence, as distinguished from direct evidence, is testimony not based on actual personal knowledge or observation of the facts in controversy, but of other facts from which deductions are drawn, showing indirectly the facts sought to be proved. *Aday v. State*, 28 Okl.Cr. 201, 230 P. 280, 281.

The court in *People v. Barnhart*, 66 Cal. App.2d 714, 153 P.2d 214, treated as circumstantial evidence testimony of police officers relative to the modus operandi of bookmakers and the opinions of the officers with respect to papers found in the possession of the defendant, similar to the testimony of officer Marshall in the case at bar. Also in *People v. Levene*, 107 Cal.App.2d 125, 236 P.2d 604, a bookmaking case, the court clearly implied that the testimony of a police officer as an expert with respect to the bookmaking character of sheets of paper found in a room occupied by the defendant was circumstantial evidence, and said that an instruction thereon should have been given. *People v. Jones*, 42 Cal.2d 219, 266 P.2d 38, 42, held that expert tes-

timony that the defendant was not a sexual deviate is circumstantial evidence. The court said such evidence was analogous to evidence as to the character of the accused and, quoting Wigmore, that one of its purposes was "to base thereon a probable presumption that he would not be likely to commit, and, therefore, did not commit, the crime with which he is charged." In *People v. Zerillo*, 36 Cal.2d 222, 223 P.2d 223, the court held the opinion of a chemist concerning the purity of tomato paste was circumstantial evidence. In *Re Estate of Reed*, 132 Cal.App.2d 732, 282 P.2d 935, this court characterized the testimony of a handwriting expert as "indirect evidence." *Wakeley v. State*, 118 Neb. 346, 225 N.W. 42, a prosecution for forgery, held that the opinion of an expert on handwriting derived from a comparison of writing of the defendant and the writing in question is circumstantial evidence. To same effect, *In re Parvin's Estate*, 131 Neb. 853, 270 N.W. 470, 472. In *In re Trope's Estate*, 190 Okl. 453, 124 P.2d 733, it was held that reputation evidence that parties are living together as husband and wife constitutes circumstantial evidence that they are living together under a marriage contract. In *Lynn v. State*, 169 Ark. 880, 277 S.W. 19, it was held the testimony of officers that mash which they found in defendant's potato patch was fresh mash suitable for distillation of alcoholic liquor was circumstantial evidence. *State v. Martinez*, 52 N.M. 343, 198 P.2d 256, says that the opinion of a ballistic expert that the death bullet was fired from the defendant's gun was "an evidentiary fact and a link in the chain of facts from which the jury could determine that the defendant was guilty of murder."

2. In *Barker v. Gould*, 122 Cal. 240, at page 243, 54 P. 845, at page 846, the court stated: "There was no evidence of any visible or open flow of water from the creek to the tunnel, but the defendants sought to establish the fact by means of expert testimony, based upon the geological formation of the surrounding country, the direction and angle of dip of the strata, the character of rock in the different strata, and the character of the intervening seams. * * * The conclusion of each expert witness was but an opinion formed by him from his knowl-

Wharton in his latest work on Criminal Evidence labels opinion evidence as to fingerprints, palm prints, and tracks as circumstantial evidence. (3 Wharton's Criminal Evidence, 12th ed., (1955) 479, § 982.) (Also see Taylor on Evidence, 12th ed., §§ 65, 1416 et seq.)² Any implication in *People v. Pedroza*, 125 Cal.App.2d 144, 269 P.2d 921, that the opinion of an expert is direct evidence of the ultimate fact to be proved, is out of line with the authorities to which we have referred.

[9] We are of the view that the testimony of officer Marshall as an expert was circumstantial evidence. He testified to his opinion relative to the character of the six pieces of paper found in defendant's newsstand. From that opinion, together with the other evidence in the case, the jury was asked to infer the ultimate fact that defendant occupied the newsstand with paraphernalia for the purpose of recording bets. The case of the People rested chiefly on circumstantial evidence and it was error to refuse to give the requested instructions as to both counts. The question is was the error prejudicial. We think it was not.

[10-12] The evidence points convincingly to the guilt of defendant. Within a period of 2¼ hours on February 16, 1955, 8 to 10 persons went into defendant's newsstand, did not stop in the front room but went into the rear room. Defendant immediately followed each one into that room. He returned to the front room 10 or 15 seconds later, each time putting his pen into his shirt pocket. The other person immediately left the premises. No one of the 8 to 10 persons made a purchase. The only

edge of the science applicable to the subject-matter of the investigation, and his capacity for forming this opinion, as well as the value to which the opinion was entitled, depended upon the extent of his studies and of his experience in reference to that subject, and also upon the extent to which he had applied the knowledge thus acquired by him to this particular subject. His testimony was not of a fact, but was merely his deduction from other facts under the theory adopted by him as the result of his previous studies and experience."

window in the rear room was covered by a green shade. Shortly after 2 p. m. that day the officers found six betting markers with a series of letters written on them, all in defendant's handwriting, in the rear room. All the betting markers, with one exception, were written with ink; the one exception was written partly with ink and partly with a pencil. When asked what they were, defendant replied they were a form of double bookkeeping for tax evasion purposes, and when asked to explain, said, "I can't; you will have to talk to my lawyer." The officers found a newspaper of February 16, 1955 open to the entries "at the current tracks" in the rear room. The betting markers showed bets on horses running at Santa Anita and Hialeah on February 16, 1955. Defendant had it in his power to explain all of these circumstances. He did not. "[T]he failure of the defendant to deny or explain evidence presented against him, when it is in his power to do so, may be considered by the jury as tending to indicate the truth of such evidence, and as indicating that among the inferences that may reasonably be drawn therefrom, those unfavorable to the defendant are the more probable." *People v. Adamson*, 27 Cal.2d 478, 489, 165 P.2d 3, 9. The fact that all the evidence was circumstantial does not lessen its weight, for circumstantial evidence is as adequate to convict as direct evidence. *People v. Koenig*, 29 Cal.2d 87, 91, 173 P.2d 1. That the officers did not observe any activity in the rear room, did not know who any of the persons were who went into that room, that the six papers were not dated, that neither "owe sheets" nor a "scratch sheet" were found on the premises, that no one saw anyone place a bet, and that officer Marshall supposed a code of the kind indicated by the six papers could be applied "to a business operation, or purchases, and so forth," do not weaken the force of the evidence on which the verdict rests.

[13, 14] The offense charged in Count I was complete when it was shown that the accused occupied a place with paraphernalia for the purpose of registering bets on February 16, 1955. The offense denounced is the occupancy of the place with the nec-

essary equipment for registering bets, not the actual taking of bets. *People v. Barnhart*, 66 Cal.App.2d 714, 721, 153 P.2d 214. The evidence to the effect that the notations on the slips of paper, admittedly in the handwriting of defendant, were records of bets on horses which ran on February 16, 1955, together with the other circumstances related, established that defendant registered bets on that day.

[15] There is no doubt the jury was justified in concluding that defendant was guilty as charged in both counts. We are satisfied that if the instructions had been given the result would have been the same. The evidence of defendant's guilt is so clear we cannot hold the failure to give the requested instructions to be reversible error. *People v. Levene*, 107 Cal.App.2d 125, 236 P.2d 604; *People v. Tenedor*, 107 Cal.App.2d 581, 584, 237 P.2d 679.

The judgment and the order denying a new trial are affirmed.

SHINN, P. J., and PARKER WOOD, J.,
concur.



139 Cal.App.2d 260

PACIFIC EMPLOYERS INSURANCE COMPANY, Petitioner,

v.

**INDUSTRIAL ACCIDENT COMMISSION
of the State of California,**

and

Virginia R. Decker et al., Respondents.

Civ. 16846.

**District Court of Appeal, First District,
Division 1, California.**

Feb. 16, 1956.

Workmen's compensation case. The Commission awarded death benefits, and the employer's insurance carrier challenged the award. The District Court of Appeal, Pe-

ters, P. J., finding no prior decision on the precise point by the appellate courts of the State, held that death of workman, who had been assaulted by a coworker who had been laboring under an insane delusion of persecution and who had had no real grievance against decedent but only thought he had, would be deemed to have arisen out of employment, where decedent's only contact with his assailant had been the employment contact and there had been some irritation between the two growing out of the work relationship.

Award affirmed.

1. Workmen's Compensation §612

When a workman is not exposed to a peculiar risk because of his employment but is only exposed to risk common to general public, and is injured by that source, the injury is not compensable.

2. Workmen's Compensation §697

Injuries resulting from assault by fellow workman, when attack results from personal animosity unconnected with employment, are not compensable; but this rule is inapplicable if employment increases or contributes to risk of assault.

3. Workmen's Compensation §687

Death of workman, who was assaulted while on the job by a coworker, who was laboring under an insane delusion of persecution and who had no real grievance against decedent but only thought he had, would be deemed to have arisen out of employment, where decedent's only contact with his assailant had been the employment contact and there had been some irritation between the two growing out of the work relationship. West's Ann.Labor Code, § 3201 et seq.

PETERS, Presiding Justice.

The widow and five minor children of Clyde Decker filed an application with the Commission claiming that Decker was killed in the course of his employment, and that the death arose out of the employment. The Commission so found and awarded the widow and children the benefits provided in the Workmen's Compensation Act, Labor Code, § 3201 et seq. The insurance carrier of the employer challenges the award, contending that the death did not arise out of the employment, but arose out of personal animosity between the deceased and a fellow employee. As such, so it is claimed, the death is not compensable.

Decker was employed as an engraver for Granat Brothers, and had been so employed for some 16 years prior to his death. Working with Decker was a fellow employee by the name of Schultz who had worked for Granat Brothers for some 9 or 10 years. The two men worked in the same room, side by side, Schultz being superior in rank to Decker. Schultz was in fact completely deaf, and had been so for many years. He was also reputed to be a mute, but in fact possessed the power of speech. No one at his place of employment, prior to the assault, had ever heard Schultz speak a word. Decker possessed the ability to communicate with Schultz by sign language, and orders from superior employees to Schultz were customarily relayed through Decker. Decker had no social contacts with Schultz, his only contact being on the job. Although the two men were apparently friendly, there had been some friction between them. About a year and a half before the assault Schultz had written a note to his boss complaining that Decker was not turning out enough work. The boss could find no evidence that this was true. Decker, shortly before his death, had told his family that Schultz was making a lot of mistakes and because of his superior position was taking all the easy work, leaving Decker to do the hard work. Decker also told his wife that when he complained to Schultz the latter became violently angry.

Mullen & Filippi, San Francisco, for petitioner.

Everett A. Corten, Daniel C. Murphy, San Francisco, for respondent Industrial Accident Commission.

On the morning of November 8, 1954, shortly after the two men had arrived at work, Decker complained to his foreman that Schultz had hit him. While Decker was talking to his foreman, Schultz walked over from his bench with a revolver in his hand and shot and killed Decker. Schultz was then disarmed. The foreman asked him why he had killed Decker, and was astonished when Schultz replied "You know damn well why I did it." Although the foreman had been Schultz' boss for nearly 10 years, this was the first time he or any other employee at Granat Brothers had ever heard Schultz speak a word.

Schultz was charged with murder, and Dr. Poliak, a psychiatrist, was appointed by the court to examine him, which he did on several occasions. He communicated with Schultz either by means of written questions or through a sign language interpreter, and Schultz replied either orally or through the interpreter. Dr. Poliak testified that Schultz told him that he shot Decker because he believed that Decker was spreading stories among the employees and neighbors of Schultz that he, Schultz, was a sex pervert and was faking being a deaf mute. He also told Dr. Poliak that he believed that Decker had planted a dictaphone in the Schultz home to find out if Schultz was a faker. Dr. Poliak was of the opinion, based upon his examination, that Schultz was a paranoic schizophrenic who was mentally unbalanced; that he had been suffering from the delusion of persecution by Decker for over a year; that during this period he could have erupted at any time, and that because he was deaf and did not speak, his inward feelings of hatred were hard to detect.

On this evidence the Commission found that the death of Decker arose out of and happened in the course of the employment. The petitioner argues that, as a matter of law, the attack arose from personal motives; that the place of employment just happened to be the locus of the assault; that the possibility of such assault was not a risk of the employment; and that the employer was ignorant of Schultz' condition. Under such circumstances, it is argued, the death is not compensable.

[1-3] It is undoubtedly the law that when a workman is not exposed to a peculiar risk because of his employment but is only exposed to a risk common to the general public, and is injured by that source, the injury is not compensable. More specifically, it is well settled that injuries resulting from assaults by fellow workmen when the attack results from personal animosity unconnected with the employment, are not compensable. (See cases collected and analyzed in 1 Larson, Workmen's Compensation Law, p. 109; Horovitz on Workmen's Compensation, p. 136.) But this rule is inapplicable if the employment increases or contributes to the risk of assault. The question here is whether, under any reasonable interpretation of the evidence, the assault by Schultz, who was laboring under an insane delusion of persecution by Decker and who had no real grievance against Decker but only thought he did, can be said to have been a risk of the employment.

This precise point does not seem to have been directly passed on by the appellate courts of this state. Although there may be some conflict in the decisions of other states, the weight of authority, and certainly the better reasoned cases, hold that when a fellow employee goes insane and kills or attacks a fellow employee the injury or death is compensable.

One of the better reasoned cases is *Chadwick v. White Provision Co.*, 82 Ga. App. 249, 60 S.E.2d 551, where numerous cases are discussed. Chadwick was employed as a meat cutter and was shot and killed by a fellow workman who went insane. The employer was ignorant of the fellow worker's condition. The Commission held the death not compensable, but this was reversed. It was held that the employment added to the risk of such assaults; that the injury had its origin in a risk connected with the employment; that it flowed from that source as a rational consequence, and was therefore compensable.

Another well reasoned case is *Anderson v. Security Bldg. Co.*, 100 Conn. 373, 123 A. 843, 40 A.L.R. 1119, where a janitor went crazy and shot a fellow employee against whom he had no special grievance. The injury was held to have arisen out

of the employment and, therefore, compensable. The court first reasoned that there was no legal distinction between a situation where an employee is injured by a latent defect in a machine which was unknown to the employer, and the situation where the employee is injured by reason of a latent defect, insanity, of a fellow employee. The court then stated, 123 A. at page 844:

"Whenever an employer puts his employees at work with fellow servants the conditions actually existing, apart from the possibility of willful assaults by a fellow servant independent of the employment, which result in injury to a fellow employee, are a basis for compensation under the implied contract of that act. So in this case, although the employer may not have had knowledge actual or constructive that Markus, a fellow servant of the plaintiff, was insane and liable to run amuck, yet such liability of Markus to run amuck was in fact a condition under which the plaintiff was employed on the night in question, and, if such condition of Markus caused an injury to the plaintiff, as it did, then the injury to the plaintiff arose out of his employment as truly as if it had arisen from the negligence of Markus in doing his work. * * *

"It is the actual conditions under which the employment is carried on that is important; not the conditions under which parties know or suppose that it is carried on. The possibility that a fellow servant may be or become insane and run amuck is a condition under which one employed with fellow servants is required to perform his work." See also *Dodson v. F. W. Woolworth Co.*, 118 Neb. 276, 224 N.W. 289.

Petitioner contends that whatever the rule may be in other states the rule in California is that such injuries are not compensable. In support of this contention *Royal Indemnity Co. v. Industrial Accident Comm.*, 192 Cal. 675, 221 P. 371, is cited. That case, involving an employer of a chauffeur and a cook, was decided by a divided court. One night, while discussing business with her chauffeur, the employer became disturbed by noises from the lower

floor of the house. She asked the chauffeur to accompany her to investigate. The two proceeded to the lower floor and discovered that the noises had been made by the cook. The employer was satisfied and turned to go back upstairs when the cook suddenly produced a gun, shot and killed the chauffeur, and then committed suicide. The Supreme Court, by a 4 to 1 decision, annulled an award in favor of the dependents of the chauffeur. The basis of the decision is to be found in the following quotation 192 Cal. at page 676, 221 P. 371: "Assuming that the direction by the employer to the chauffeur to accompany her downstairs to repel suspected burglars brought the transaction within the course of his employment, so that, if he had been killed or wounded in preventing a burglary, the injury would have been compensable, because arising out of his employment, it is clear that the death of the deceased did not arise out of such employment, but that he was killed from motives of a private revenge or for some other reason pertaining to him individually and not arising out of the employment. The employer would never have directed the deceased to accompany her for the purpose of overcoming the Chinese cook, and immediately upon discovering his presence she was satisfied that their errand had been unnecessary and fruitless. Neither the employer nor the deceased anticipated the tragedy which immediately followed. The award must be annulled."

While this case has some features analogous to those involved in the instant case, it is not controlling. In the *Royal Indemnity Co.* case there apparently was no evidence of the motive for the killing. The majority of the court strongly implied that it must infer that the killing was motivated by something other than the employment. The opinion does not state that the cook was insane. Here Schultz was insane and the cause of the assault is known—the insane delusion that Decker, his co-employee, was persecuting him.

In the instant case the report of the referee that heard the evidence indicates that he was well aware of the rule that assaults between fellow workmen that grow

out of personal animosity are not compensable. But, in holding that that rule was not applicable to the present case, the referee pointed out that there was no evidence of any dispute between the employees immediately before the assault; that Schultz was suffering from an insane delusion that Decker was persecuting him; and then pointed out that the only association of these two men was at work, that Decker was used by the employer as a conduit to convey messages to Schultz and then concluded: "The most reasonable inference appears to be that the incident was the outgrowth of Schultz' delusions, which centered themselves around deceased because of his prominence and importance in the employment activities of this insane man. It was only because of the employment that these men were brought together and this situation was created. It is, then, comparable to the situation * * * where the injured employee was allowed to recover because employment put him in a place or position of peril or danger."

We agree with this reasoning. Schultz had no grievance, personal or otherwise, against Decker—he only thought he had because of his mental condition. Because of that condition Schultz had delusions of persecution which he centered upon the person with whom he worked. That person was Decker with whom he worked for almost ten years. Decker's only contact with Schultz was the employment contact, and Decker was the means of communication between the employer and Schultz. There was some irritation between the two that grew out of the work relationship. Under these circumstances it seems clear that the employment increased the risk to Decker that such an insane man would be likely to pick on him. The risk was far greater than that incurred by the public generally. This being so, the evidence supports the finding that the injury causing death arose out of the employment.

The award is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

139 Cal.App.2d 314

**Maude R. WARREN and Ellnor Warren
Griffin, Plaintiffs and Respondents,**

v.

CRAFTON WATER COMPANY, a corporation, Defendant and Appellant.

Civ. 5210.

**District Court of Appeal, Fourth District,
California.**

Feb. 17, 1956.

Action to quiet title in plaintiffs to 14.4 day-inches of water per month, at rate not to exceed two miner's inches, from an outflow weir in defendant's water system. The Superior Court, San Bernardino County, R. Bruce Findlay, J., entered judgment and decree for plaintiffs, and defendant appealed. The District Court of Appeal, Mussell, J., held that evidence was sufficient to sustain trial court's finding that plaintiffs had acquired a prescriptive right to water flowing through defendant's outflow weir and into plaintiff's cistern and that the taking of such water was open, notorious, and adverse to defendant and under claim of right.

Judgment modified, and, as modified, affirmed.

1. Waters and Water Courses ⇨127

To perfect a prescriptive water right use of water must be actual, open and notorious, hostile and adverse to owner's title, continuous and uninterrupted for the statutory period, and under claim of title in the claimant, not by virtue of another right, and the claim may be made by acts alone quite as effectively as by use of words, either oral or written.

2. Waters and Water Courses ⇨152(8)

In action to quiet title in plaintiffs to 14.4 day-inches of water per month, at rate not to exceed two miner's inches, from outflow weir in defendant's water system, evidence was sufficient to sustain trial court's finding that plaintiffs had acquired a prescriptive right to water flowing through defendant's outflow weir and

into plaintiff's cistern and that the taking of such water was open, notorious, and adverse to defendant and under claim of right.

3. Waters and Water Courses $\S$ 152(11)

In action to quiet title in plaintiffs to certain amount of water from defendant's water system, injunction, which allowed defendant to make such adjustments, correction or alterations in flow of water to plaintiffs as good business and operating practice might require was not too broad in view of fact that defendant was not required to divert or store water solely for plaintiffs' use and that rate to plaintiffs was not to exceed two minor's inches.

Surr & Hellyer, San Bernardino, for appellant.

Clayson, Stark & Rothrock, Corona, for respondents.

MUSSELL, Justice.

Defendant appeals from a judgment and decree quieting title in plaintiffs to 14.4 day-inches of water per month, at a rate not exceeding 2 miner's inches, from an outflow weir in a water system owned and operated by the defendant Crafton Water Company.

The facts are set forth in a settled statement on appeal filed herein. Plaintiffs are the owners of the "Warren Ranch", described as parcel one in the complaint, consisting of approximately 18 acres, near Redlands in San Bernardino county. About 14 or 15 acres of the ranch is planted to an orange grove and the balance is improved with a large three story house and is devoted to lawn, garden, driveways, walks, outbuildings and other improvements. Plaintiffs also own the property described as parcel two in the complaint, which property is approximately one-fourth mile from the ranch house. A cistern, approximately 20 x 25 feet and 5 feet in depth, is located on this parcel and from it plaintiffs and their predecessors in interest have for many years obtained water for use on the acreage on parcel one not planted to oranges. It is the right to

a continued use of the water obtained through the defendant's water system to the cistern that is in issue here.

The defendant is a mutual water company, authorized to serve water to its shareholders only and on a nonprofit basis. Its main reservoir (known as "Crafton Reservoir") is situated near plaintiffs' said cistern. The chief source of water supply to the Crafton reservoir is Mill Creek, from which the water is conducted by a pipe into the reservoir. The flow from this reservoir is controlled by gates and valves and near them is an outflow weir from which a six inch gravity pipe line leads to plaintiffs' cistern. This pipe is equipped with a slide gate by which the flow of water from the outflow weir into the cistern can be regulated or stopped. If the slide gate is not closed, the cistern is so situated that the level of the water therein will "float on" or be at the same level as the water in the weir, unless water is drawn from the cistern faster than it can flow through the gravity line. From the cistern a pipe line (described as the "delivery line") extends to the Warren ranch. The cistern is about 130 feet higher than the Warren ranch house, giving a water pressure at the ranch at 57 pounds per square inch.

In 1921 one Junnius Pierce purchased the Warren ranch and the cistern parcel and continued to own this property until 1933 when he sold it to H. L. Putnam and wife. Pierce testified that when he first owned the Warren ranch he took part of the water which was used for irrigating the grove from the zanja, which was an old-time ditch carrying water from Mill Creek, and until he entered into a contract with the city of Redlands, the remainder of water used on the Warren ranch for irrigating the grove was delivered under his stock of the Crafton Water Company. When the flow in the zanja became intermittent, he started suit against the city of Redlands which resulted in the contract with the city, dated March 18, 1930. After the execution of this contract and while Pierce owned the Warren ranch, the Crafton Water Company delivered water under the contract on be-

half of the city of Redlands for irrigation of the Warren ranch and the water was used for irrigating the orange grove thereon. While he owned the Warren ranch, assessments were levied upon his stock of the Crafton Water Company regardless of where the water delivered under that stock was used. During that period water from the cistern was delivered to the Warren ranch and was used in the house and for watering the garden and livestock and he received water from the cistern even when he was not irrigating. The supply of water from the cistern was interrupted only a few times and was virtually continuous, and as far as he knew, there was no deduction from deliveries under his Crafton water stock or under the contract for water which went into the cistern, but he usually did not use all the water available under his Crafton water stock or under the contract. He sold no shares of stock of the Crafton Water Company to the Putnams when he sold the ranch to them.

The contract with the city of Redlands was executed March 18, 1930, between the city as party of the first part and J. Pierce and wife as parties of the second part. It recited that second parties were then owners of the real property described in the complaint herein; that about 18 acres of said real property for many years past has been supplied with irrigation and domestic water taken from that certain stream known as Mill Creek Zanja, the taking of such water for irrigation and domestic purposes from said zanja having continued for a sufficient length of time with notice to the owners of water flowing in said zanja and adversely to their rights, so that second parties, through their predecessors in interest, have gained a certain prescriptive right sufficient that they are now at all times entitled to a certain proportion of the water flowing in said zanja; and said right has become to be and is now recognized by the owners of water rights in said Mill Creek Zanja, such right of second parties having been established as the right to daily take from the said zanja a certain proportion of the stream

running therein, such proportion, it being mutually agreed, is the equivalent of a constant flow of 10 miner's inches of water (1 miner's inch being hereby defined as the one-fiftieth part of a cubic foot per second, constant flow) such quantity being sufficient to furnish all of the irrigation and domestic water required upon about 18 acres of the real property hereinbefore described. The agreement then recites that the city owned a certain number of hours of the flow of Mill Creek, which water right was chargeable with the irrigation and domestic right of second parties; that the city and other owners who had been accustomed to take delivery of their water through the said Mill Creek Zanja desired to discontinue the use of the zanja as a delivery ditch and intended to divert the water through the irrigation system of the Crafton Water Company and through lines of the city and other parties; that it was necessary in order to make such diversion and to discontinue the use of the Mill Creek Zanja, for the city and other owners in Mill Creek Zanja (other than the Crafton Water Company, which company owns approximately one-half of the water and water rights in said Mill Creek Zanja) to make some settlement or adjustment with second parties in order that they might not be deprived of their water and water rights. Second parties relinquished and transferred all their rights to divert water from said zanja for irrigation and domestic purposes and the city agreed to perpetually deliver to second parties for their use for irrigation and domestic purposes, and without cost to second parties, a stream of water equivalent to 300 miner's inches of water for each 30-day period throughout each and every year thereafter occurring, subject to certain conditions thereafter set forth in the agreement.

H. L. Putnam testified that he purchased the Warren ranch from Junnius Pierce in 1933 and with it the rights under the contract between Pierce and the city of Redlands; that he got no water stock with the ranch and never owned any stock of the Crafton Water Company; that he

owned the Warren ranch until he sold it to James G. Warren on April 5, 1937; that while he owned the ranch he used water from the cistern only for the garden around the residence and on the ranch and used in the residence water supplied by the city of Redlands from a meter; that when he bought the ranch and for some years afterward, the Crafton Water Company was delivering through the pipe line on Third Avenue for the city of Redlands the water mentioned in said contract between Pierce and the city; that shortly after he bought the ranch, he had a conversation with John Reece, the zanjero of Crafton Water Company, in which conversation Reece asked if he (Putnam) wanted water to be delivered into the cistern and charged against the 300 day-inches to which Putnam was entitled, to which Putnam replied that he did; that Reece asked if it was satisfactory to calculate the cistern water at fifteen day-inches per month and he (Putnam) said that it was satisfactory to do so; that so far as he knew this was done as long as he owned the property.

The record shows that Putnam sold the ranch to James G. Warren on April 5, 1937, and that it was owned by him until his death and thereafter by his widow and daughter, the plaintiffs herein.

Sylvester L. Bassett testified that he worked for James G. Warren beginning January 5, 1938 and until April 29, 1950; that until April of 1942 he worked on the ranch under Charles Blackwell; that after Blackwell left in 1942, he, Bassett, moved onto the ranch and "had full responsibility of everything that went on on the ranch"; that while he was working there the water for irrigating the orange grove came from the city of Redlands through a meter at the southeast corner of the ranch; that the water used in the residence area came from the cistern at the foot of the Crafton reservoir; that the pipe line from the cistern ran westerly and passed across the Finch property to the southeast corner of the residence area of the ranch; that water from the cistern was used while he worked on the ranch for irrigating lawns and shrubbery around

the residence; that before 1942, he put a new roof on the cistern and in 1949 put new screens around it; that he also cleaned the weeds around the cistern and during the spring of each year repaired leaks in the pipe line; that during the time he was employed on the ranch there were interruptions in the flow of the water from the cistern, but such interruptions altogether were not for more than one week; that the first interruption was during the period from 1938 to 1942; that after he took over in 1942 there were probably two or three different times that the water was shut off; that on such occasions he would call up Reece, the zanjero of the Crafton Water Company, and ask what was wrong with the water and Reece would say, "I will have to go and see" and shortly thereafter the water would flow from the cistern to the Warren ranch again; that in 1944 or 1945 the water from the cistern had been turned off and he was instructed by the manager of the ranch to see if he "could find a share of Crafton water" for the Warrens to supply water to the cistern; that he had a conversation with Reece in which he asked Reece if he knew where he could buy a share of water from the Crafton Water Company for the Warrens; that Reece told him that he did not know where shares of the water company could be bought and said, "You better keep quiet in regard to that water * * * if my boss hears of it or knows about it * * * he would raise hell and he would get that water shut off mighty quick."

Mr. DesMazes testified that he had managed the Warren ranch since March, 1950; that after he started managing it, the flow of water was uninterrupted until after Mr. Bassett left the ranch; that in April, 1950, the flow of water through the delivery line was interrupted; that he went up to the outflow weir on April 29, 1950, and found the slide gate into the gravity line closed; that he opened the gate and the water flowed through the delivery line for a few days when again the gate was closed; that he again attempted to open the line on or about June 15, 1950, it was blocked with concrete.

John W. Reece, zanjero for the Crafton Water Company from 1929 to April 1, 1948, testified that when he went to work for the company he was given a list of lands to which water was to be delivered and that he delivered water to the Warren ranch, which was on the list, through the cistern and also delivered irrigation water through a water line on Third Avenue; that the company delivered the 300 inches specified in the said contract with the city to the Warren property both through the irrigation system and through the cistern with an arrangement made through the city of Redlands to make that delivery due to the fact that the city had no line to deliver it; that later the city put in a line down Third Avenue and delivered irrigation water to the property; that during the time the company was delivering the 300 inches of water for the city he had several conversations relative to the cistern water with Mr. Putnam, the then owner of the property; that they tried to calculate the amount of water that he used through the cistern and "take it from the 300 inches, the balance going on the grove for irrigation purposes" and that during this period the company each month submitted a statement to the city for delivery of water, including deliveries through the cistern and was by the city repaid a like amount of water to that delivered; that from the time Putnam became the owner of the property until the city took over the delivery of the 300 inches, the deliveries which he made for the company to the Warren property, including water through the cistern and that used for irrigation, did not exceed in all 300 day-inches per month at any time; that when Pierce owned the property a deduction of 15 day-inches per month was made on account of the delivery of water into the cistern and that this deduction was made from the amount of water Pierce was entitled to receive; that very often Pierce used only part of the amount of water to which he was entitled under his stock in the company, or the 300 inches; that while he was zanjero the entire water system of the company was shut down at least once

a year for a period of one to six weeks in the winter and when the system was shut down, no water flowed into the cistern; that there were shorter periods when the cistern was shut down during the irrigation season when the company was short of water or when someone wanted it shut off.

Reece's version of the conversation with Bassett relative to the purchase of Crafton water stock was that Bassett wanted to know if he could buy some Crafton water stock; that he told Bassett that he knew of none then available; that Bassett said they needed domestic water through the cistern and water for the lawns. Reece stated he understood that Putnam was using city water; that Bassett said Putnam was using city water but it wasn't enough to cover the ground fast enough; that he had been using some from the cistern and that they would like to continue; that he told Bassett he had no water stock and consequently had no water; that Bassett then stated that was why he wanted the stock; that he, Reece, then said, "Well you go ahead and use the water until such time as we can get you some * * * stock, but if Charley Paine (president of defendant water company) hears about it, he will raise the devil and you will have to shut it off"; that Bassett said "All right" and that he would leave it for Reece to try to locate some stock; that he, Reece, did not repeat this conversation to Paine and did not locate any stock for Bassett.

The trial court found, in part, that grove irrigation water was delivered to the Warren ranch pursuant to the contract with the city of Redlands and through its Third Street main; that there is a domestic line from the city which line is connected to the Warren residence and to outlets serving some of the surrounding grounds; that domestic irrigation water for a portion of the grounds around the residence is furnished through the delivery line from the cistern on the cistern parcel, said cistern being filled through the gravity line from water in the defendant's outflow weir and that said domestic irrigation system is also avail-

able as a source of fire protection for the residence; that Warren acquired the Warren ranch in April, 1937, and for a period of years in excess of five thereafter, to wit, until the water company caused the gravity line to be cut off and closed by the installation therein of a concrete plug on or about June 15, 1950, did at such times as there was water flowing in the outflow weir, continuously take and draw through said domestic irrigation lines from water in the company's outflow weir a quantity of 14.4 day-inches per month at a rate not exceeding two miner's inches; that said taking of water by Warren from the water company's said outflow system was continuous and uninterrupted as aforesaid during said period and at all times was open, notorious, adverse and hostile to the water company and under claim of right; that the water thereby diverted was put to beneficial use on the Warren ranch for purposes of irrigation, fire protection and other beneficial purposes. The court concluded that plaintiffs are the owners of a prescriptive water right to 14.4 day-inches of water per month from the outflow weir to be taken at a rate not to exceed 2 miner's inches from the outflow weir, and are entitled to a decree enjoining the defendant from interfering with such rights. A judgment and decree quieting title to plaintiffs and granting injunctive relief was entered and defendant water company appeals, contending (1) That a claim of right and adverse use necessary to prescription was not shown by the evidence; (2) That prescriptive rights do not apply to a controlled and intermittent flow of water in a distributing system; and (3) That any injunction should be no broader than the right decreed.

[1] It is well settled law that to perfect a prescriptive water right the use of water must be: (1) actual, (2) open and notorious, (3) hostile and adverse to the original owner's title, (4) continuous and uninterrupted for the statutory period, and (5) under a claim of title in the claimant, and not by virtue of another right. *Peck v. Howard*, 73 Cal.App.2d 308, 325, 167

P.2d 753. In *Knight v. Cohen*, 7 Cal.App. 43, 47, 93 P. 396, it was held that adverse use is inconsistent with a license or permissive use; the occupation in order to constitute an adverse user must be based upon a claim of right. This claim may be made by acts alone quite as effectively as by the use of words either oral or written. And in *Anaheim Union Water Co. v. Ashcroft*, 153 Cal. 152, 160, 94 P. 613, it was held that an express declaration of a right was not essential where there was satisfactory proof of a continuous, open, notorious and uninterrupted use of the water on the lands of the defendants for the statutory period, of such character as unquestionably to indicate that the use was being exercised in hostility to the right of any person to interfere with its exercise. In *Chapman v. Sky L'Onda, etc., Water Co.*, 69 Cal.App.2d 667, 678, 159 P.2d 988, it was held that when one who claims an easement by prescription offers satisfactory evidence that all the required elements exist, the burden of showing that the use was merely permissive shifts to the owner of the land and where the claimant shows exclusive, open and notorious possession, and acts evidencing domination and control throughout the statutory period, the inference arises that the use was adverse and under a claim of right.

In the case at bar the record clearly shows that water was supplied by the defendant Crafton Water Company to the Warren ranch through the cistern for many years. The city of Redlands recognized the prescriptive right of Pierce and his wife to the taking of water from the Mill Creek Zanja for irrigation and domestic use upon the Warren ranch and in return for relinquishment of such rights, the city agreed to deliver to the ranch at the high point on the east line thereof, or at such other point as agreed upon, a stream of water equivalent to 300 miner's inches of water for each 30-day period throughout each and every year thereafter for use for irrigation and domestic purposes and under certain conditions and reservations. The defendant company under an arrangement with the

city delivered this water both for irrigation on the orange grove and for use on the residential area of the ranch through the cistern owned by plaintiffs' predecessors in interest. When Pierce sold the property to the Putnams in 1933, the delivery of water through the cistern was continued as before. Putnam acquired the rights of Pierce under the contract with the city and it appears that the water delivered through the cistern was calculated at 15 day-inches per month and charged against the 300 miner's inches specified in the city's contract. There is no indication in the record that Putnam's right to have the water delivered through the cistern was challenged by the defendant company. After Warren acquired the property in 1937, the defendant water company continued to deliver water through the cistern under the contract between the city and Pierce without objection, thereby recognizing the claim of plaintiffs and their predecessors in interest to a continuance of delivery of such water through the outflow weir and cistern to the Warren ranch.

Bassett, the ranch manager, testified that during the time he was employed on the ranch (January 5, 1938-April 29, 1950) there were interruptions in the flow of water from the cistern but such interruptions were not for more than one week altogether; that when the water was shut off, he would call up the zanjero and ask what was wrong with the water and the zanjero would go and release the water into the cistern. The record shows that interruptions to the flow of such water were objected to by the Warrens and in each instance the water supply was resumed. Bassett and his helper repaired the cistern, cut the weeds around it each spring and repaired leaks in the pipe line. It is evident that the use of the water through the weir and cistern was open and notorious for many years, and there is substantial evidence to support the finding that such use was under claim of right.

Appellant contends that the offer made by the Warrens through Bassett to purchase a water right for the cistern by buying

a share of the company's stock was a perfect answer to Warren's claim of prescription and that the conversation between Bassett and Reece showed that the use of such water was permissive rather than adverse and under claim of right. However, the record does not show that the company, through its officers, ever disputed the right of the Warrens to take delivery of the water through the cistern, at least until the pipe was permanently closed by cement plug in April, 1950. The conversation between Bassett and Reece took place around 1944-1945, long after the Warrens acquired the property and after they had used the water through the cistern for more than five years without discussing the matter with anyone other than to complain about interruptions in service and to have such service restored. The evidence as to the inquiry by Bassett in regard to the purchase of water stock reasonably supports the inference that the Warrens did not thereby intend to relinquish their rights in the cistern water. Bassett testified that he was instructed by the ranch manager to see if he could "find a share of Crafton water" for the Warrens to supply the cistern. Such an instruction is not an offer to buy. Reece testified that he said to Bassett "Well, you go ahead and use the water until such time as we can get you some * * * stock, but if Charley Paine hears about it, he will raise the devil and we will have to shut it off." This statement, if made, indicates that Reece was not representing the company at the time and that he had no authority to make such a statement. He testified that he did not repeat the conversation to the president of the company and there is no indication in the record that any of its officers knew of it.

[2] Appellant contends that the water here involved is water of the Crafton Water Company, flowing in the channels of the company, namely, its pipes and weir box, and is personal property en route to delivery to the company's shareholders; that even though the company may have permitted certain of such water to flow out of its boxes into the cistern, such flow could

not and did not give birth to any right of Warren to have the flow continued and that not only is the claimed prescriptive right precluded from arising by reason of the character of the system, but also because the flow was always controlled and was interrupted at least annually. However, there is substantial evidence to support the court's finding that the plaintiffs acquired a prescriptive right to water flowing through defendant's outflow weir and into the cistern and that the taking of such water was open, notorious and adverse to the water company and under a claim of right. The evidence shows that there were interruptions in the flow of water through the company's system during the winter and water from the cistern was not used during the rainy season of approximately two months each year. However, in *Armstrong v. Payne*, 188 Cal. 585, 206 P. 638, it was held that in considering the effect of interruptions relied upon to break the continuity of use essential to establish title by prescription, it should also be noted that the use does not have to be of a continuous flow in order to establish a prescriptive right; that the adverse claimant may establish a right to use water intermittently and for part of the season; that if that right is insisted upon and maintained without interruption, a corresponding prescriptive right arises. And on page 593 of 188 Cal., on page 642 of 206 P. it is said that "In order to support an easement by prescription, the adverse use must be continuous. * * * An occasional suspension or interruption of the enjoyment will not defeat the right, if it arises from such causes as the dryness of the season; a temporary failure to exercise the right to the extent claimed; or fluctuations in the flow of the stream.'"

[3] Finally, it is argued that the injunction as to the defendant water company is too broad in its provisions; that with the

company's system of delivery of water to its shareholders in heads, if Warren at pleasure could take the full 14.4 day-inches of water in one day and reduce the head set for a particular shareholder to that extent, it would work a greater hardship on the company and its shareholders than if the same quantity were taken by Warren at the two inch rate of flow specified for it in the judgment. However, the judgment provides that nothing therein contained shall be deemed to prevent the water company from in good faith making such adjustments, corrections or alterations in the flow of water through said outflow weir or outflow system as good business and operating practice may require; that nothing in the injunction shall be construed to require the water company to divert or store in the Crafton reservoir any quantity of water solely for the purpose of making the same available to Warren nor shall it be construed to require the water company in the event said water shall not be stored by it in the Crafton reservoir to maintain a constant flow therefrom through the outflow system or more particularly to the outflow weir. The evidence shows that in the normal operation of the cistern its level was allowed to "float" on the level in the weir by means of the larger six inch gravity line. The provision in paragraph 4(b) of the judgment which reads "From in any way, manner or form closing or restricting the gravity line" is modified by adding thereto the words "in such a manner as to interfere with plaintiffs' right to 14.4 day-inches of water per month through said gravity line at a rate not exceeding two miner's inches".

The judgment as so modified is affirmed. Respondents to recover costs on appeal.

BARNARD, P. J., and GRIFFIN, J., concur.

139 Cal.App.2d 178

In the Matter of the ESTATE of William
CARUCH, also known as Wm. Caruch,
Deceased.

William WESTLAKE, Petitioner, Respond-
ent and Appellant,

v.

STATE of California and John Mullen
Respondents and Appellants,

Ben Harmon and Mrs. Ben Harmon,
Respondents.

Civ. 16575.

District Court of Appeal, First District,
Division 1, California.

Feb. 14, 1956.

Proceeding under Probate Code, § 1080, to determine the respective interests of legatees under a will. The Superior Court, City and County of San Francisco, T. I. Fitzpatrick, J., entered an order determining heirship and decreeing that testator's estate be distributed in accordance with attested typewritten will as modified by holographic changes, and legatees named in typewritten will and the state, claiming by escheat, appealed. The District Court of Appeal, Peters, P. J., held that attested typewritten will as modified by holographic changes was not on its face and without ambiguity invalid, since such changes could have been made before will was executed, and that hence will as modified could not be collaterally attacked in proceeding to determine heirship instituted more than six months after will as modified by holographic changes had been admitted to probate.

Order affirmed.

1. Wills Ⓒ427

Where no contest to test validity of will was filed within six months after admission to probate, order admitting will to probate was conclusive as to validity of the will admitted to probate by such order. Probate Code, §§ 380, 384.

2. Wills Ⓒ417

Where attested typewritten will, dated July 17, 1950, as modified by holographic

changes under date of November 1, 1952, was filed with court and described in petition for admission to probate as a document, dated July 17, 1950, together with changes, interlineations, deletions, and additions thereto, dated November 1, 1952, and order admitting will to probate, though referring to instrument dated July 17, 1950, also referred to will filed with clerk of court and recited that the facts set forth in petition for probate were true, attested will as modified by holographic changes was admitted to probate, as expressly found by same judge in subsequent proceeding for determination of heirship. Probate Code, §§ 50, 1080.

3. Appeal and Error Ⓒ553(2)

Rule on appeal, permitting portions of oral proceedings to be transcribed and transmitted to reviewing court, refers to oral proceedings before trial court in the proceeding involved on the appeal. West's Ann.Rules on Appeal, rule 12(a).

4. Executors and Administrators Ⓒ314(12)

Proceedings involved on admission of a will to probate were separate and distinct from proceeding to determine heirship, and hence on appeal from decree determining heirship, reviewing court could not consider reporter's transcript of proceedings on petition for admission of will to probate in order to determine what trial court meant to include by order admitting will to probate. West's Ann.Rules on Appeal, rule 12(a); Probate Code, § 1080.

5. Wills Ⓒ421

Where proceeding to contest probate of will was not instituted within six months after probate, due execution, attestation and validity of will were conclusively established by order admitting will to probate, from which no appeal was taken, and could not be collaterally attacked more than six months after probate in proceeding to determine heirship, unless order admitting will to probate was void on its face. Probate Code, §§ 50, 380, 384, 1080.

6. Executors and Administrators Ⓒ314(11)

Proceedings to determine heirship are separate and distinct from proceedings to admit will to probate, and in proceeding to determine heirship, court has power only

to interpret the will that has been admitted to probate and cannot again pass on questions of due execution or validity of such will. Probate Code, §§ 50, 1080.

7. Wills ☞421

Where order admitting will to probate is void on its face, such order may be collaterally attacked at any time and may be thus attacked in proceeding to determine heirship, but the defect must be patent and not latent and must appear without question in order or judgment under collateral attack. Probate Code, §§ 50, 380, 384, 1080.

8. Wills ☞206, 421

Probate court, though having jurisdiction over the estate and the parties, has no jurisdiction to admit to probate a will that shows on its face that it does not comply with statutory requirements, and hence will, though admitted to probate, may later be collaterally attacked on ground that it is unsigned. Probate Code, § 50.

9. Courts ☞198

Probate proceedings are purely statutory and therefore special in their nature, and hence superior court, though a court of general jurisdiction, is circumscribed in such proceedings by provisions of statute conferring such jurisdiction and may not competently proceed in a manner essentially different from that prescribed by statute.

10. Courts ☞1

Jurisdiction may mean either authority over the subject matter or authority to do the particular thing done.

11. Wills ☞130, 132

A holographic will may, under some circumstances, incorporate by reference nonholographic material, but a holographic codicil may not integrate a typewritten will without violating rule that holographic will must be wholly written, dated and signed in the hand of testator. Probate Code, § 50.

12. Executors and Administrators ☞314(12)

Holographic changes on face of typewritten will could have been made before will was executed, even though a date more than two years after date of execution and attestation of will had been written at the top thereof by testator, and hence on appeal

from decree determining heirship, reviewing court must conclusively presume that question of whether such holographic changes became part of attested will was raised and passed upon at time will as modified by such changes was admitted to probate. Probate Code, §§ 50, 1080.

13. Wills ☞421

Attested typewritten will as modified by holographic changes was not on its face and without ambiguity invalid, since such changes could have been made before will was executed, and hence will could not be collaterally attacked in statutory proceedings to determine heirship instituted more than six months after will as modified had been admitted to probate. Probate Code, §§ 50, 380, 384, 1080.

W. A. Lahanier, San Francisco, R. P. Stimmel, Redding, John F. Gallen, San Francisco, for appellant-respondent (Westlake).

Keil & Connolly, San Francisco, for appellant-respondent (Mullen).

Edmund G. Brown, Atty. Gen., Wayne D. Hudson, Deputy Atty. Gen., for appellant-respondent (California).

Donovan, Stuhr & Martin, Patrick E. Martin, San Francisco, for respondents (Harmon).

PETERS, Presiding Justice.

The State of California, William Westlake and John Mullen separately appeal from a decree determining heirship in the estate of William Caruch.

William Caruch, on July 17, 1950, executed a witnessed will disposing of portions of his estate. This will was typewritten, signed and properly executed as provided in section 50 of the Probate Code. It contained no residuary clause. It is claimed that on November 1, 1952, the testator made, in handwriting, numerous changes and interlineations on the witnessed will. They consisted substantially of the following: At the top of the will the testator wrote the date, "Nov. 1st 1952." In the second paragraph the testator drew a line through the name of "William Westlake"

and interlined the names of "Mr. and Mrs. Ben Harmon" as the recipients of a house at 124 Peru Street, San Francisco, and of certain personalty there located. In the same paragraph the testator reestablished William Westlake as the recipient of certain personal property, and made a bequest of a refrigerator to Ben Harmon. In paragraph fourth of the witnessed will John Mullen had been made the recipient of a 1941 Chrysler coupe, a 1929 Ford, and a Hamilton watch. The testator drew a line through the bequest of the Ford. In paragraph sixth the testator had left to Judy Mullen, described as age five, \$1,000 in cash, and a certain table lamp. By the interlineations the testator changed the "five" to "seven," struck out the bequest of the table light, and after Judy's name added "Mrs Etta Mullen guardian." Paragraphs seven and eight, leaving bequests to certain persons not involved in these appeals, were completely stricken out. In paragraph tenth the testator had bequeathed certain articles of personal property to Ray Marc, including a 1950 Harley Davidson motorcycle. By the interlineation the testator crossed out the zero in 1950 and changed it to a "2," making it read a "1952 Harley Davidson motorcycle." Then at the end of the witnessed will, and just before the testator's signature, he added "any cash etc left over to go to Wm Westlake Redding Calif." There is no other signature than the one to the witnessed will.

The testator died on May 18, 1953, and left no heirs surviving. Before his death the testator had sold the 1929 Ford, whose disposition to John Mullen in the fourth paragraph of the witnessed will had been stricken out, and had purchased a 1952 Studebaker. On one occasion, about two months before his death, the testator told Mullen that he would "be driving this car in six months—I won't be living." To other witnesses the testator stated, on various occasions, that he did not want the state to get any portion of his estate.

On June 1, 1953, the will, as modified by the interlineations, was offered for probate. The petition describes the proffered will as "a certain document, dated July 17, 1950, purporting to be his last will and testa-

ment, together with certain changes, interlineations, deletions, and additions thereto, dated November 1, 1952." The will, with its interlineations, was filed with the court. It was admitted to probate by an order dated June 16, 1953. This order recites that the petition of John Mullen, named as executor in the will, for the admission to probate "of a certain instrument filed in this Court purporting to be the last Will and Testament of said deceased" having been considered by the court, the court finds that the facts set forth in the petition "are true." Then the court orders that "the certain instrument dated July 17, 1950, heretofore filed with the Clerk * * * purporting to be the last will and testament of the above named deceased be admitted to probate as the last will and testament of said deceased."

No contest of the order admitting the will to probate was instituted by any interested party. On February 2, 1954, more than six months after the will was admitted to probate but before final distribution, William Westlake, a legatee under the witnessed will and under the will as modified by the holographic interlineations, petitioned the probate court to determine the respective interests of the legatees in the estate. Most of the legatees named in the witnessed will and in the holographic interlineations filed claims, as did the State of California, the latter claiming that a portion of the estate escheated to the state. On the hearing of this petition before the same judge who had admitted the will to probate, the main question presented was whether the holographic changes were valid. In its decree establishing heirship the probate court found:

"That on November 1, 1952 the decedent with testamentary intent, wrote in his own hand on the face of his witnessed will dated July 17, 1950 at the beginning of page one thereof the date of November 1, 1952. He then at the time of writing said date made changes, cancellations and additions including a residuary clause on the face of said instrument on said date in his own hand and intended to and did adopt his signature already present on said instrument as his signature to said changes, cancellations and

additions and said instrument of July 17, 1950 together with said changes, cancellations and additions on the face thereof was validly admitted to probate by this Court on the 16th day of June, 1953, as the Last Will and Testament of the decedent.

"That said changes, cancellations and additions on the face of the said witnessed will dated July 17, 1950 constituted a valid codicil to said will * * *. That said codicil was entirely written and dated on November 1, 1952 in the hand of the testator and signed by him by his adoption of his signature already present on said will dated July 17, 1950." The court thereupon decreed that the property be distributed in accordance with the terms of the witnessed will as modified by the holographic changes, cancellations and additions. It is from this decree that the State of California, William Westlake and John Mullen separately appeal.

[1] It will be noted that the decree appealed from is based on two theories. It is first held that the holographic modifications constituted a valid holographic codicil to the witnessed will, and then it is held that the will, as modified by the holographic modifications, had been admitted to probate on June 16, 1953. Before we can even consider the problems involved in determining the validity of the holographic modifications we must first determine whether those problems are now before us. This depends, in part at least, on the legal effect and interpretation of the order of June 16, 1953, admitting the will to probate. This is so because no contest was filed to test the validity of the will after the will was admitted to probate. Such a contest must be filed within six months after admission to probate. § 380, Probate Code. When no such contest is filed, section 384 of that code provides that the "probate of the will is conclusive" with certain exceptions not here relevant. Thus, it becomes very important to determine what document was admitted to probate by the order of June 16, 1953, the validity of which became "conclusive" against all parties here involved.

[2] The order of June 16, 1953, recites that the facts set forth in the Mullen peti-

tion for admission of the will to probate "are true," and orders that the "instrument dated July 17, 1950, heretofore filed with the Clerk of the above entitled Court, purporting to be the last will and testament of the above named deceased be admitted to probate." Nothing is directly stated in the order about the holographic changes. Certainly there is no language stating that the interlineations are excluded. While the order refers to the instrument "dated July 17, 1950," which is the date of the witnessed will, it also refers to the will filed with the clerk of the court, which was the witnessed will plus the holographic changes, and also finds the facts alleged in the Mullen petition to be true. That petition alleges that the witnessed will, plus the holographic changes, is the last will of the decedent, and prays that that document be admitted to probate. The conclusion is inescapable that by the order of June 16, 1953, there was admitted to probate not only the witnessed will, but also that will as modified by the holographic changes. This conclusion is strengthened by the fact that the petition to determine heirship under section 1080 of the Probate Code was heard and determined by the same judge who had admitted the will to probate, and in the heirship proceeding that judge expressly found that the holographic changes had been admitted to probate by the order of June 16, 1953. This fact is significant. In *Estate of Moeller*, 199 Cal. 705, 251 P. 311, there was presented for probate a holographic instrument written on both sides of a sheet of paper. The court admitted to probate the "document filed herein." No contest was filed. Upon distribution, the same judge who had admitted the will to probate, admitted evidence to the effect that the back side of the document had been written at a later date than the front side. The probate court, on the distribution, so found and held the back page of the document invalid, being undated. This was reversed by the Supreme Court. It pointed out that on the distribution proceeding the same judge who admitted the will to probate interpreted his first order as admitting both sides of the document to probate, but assumed that he could reconsider that order

on the distribution proceedings. At page 710 of 199 Cal., at page 313 of 251 P., the Supreme Court stated:

"* * * While we are not bound by the construction which the court placed upon its own order, yet, when the same judge who signed the order admitting the will to probate thereafter admitted evidence for the purpose of showing that a portion of a document on file in said court, and claimed to be the last will, was illegal on account of its defective execution, we must conclude that the trial judge of said court considered that the alleged illegal portion thereof had been in the first instance admitted to probate as a part of the last will of said deceased. We must assume that the judge of the probate court knew better than any one else what document he had in mind when he signed the order admitting it to probate as the last will of said deceased, and it is not unreasonable to conclude that, when he later permitted evidence to be introduced which tended to invalidate a portion of said document, he considered that said document as a whole had been admitted to probate as the will of said deceased by his previous order. We think it therefore sufficiently apparent from the record before us that the document admitted to probate as the last will of said deceased was the entire writing of said deceased found on either side of the paper on file in the probate court. As the order admitting the same to probate was never appealed from, and no contest was ever filed to said will, said order became final. *Estate of Parsons*, 196 Cal. 294, 237 P. 744.

"We think it follows without the necessity of any argument that the attempt to show at the hearing of the petition for distribution that the writing on the reverse side of said paper was executed at a later date than the writing on the first page thereof, and was invalid by reason of its being without date, was an attack upon a final order of the court, and was without warrant of any law whatever."

1. A consideration of the oral proceedings on this appeal actually would benefit none of the parties to this appeal. These oral proceedings fail to disclose whether the probate judge did or did not intend to

[3, 4] This opinion is controlling in the instant case. This conclusion makes it unnecessary to determine the validity of an attempted augmentation of the record made by the parties to this appeal. The augmentation consists of a portion of the oral proceedings on the hearing of June 16, 1953. It is requested that this court on this appeal from the decree establishing heirship consider the oral proceedings on the petition for admission of the will to probate in order to determine what the trial court meant to include by its order of June 16, 1953.¹ We cannot properly consider these proceedings. Under Rule 12(a) of the Rules on Appeal a proper augmentation is limited to the "original or a copy of a paper, record or exhibit offered at or used on the trial or hearing below and on file in or lodged with the superior court". The rule also permits portions of the oral proceedings to be transcribed and transmitted to the appellate court, but obviously refers to oral proceedings before the trial court in the proceeding involved on the appeal. The law is well settled that the proceedings involved on the admission of a will to probate are separate and distinct from a proceeding to determine heirship under section 1080 of the Probate Code. *Estate of Parsons*, 196 Cal. 294, 237 P. 744. This being so, under Rule 12(a) it would be improper for this court to consider a reporter's transcript in a proceeding separate from the one involved on the appeal.

This brings us down to the basic question involved, and that is whether, in a proceeding to determine heirship under section 1080 of the Probate Code, instituted more than 6 months after the will has been admitted to probate, the parties can challenge the due execution of holographic changes to a witnessed will already admitted to probate.

[5] The general rule is clear. Once a will has been admitted to probate, if no contest is instituted within the statutory time, the due execution and attestation of

include the holographic changes in his order. Thus, in any event, we are relegated to the order itself in determining its legal effect.

the will, together with any question affecting the validity of the will, have been conclusively determined.

The pertinent code sections are as follows:

Probate Code, § 380, provides: "When a will has been admitted to probate, any interested person, * * * may, at any time within six months after such probate, contest the same or the validity of the will. * * *

Probate Code, § 384, provides: "*If no person contests the validity of a will or of the probate thereof within the time specified in this article, the probate of the will is conclusive*; saving to infants and persons of unsound mind who were not made parties to the proceeding a like period of six months after their respective disabilities are removed." (Italics added.)

Probate Code, § 1080, as it read at the times here involved, provided: "When the time to file or present claims against the estate has expired, and a petition for final distribution has not been filed, any person claiming to be an heir of the decedent or entitled to distribution of the estate or any part thereof may file a petition setting forth his claim and praying that the court determine who are entitled to distribution of the estate. * * *

Under these sections it is settled that, in a proceeding under section 1080 of the Probate Code to determine heirship, the parties may not challenge the validity of a will, more than six months after that will has been admitted to probate. The due execution, attestation and validity of the will have been conclusively established. Estate of Blalock, 95 Cal.App.2d 463, 213 P.2d 100.

One of the leading cases on this subject is Estate of Parsons, 196 Cal. 294, 237 P. 744. In that case the testator had drawn a pencil line through certain bequests. The petition for probate made no mention of these cancellations, and the court admitted to probate the will as originally drafted. No contest was filed within the statutory time. Thereafter, on petition for partial distribution, it was claimed that the bequests through which the line had been

drawn had been revoked. The Supreme Court held at page 299 of 196 Cal., at page 746 of 237 P.: "The probate procedure of this state contemplates in the administration of the estates of deceased persons a series of different proceedings, each of which is separate as to the matters embraced within its purview. An adjudication as to each step in this series is intended to be final in its nature, and not subject to review in a subsequent stage of the administration of the estate. An order admitting a will may be appealed from, or the admission of the instrument to probate may be contested, and the validity of the will attacked within one year [amended now to six months] after such probate, but an attack on the order, or a contest of the validity of the whole or of a part of the will, is not a direct attack merely because made or instituted in some proceeding connected with the administration of the same estate. * * *

"The attack aimed at the will of the decedent Parsons by the respondent was made in response to a petition for partial distribution filed more than one year after the will was admitted to probate—an independent and wholly distinct proceeding from that for the probate of the document. It is therefore a collateral and not a direct attack. * * * The issue thus joined was one which could properly have been raised upon the proceeding for the probate of the will. Not having been so raised, and more than one year having elapsed since the order was made, the instrument admitted is now conclusive evidence as to the intent of the testator."

In Estate of Moeller, 199 Cal. 705, 251 P. 311, discussed above, upon distribution it was shown, and the trial court found, that the back page of the holographic will that had been admitted to probate in its entirety, had been written at a different time than the front page, and was undated. The Supreme Court reversed the decree of distribution which had held that the back page of the document was invalid, because it "was an attack upon a final order of the court, and was without warrant of any law whatever." 199 Cal. at page 711, 251 P. at page 313.

[6] Under these cases the due execution and validity of the will are determined at the time the will is admitted to probate. If no contest is filed within the time set forth in section 384 of the Probate Code, those determinations are final and conclusive. The proceedings under section 1080 of the Probate Code are separate and distinct from those to admit the will to probate. In such a proceeding due execution and validity of the will cannot be collaterally attacked. All that the court has power to do in such a proceeding is to interpret the will that has been admitted to probate—it cannot again pass on the questions of due execution or validity. This was the precise holding in *Estate of Salmonski*, 38 Cal.2d 199, 207, 238 P.2d 966, 971: “[W]hat documents go to make up a will must necessarily be determined in the first instance on application for probate; and determinations so made have the effect of judgments and become conclusive in the course of time. * * *

“[I]t is clear here that in the absence of an appeal, the order admitting the two documents to probate after contest now stands as a conclusive adjudication of their status as a will and a codicil thereto; but beyond consideration for the determination of that precise issue of what documents constituted the deceased’s last will, questions of construction and interpretation in measure of the effect of the two documents one on the other were ‘appropriate matters for consideration and determination’ in the instant heirship proceeding”. See also *Estate of Sargavak*, 41 Cal.2d 314, 259 P.2d 897; *Estate of Challman*, 127 Cal.App.2d 736, 274 P.2d 439.

Under these rules even the admission of forged wills becomes conclusive. *Tracy v. Muir*, 151 Cal. 363, 90 P. 832; *Estate of Davis*, 136 Cal. 590, 69 P. 412; *State of California v. McGlynn*, 20 Cal. 233.

[7, 8] There is a very limited exception to this rule to the effect that if the order admitting the will to probate is void on its face it may be collaterally attacked at any

time. In such a situation an attack under section 1080 of the Probate Code would be proper. This exception is strictly limited. The defect must be patent and not latent and must appear without question in the order or judgment under collateral attack. Thus, if a will that is unsigned is admitted to probate it may later be collaterally attacked. *Wall v. Wall*, 123 Pa. 545, 16 A. 598. The reason for this rule is that the probate court, although having jurisdiction over the estate and the parties, has no jurisdiction to admit to probate a will that shows on its face that it does not comply with statutory requirements.

[9, 10] The exception to the general rule was applied in *Texas Co. v. Bank of America, etc., Ass’n*, 5 Cal.2d 35, 53 P.2d 127. There an administrator was appointed and he executed a lease of estate property. The court, in appointing the administrator, did not follow the statutory provisions. A collateral attack was made on the order of appointment, it being contended that the lease was invalid because the administrator’s appointment² was in violation of the statutory provision. The court held that the appointment order could be collaterally attacked. In so holding the court stated 5 Cal.2d at page 39, 53 P.2d at page 130: “Probate proceedings being purely statutory, and therefore special in their nature, the superior court, although a court of general jurisdiction, is circumscribed in this class of proceedings by the provisions of the statute conferring such jurisdiction, and may not competently proceed in a manner essentially different from that provided. [Citation.] * * * Jurisdiction sometimes means authority over the subject-matter, but it also frequently means authority to do the particular thing done. [Citation.] Although jurisdiction over the subject-matter of the estate authorized the appointment of an administrator, yet, since various provisions of the Code of Civil Procedure provided the exclusive method for the exercise of such authority, an appointment contrary to the applicable provisions would be in excess of the court’s jurisdiction. * * *

2. In a direct attack, on appeal, on the order of appointment by different parties

the appointment was held invalid because violative of statutory requirements.

"The same presumption as to jurisdiction attaches to decrees in probate proceedings upon collateral attack as to other judgments of the superior court, as a court of general jurisdiction. [Citation.] To be attackable collaterally for lack of jurisdiction, the order must be void on its face and it is not void on its face unless the record affirmatively shows that the court was without jurisdiction to make the order. [Citation.] If the record discloses that the court had no jurisdiction to make the order of appointment, then it is void and can be attacked at any time. [Citations.] * * * A judgment void on its face is a nullity and all acts performed under it are void."

In *Estate of Strobeck*, 111 Cal.App.2d 853, 245 P.2d 317, the court used the following language in reference to a factual situation entirely different from the one here involved, but which is applicable to the exception under discussion 111 Cal.App. at page 859, 245 P.2d at page 322: "As an additional reason for granting relief under section 473 it should be noted that the requirements for the execution and attestation of a will are set forth in section 50 of the Probate Code and there is no right to make testamentary disposition except upon compliance with those provisions. [Citation.] In the instant case the record shows without question that the trial court * * * admitted the 1950 will to probate without proof of execution and attestation as provided by the statute. Under such conditions, the order admitting the document was in excess of the court's jurisdiction and void [Citations] even though the trial court had jurisdiction of the subject matter of the estate." See also *Estate of Eikerenkotter*, 126 Cal. 54, 58 P. 370.

[11,12] But for this exception to the rule to apply the invalidity must appear on the face of the record. In other words, does the will admitted to probate show on its face that portions of it are illegal? For the purposes of this discussion we may assume that, were the question of validity before us, a serious question as to validity would be presented. While a holographic will, under some circumstances, may in-

corporate by reference non-holographic material, *Estate of Atkinson*, 110 Cal.App. 499, 294 P. 425; *In re Soher*, 78 Cal. 477, 21 P. 8; *Estate of Plumel*, 151 Cal. 77, 90 P. 192; *Estate of Anthony*, 21 Cal.App. 157, 131 P. 96; *Estate of Young*, 123 Cal. 337, 55 P. 1011; *In re Shillaber*, 74 Cal. 144, 15 P. 453, a holographic codicil may not integrate a typewritten will without violating the rule that a holographic will must be wholly written, dated and signed in the hand of the testator. *Estate of Dumas*, 34 Cal.2d 406, 210 P.2d 697; *Estate of Bernard*, 197 Cal. 36, 239 P. 404; *Estate of Thorn*, 183 Cal. 512, 192 P. 19; *Estate of Rand*, 61 Cal. 468; *Estate of Bower*, 11 Cal.2d 180, 78 P.2d 1012. In the present case, such does not appear on the face of the will. While a date—November 1, 1952—appears at the top of the will, there is nothing on the face of the document to show, without question, that the holographic changes thereafter appearing were written on that date. Obviously, the holographic changes could have been added to the typewritten will before it was executed. If so, of course, they became part of the witnessed will. Thus, the order admitting the witnessed will, together with the holographic changes, could have been proper. Since such a reasonable possibility exists in this proceeding, under the general rule already discussed, we must conclusively presume this question was raised and passed upon at the time the document was admitted to probate.

[13] The present case is not unlike *Estate of Parsons*, 196 Cal. 294, 237 P. 744, discussed above. There both pages of a holographic instrument were admitted to probate. Thereafter, in a collateral proceeding, it was shown by expert testimony that the back page had been written later than the front page. The back page was undated. Thus, in a sense, the invalidity of the back page appeared on the face of the document. Nevertheless, the court held that this question could not be raised in a collateral proceeding. The case is very close, factually and legally, to the present one. The underlying theory of the *Parson* case is that since the document was not ob-

viously and without ambiguity invalid, its validity could not be attacked collaterally. That is our case precisely.

For the foregoing reasons we hold that the order of June 16, 1953, admitted to probate the will of July 17, 1950, together with the holographic changes; that such order, when not contested within 6 months, became final and cannot be collaterally attacked; that the attack under section 1080 of the Probate Code is a collateral attack; that such attack must fail unless the invalidity of the document appears, without ambiguity, on the face of the will; that such illegality does not here appear. That being so, the trial court in this proceeding, although it incorrectly attempted to pass upon the validity of the document, correctly held that the witnessed will, together with its holographic changes, had already been admitted to probate. That being so, and since the document so admitted is not invalid on its face, the order admitting it to probate is conclusive.

The order determining heirship is affirmed.

BRAY and FRED B. WOOD, JJ., concur.



139 Cal.App.2d 266

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Joe MORA, Michael Gallardo and William R. Inocencio, Defendants and Appellants.

Cr. 3085.

District Court of Appeal, First District,
Division 1, California,

Feb. 16, 1956.

Defendants were convicted in the Superior Court, Alameda County, Donald K. Quayle, J., of first degree robbery, and they appealed. The District Court of Appeal, Peters, P. J., held that when a person is

shown to be in possession of recently stolen property, slight corroborative evidence of other inculpatory circumstances tending to show guilt is sufficient to support conviction, and among other circumstances which, in addition to fact of possession of stolen property, will be sufficient to connect accused with crime and sustain his conviction are false statements showing consciousness of guilt, or false statements as to how property came into his possession.

Affirmed.

1. Larceny ⇨64(7)

When a person is shown to be in possession of recently stolen property, slight corroborative evidence of other inculpatory circumstances tending to show guilt is sufficient to support conviction, and among other circumstances which, in addition to fact of possession of stolen property, may be sufficient to connect accused with crime and to sustain his conviction are false statements showing consciousness of guilt, or false statements as to how property came into his possession.

2. Criminal Law ⇨1036(2)

Where defendants seldom objected to allegedly leading questions and in few cases when they did, objections were almost invariably sustained, point complaining that prosecutor had improperly asked leading questions could not successfully be raised on appeal. West's Ann.Code Civ.Proc. § 2046.

3. Witnesses ⇨240(2)

Not only is it proper to ask leading questions when they are designed more quickly to reach testimony material to issue, but trial court has wide discretion in determining extent to which such questions may be asked. West's Ann.Code Civ.Proc. § 2046.

4. Witnesses ⇨241

In defining the term "leading question", the legislature contemplated only answers material to issue under consideration, and for orderly expedition of trial it is proper by leading questions for examiner to place circumstances of witness before court. West's Ann.Code Civ.Proc. § 2046.

5. Criminal Law Ⓒ720(5)

Where all of defendants in robbery prosecution had told different stories at different times, it was a fair comment for prosecuting attorney to refer to their stories as lies and to characterize the defendants as liars.

6. Criminal Law Ⓒ719(3), 1186(4)

In robbery prosecution, it was error for prosecutor to state to jury that he was firmly convinced that defendants had committed crime, since such argument necessarily implied that prosecutor had knowledge of facts not presented to the jury that convinced him of defendants' guilt; but such error would not require reversal where defendants had not assigned remarks as misconduct when made and where evidence of guilt was quite conclusive. West's Ann. Const. Art. 6, § 4½.

7. Constitutional Law Ⓒ266

The use of police line-up and use of photographs are proper methods to ascertain identity, and defendants identified by such methods can not successfully complain that they are thereby deprived of due process.

8. Criminal Law Ⓒ814(20)

Receipt of stolen goods is not an offense included in offense of robbery, and therefore it was not error for trial court, in robbery prosecution, to fail to give instruction on offense of receiving stolen property, even though there was evidence of receipt of stolen goods. West's Ann.Pen.Code, § 1159.

9. Criminal Law Ⓒ808½

In robbery prosecution, there was sufficient evidence of flight by several of defendants to justify giving of an instruction thereon; and such instruction, substantially in language of Penal Code, to effect that an inference of guilt arises from flight, was sufficient without amplification. West's Ann.Pen.Code, § 1127c.

10. Criminal Law Ⓒ673(4), 1172(2)

Where there was no evidence of flight insofar as one of three defendants in robbery prosecution was concerned, instruction as to inference arising from flight should have been limited to the other two defendants; but error in failing so to do

could not be deemed to have been prejudicial where non-fleeing defendant had been positively identified by victim of robbery and evidence against him was overwhelming.

George W. Kilbourne (Aptd), Berkeley, for appellant Mora.

Carl B. Shapiro (Aptd), Fairfax, for appellants Gallardo and Inocencio.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

The three defendants, Mora, Gallardo and Inocencio were charged with having robbed Allan Tompkins and Margaret Von Husen on April 8, 1954, of 5 guns and \$160 in cash. Each defendant was also charged with a prior felony conviction. The defendants admitted the priors but pleaded not guilty to the robbery. The jury found all three guilty of first degree robbery. From the judgments based on these verdicts, and from the orders denying their motions for new trials, all three defendants appeal.

Upon request of the defendants, counsel were appointed to represent them. To prevent possibility of a conflict of interests one lawyer was appointed to represent Mora, while another lawyer was appointed to represent Gallardo and Inocencio. Both lawyers have ably performed their assigned tasks.

The robbery involved occurred about 1:20 p. m., April 8, 1954, and was of a sporting goods shop in Oakland where Allan Tompkins and Margaret Von Husen were employed. The robbers took 5 guns and about \$160 in cash. Tompkins identified Mora as one of the robbers, while Von Husen identified Inocencio as another of the robbers. Neither could identify Gallardo as a participant, his conviction being based on other evidence.

The three defendants, according to their own testimony, were together during most of April 8, 1954, and, while denying complicity in the crime, admitted being to-

gether at 1:20 p. m., the time of the robbery.

The proprietor of Tex & Mae's in Oakland, a restaurant and bar, testified that the 3 defendants, together with 2 other men, entered the tavern at 10 a. m. on April 8th, and 4 of them, including the 3 defendants, left the premises about 11 a. m. The 4 returned to the tavern about 2 p. m., stayed a short time, and left.

Tompkins, an employee of the sporting goods shop, testified that about 1:20 p. m. Mora entered the store, and, after some preliminary conversation, pulled a gun and ordered Tompkins to face the wall. While Tompkins was talking to Mora 2 other men came into the shop, one going to the back of the store, the other going to the gun rack where he removed 2 shotguns and 3 small guns, including a pellet gun. One of the shotguns belonged to one Gooch by name, who had left the gun at the store. The robber who came to the back of the store, identified by Miss Von Husen as Inocencio, ordered her to open the cash drawer, which she did, whereupon he removed the money therein contained, about \$160. The two employees were then, at gunpoint, forced into a back room, and the three robbers fled.

An operator of a nearby store saw 3 or 4 men carrying guns pass in front of her store about 1:30 p. m. of April 8, 1954. One of them she identified as Inocencio. Other witnesses identified the car used by the robbers, a grey 1937 two-door sedan. Such a car was owned by an uncle of Inocencio, who testified that on April 8, 1954, he had parked the car near where he works, that at lunch time he noted that someone had taken the car which could easily be started without an ignition key, but that at 4:30 p. m. he returned to the area where he had parked the car and found Inocencio, somewhat intoxicated, sitting in it.

Another prosecution witness, Zambrano by name, who was an old friend of Inocencio's and Mora's, testified that early in the evening of April 10, 1954, Inocencio and Gallardo, who the witness had not theretofore known, in the company of a third man, Rodriguez by name, came to his

home. Gallardo brought into the house 2 shotguns, one of them the gun owned and identified by Gooch, and several small guns, including a pellet gun. They were the guns stolen from the sporting goods shop.

All 3 defendants took the stand and told substantially the same story. They admitted being together on April 8, 1954, for most of the day and particularly at 1:20 p. m. Gallardo testified that he was at Tex & Mae's, in the company of defendants, until nearly noon of April 8, 1954; that he then left that tavern with the other two defendants and another man in a Chevrolet of the make, type and color of the one owned by Inocencio's uncle; that they then went to Roy's Bar; that while there the fourth man, Tony Rodriguez, was given a traffic ticket for jaywalking. The bartender at Roy's and the officer who had issued the citation verified this testimony. The officer stated that the citation was issued at 12:48 p. m. Gallardo testified that he did not leave Roy's place until 2 p. m. when the 4 left; that he then spent several hours at home, and then returned to Tex & Mae's where he met the other 2 defendants and Rodriguez; that the evening of the 8th the 4 made the rounds of several bars, and about midnight Rodriguez and a man by the name of Real told him that Real had some guns to sell which Gallardo wanted to buy for purposes of resale; that pursuant to an agreement then made, he met Real on the 9th, and purchased from him the 2 shotguns and the small guns for \$500; that on the evening of the 9th he, Rodriguez and Inocencio went to Richmond to spend the night; that they did this because Inocencio had some traffic tickets and they had learned that some officers had called at Inocencio's home and believed it was in connection with these traffic tickets or possible parole violations; that they returned from Richmond on the 10th and tried to sell Zambrano the guns in order to raise money to pay Inocencio's traffic tags. Gallardo admitted on the stand that when arrested on April 12th he had told the officers he had secured the guns from Inocencio, but that this was untrue. He told the investigating officers that he first saw the guns in the 1937 Chev-

rolet in the late afternoon of April 8th, but on the trial stated he first saw the guns on April 9th.

Mora told substantially the same story as did Gallardo, and specifically stated that the 3 defendants and Rodriguez remained in Roy's Bar for at least 40 minutes after Rodriguez got the jaywalking citation.

Inocencio told substantially the same story. He admitted picking up his uncle's Chevrolet before noon of April 8th and going with the other defendants and Rodriguez to Roy's, where they arrived at about quarter to one. He first testified that they left Roy's about a half an hour after Rodriguez got the traffic tag, but on cross-examination fixed the time they left Roy's at 2 p. m. He testified that he first saw the guns on the 10th when Gallardo showed them to Zambrano.

A patron of Roy's Bar testified that he saw the 3 defendants and Rodriguez in the bar, when Rodriguez got the traffic tag, and that they all remained there for 30 or 40 minutes thereafter. The bartender at Roy's fixed the time the people with Rodriguez remained in the bar after Rodriguez got the traffic tag at 10, 15, or 20 minutes, but "they might have stayed more for all I know."

[1] All of the appellants attack the sufficiency of the evidence, contending that there was no substantial evidence to connect them with the crime. In addition to the more than ample circumstantial evidence, Mora was clearly and unequivocally identified by Tompkins, and Inocencio was similarly identified by Von Husen. It is true that there is no direct identification of Gallardo as one of the robbers, but the circumstantial evidence connecting him with the crime is substantial and sufficient. Admittedly, he had possession of the guns 1 or 2 days after they were stolen. Admittedly, he told inconsistent stories as to how the guns had come into his possession. He admitted to being with Mora and Inocencio, who were identified, between 1 and 2 p. m. on April 8th, when the robbery was committed.

The law is clear that such evidence is sufficient to sustain the judgment against

this appellant. " * * * when a person is shown to be in possession of recently stolen property slight corroborative evidence of other inculpatory circumstances tending to show guilt is sufficient to support a conviction." *People v. Bonner*, 5 Cal. App.2d 623, 631, 43 P.2d 343, 347, citing several cases. " * * * among the circumstances which in addition to the fact of possession of the stolen property are held sufficient to connect the accused with the crime and to sustain his conviction, are false statements showing consciousness of guilt, or as to how the property came into his possession." *People v. Russell*, 34 Cal. App.2d 665, 669, 94 P.2d 400, 402.

[2-4] The appellants also urge that the prosecuting attorney was guilty of prejudicial misconduct in several respects. Most of these assignments of error are of minor importance. For example it is contended that the prosecutor improperly asked leading questions of prosecution witnesses on many occasions. An examination of the reporter's transcript shows that appellants seldom objected to such questions and, in the few cases that they did, the objections were almost invariably sustained. This being so, the point cannot be raised on appeal. *People v. Russo*, 133 Cal.App. 468, 24 P.2d 580. Moreover, under section 2046 of the Code of Civil Procedure discretion is conferred on the trial court to allow such questions. The proper rule is stated in *People v. Mason*, 86 Cal.App.2d 445, 456, 195 P.2d 60, 66, as follows: "Not only is it proper to ask leading questions when they are designed more quickly to reach the testimony material to the issues [citing a case], but the trial court has a wide discretion in determining the extent to which such questions may be asked. [Citing a case.] In defining the term 'leading question' (Code Civ.Proc., sec. 2046) as one 'which suggests to the witness the answer which the examining party desires,' the legislature contemplated only answers material to the issue under consideration. For the orderly expedition of a trial it is proper by leading questions for the examiner to place the circumstances of the witness before the court." See also *People v. Goff*, 100 Cal.App.2d 166, 223 P.2d 27; *People v.*

Hamilton, 69 Cal.App. 127, 230 P. 974; *People v. Garbutt*, 197 Cal. 200, 239 P. 1080. There was no abuse of discretion in the instant case.

[5] Objection is also made to the fact that in his closing argument the prosecuting attorney on several occasions referred to the stories told by appellants as "lies" and characterized the appellants as "liars." This was fair comment. When a witness tells one story when arrested and another story on the trial, one of the stories is untrue, i. e., is a lie, and the person who tells such conflicting stories can properly be characterized at a "liar." All of the appellants told different stories at different times. Thus, the prosecutor's statements, although harsh, were in the realm of fair comment. It should also be noted that at the trial no objection was made to these statements.

[6] The prosecutor was guilty of misconduct in stating to the jury, during argument: "We have accused all three men of the crime and I am firmly convinced they committed it." Such argument necessarily implies that the prosecutor has knowledge of facts not presented to the jury that convinces him of the guilt of the appellants. This type of argument has frequently been condemned by the courts. *People v. Adams*, 92 Cal.App. 6, 267 P. 906; *People v. Podwys*, 6 Cal.App.2d 71, 44 P.2d 377; *People v. Edgar*, 34 Cal.App. 459, 167 P. 891; *People v. Hidalgo*, 78 Cal.App.2d 926, 179 P.2d 102; *People v. Kirkes*, 39 Cal.2d 719, 249 P.2d 1; *People v. Teixeira*, 136 Cal.App.2d 136, 288 P.2d 535; *People v. Bell*, 138 Cal. App.2d 7, 291 P.2d 150. But, although this was error, it was not necessarily prejudicial. Each case under Art. VI, § 4½ of the Constitution, must be determined on its own facts. The fact that appellants did not assign the remarks as misconduct when they were made is entitled to some weight. The evidence of guilt is quite conclusive. Under such circumstances we do not believe that the error was prejudicial. *People v. Teixeira*, 136 Cal.App.2d 136, 288 P.2d 535.

[7] Appellants next contend that by the use of leading questions certain witnesses

were "led" into identifying certain of the appellants. The record does not bear out these contentions. But appellants claim that they were deprived of due process because the identifications were induced by the police by the use of what they call applied psychology. There is no support for this contention. So far as the record shows, the witnesses exercised their own judgment in making the identifications, and, where they were doubtful, they were careful to so state. The use of the police lineup and the use of photographs are proper methods to ascertain identity. Never, to our knowledge, have such methods, when used fairly, been disapproved by an appellate court.

[8] One of the appellants charges that it was error for the trial court to have failed to give an instruction on what is claimed to be the included but lesser offense of receiving stolen property. Of course, it is the duty of the trial court, under section 1159 of the Penal Code, to instruct the jury on any included offense on which there is evidence. *People v. Brown*, 131 Cal. App.2d 643, 281 P.2d 319. Here there was evidence of the receipt of stolen goods. But that offense is not included in the offense of robbery. The elements of the two offenses are different. See *People v. Russell*, 34 Cal.App.2d 665, 94 P.2d 400, holding that receipt of stolen property is not included in offense of burglary, and *In re Stanley*, 90 Cal.App. 132, 265 P. 561, holding that it is not included in grand theft.

[9] Appellants object to an instruction substantially in the language of section 1127c of the Penal Code to the effect that an inference of guilt arises from flight. It is contended there was no substantial evidence of flight, and that the instruction, if given, should have been more extensive. As to the last contention, the Code section involved expressly provides "No further instruction on the subject of flight need be given." So far as the contention that there was no substantial evidence of flight is concerned, the contention is contrary to the record. The appellants Inocencio and Gallardo testified that on April 9th, the day after the robbery, they failed to return to their homes in Oakland but went to Rich-

mond to spend the night after learning that police officers had been inquiring about one of them. Certainly the jury did not have to believe the explanation given by them for thus leaving their homes.

[10] It is true that there was no evidence of flight insofar as appellant Mora is concerned. The instruction should have been limited to the other two appellants. It is equally true that the prosecutor stated in his closing arguments that all 3 appellants went to Richmond. But no admonition was asked at the time. Mora was positively identified by Tompkins. The evidence against him is overwhelming. This being so, the error was not prejudicial.

The other contentions of appellants are so obviously lacking in merit that discussion of them is not required.

The judgments and orders appealed from are affirmed.

BRAY and FRED B. WOOD, JJ., concur.



Stephen C. VYN, doing business as The Vyn Moving and Storage, Plaintiff and Respondent,

v.

NORTHWEST CASUALTY COMPANY, a corporation, and Norwich Union Fire Insurance Society, Limited, a corporation, Defendants.

Norwich Union Fire Insurance Society, etc., Defendant, Cross-complainant and Appellant.

St. Paul Mercury Indemnity Company and Royal Indemnity Company, Cross-defendants and Respondents.*

No. 16595.

District Court of Appeal, First District,
Division 1, California.

Feb. 16, 1956

Rehearing Denied March 16, 1956.

See 294 P.2d 767.

Hearing Granted April 11, 1956.

Action by alleged insured against public liability insurer to recover on basis of

* Opinion vacated 301 P.2d 527.

alleged policy. The Superior Court, City and County of San Francisco, Thomas M. Foley, J., entered judgment adverse to such insurer and appeals were taken. The District Court of Appeal, Fred B. Wood, J., held that where highway carrier informed solicitor from whom it had obtained public liability policy that it did not wish renewal but that it was going to insure with another but solicitor, hoping to retain account, had insurer issue new policy which solicitor tendered to highway carrier but which it refused, there was neither assent to being bound by new policy nor delivery of policy and it did not form contract.

Affirmed in part and reversed in part.

1. Insurance ⇨130(7), 136(2)

Where highway carrier informed solicitor from whom it had obtained public liability policy that it did not wish renewal but that it was going to insure with another but solicitor, hoping to retain account, had insurer issue new policy which solicitor tendered to highway carrier but which was refused, there was neither assent by highway carrier to being bound by new policy nor delivery of policy and it did not form contract between insurer and highway carrier. West's Ann.Ins.Code, § 22.

2. Insurance ⇨124, 130(1)

Insurance policies are governed by same general rules which pertain to all contracts and there must be meeting of minds. West's Ann.Ins.Code, § 22.

3. Insurance ⇨136(1)

Delivery, actual or constructive, is essential to taking of effect of insurance policy, as any other written instrument. West's Ann.Ins.Code, § 22.

4. Insurance ⇨124

The filing with Public Utilities Commission by liability insurer of certificate reciting that it had issued policy to highway carrier, after carrier had accident within period supposedly covered, could not create contract between carrier and insurer to render insurer liable to indemnify carrier for its liability arising out of accident, where no policy was actually in force.

5. Insurance ⇨141(2)

Where at time highway carrier was involved in accident, there was no liability contract between it and insurer, subsequent act of insurance solicitor in billing highway carrier for alleged liability policy covering period involved and act of highway carrier in paying bill after time when accident and attendant injuries were no longer contingent or unknown could not create liability in insurer. West's Ann.Ins.Code, § 22.

6. Insurance ⇨112

Where insurance solicitor, in attempting to have issued public liability policy in favor of former insured, acted not in behalf of such former insured who refused tender of policy, but either in behalf of himself or insurer, former insured's act of remitting premium subsequent to occurrence of accident for which it sought coverage under terms of policy was not ratification of act of solicitor in procuring policy and could not make insurer liable under policy.

7. Principal and Agent ⇨163(1), 164(1)

The terms "adopt" and "ratify" are properly applicable only to contracts made by party assuming to act for another, and latter may then adopt or ratify act of former, however unauthorized.

See publication Words and Phrases, for other judicial constructions and definitions of "Adopt" and "Ratify".

8. Principal and Agent ⇨163(1)

For adoption or ratification of contract, there must be some relation, actual or implied, of principal and agent.

9. Insurance ⇨141(3)

Where payment and receipt of premium on alleged public liability policy occurred after alleged insured had accident and incurred liability and it did not prejudice him in any way, it did not estop insurer from denying liability on basis that there was no valid contract at time of accident.

Edward A. Friend, San Francisco, for respondents.

FRED B. WOOD, Justice.

Plaintiff was operating as a highway carrier under permit issued by the state Public Utilities Commission. On June 5, 1951, one of his trucks was involved in an accident, as a result of which two persons were killed and law suits filed against plaintiff which were settled for the sum of \$6,600.

The main question upon this appeal is whether or not there was in force at the time of the accident a contract of insurance between plaintiff and defendant Norwich Union Fire Insurance Society, Limited, covering plaintiff with respect to public liability claims. The trial court found that there was and gave judgment against Norwich in plaintiff's favor in the sum of \$6,600 and costs. Our examination of the record convinces us that the evidence does not support the finding on this issue.

For the year preceding June 1, 1951, plaintiff had insurance coverage with another company, a policy he had obtained through an insurance agent known as Williams Insurance Center. Before June 1, 1951, plaintiff informed Williams he was placing his insurance with a different agent. Nevertheless, hoping to keep plaintiff's business, Williams ordered a policy from Norwich for the year commencing June 1st. Such a policy was written by Norwich but Williams was unable to deliver it. Although he tried to deliver it, first to plaintiff and then to plaintiff's bank, delivery each time was refused.

Plaintiff obtained, instead, a policy from St. Paul Mercury Indemnity Company. When the accident occurred plaintiff notified St. Paul only. When the law suits were filed and the papers served plaintiff turned the papers over to St. Paul and St. Paul handled the investigation and the defense and negotiated the settlement.

[1-3] It is patent that there was no contract between plaintiff and Norwich at the time of the accident, June 5th. Norwich had tendered a contract but plaintiff had refused. There had been no meeting

Foley, Branson & Limpert, San Mateo, for appellant.

of the minds. There had been neither assent nor delivery.¹

[4] On June 7th Norwich filed with the Public Utilities Commission a certificate reciting that it had issued a policy of insurance to plaintiff effective on June 1st. On June 16th Norwich filed with the commission a certificate of cancellation of the Norwich policy, by its terms declared to be effective June 26, 1951. This unilateral action upon the part of Norwich could no more create a contract between it and plaintiff than did its writing of the policy (unsolicited by plaintiff and contrary to his instructions to agent Williams) and its ineffectual twice attempted delivery of the policy.² Significant also is the fact that the filing of this certificate occurred after, not before, the occurrence of the accident.

[5] On April 11, 1952, Williams Insurance Center sent plaintiff a bill for premium for public liability and property damage coverage of the Norwich policy for the period June 1 to June 24, 1951, and plaintiff paid that bill. Plaintiff put in evi-

dence a letter of June 19, 1952, from Norwich to him, in which Norwich disavowed liability toward him, asserting lack of any contractual basis for such liability.³ This failed to create a contract of insurance effective retroactively as of a date prior to the accident.

"Insurance is a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from a contingent or unknown event." Ins.Code, § 22. "Except as provided in this article any contingent or unknown event, whether past or future, which may damnify a person having an insurable interest, or create a liability against him, may be insured against, subject to the provisions of this code." Ins.Code, § 250. Other provisions of "this article" prohibit insurance against a lottery or its outcome, § 251, and declare void any policy executed by way of gaming or wagering, § 252. At the time of the payment of the premium the accident and the attendant injuries were no longer "contingent or unknown." The undisputed evi-

1. "Insurance policies are governed by the same general rules which pertain to all contracts. There must be a meeting of the minds." *Boyer v. United States Fidelity & Guaranty Co.*, 206 Cal. 273, 276, 274 P. 57, 59. See also *K. C. Working Chemical Co. v. Eureka-Security Fire & Marine Ins. Co.*, 82 Cal.App.2d 120, 130-131, 185 P.2d 832; and other cases collected in 14 Cal.Jur. 416-417, Insurance, § 5.

Delivery, actual or constructive, is essential to the taking effect of an insurance policy as in the case of any other written instrument. *Hill v. Industrial Accident Comm.*, 10 Cal.App.2d 178, 183-185, 51 P.2d 1126; 14 Cal.Jur. 425-427, Insurance, § 12.

2. It is unnecessary to consider and we do not undertake to determine whether the filing of such a certificate might be invoked by a member of the public as a basis of estoppel, precluding Norwich from disavowing insurance coverage of such a person.

3. Norwich's letter read as follows:

"We have your letter of June 11, 1952, concerning a Superior Court action in Santa Clara County which apparently has been filed and served against you by the Kuhwarth family.

"According to our file a policy of insurance was never issued to you by this company. Your insurance carrier, we understand, is the St. Paul Fire and Marine Insurance Company and others. It is our understanding that they are handling the defense of this pending litigation.

"In view of the fact there was notice given to the Railroad Commission we are collaborating with the St. Paul Fire and Marine Insurance and others who have coverage on your equipment in connection with the defense of these cases. In other words, it is our understanding that your interests are being well protected.

"This is the first knowledge that we have received of any suit pending against you. To complete our file you might let us know when and where you were served and who the plaintiff was in the action filed. Undoubtedly you have turned the Complaint and Summons over to the St. Paul Insurance Company or one of the others involved.

"Please let us know when the service was made and to whom you turned over the Complaint and Summons."

dence shows that plaintiff knew of the accident and reported it to the agent of St. Paul Mercury Company in June of 1951 and that in July of 1951 he received from St. Paul payment for the value of his truck, which was destroyed in the accident. That occurred many months before his payment of a premium on the Norwich policy. Also, the lawsuits which plaintiff later settled were filed and he was served with complaint and summons therein "shortly after the accident," according to his own testimony.

It necessarily follows that his payment of the premium came too late for Norwich to insure plaintiff in respect to his liability for the accident of June 5, 1951, and the resultant injuries. See *Western Indemnity Co. v. Industrial Accident Comm.*, 182 Cal. 709, 726, 190 P. 27; *Crawford v. Transatlantic, etc., Co.*, 125 Cal. 609, 611, 58 P. 177.

[6-8] If Williams had acted on behalf of plaintiff in negotiating with Norwich for the issuance of the policy, then possibly the delayed payment of the premium by plaintiff might have been treated as ratification by him, putting the contract into effect retroactively as of June 1, 1951. But the theory of ratification is not applicable here because Williams acted either for himself or on behalf of Norwich, not at all as an agent of plaintiff in conducting those negotiations. The terms "adopted and ratified" are "properly applicable only to contracts made by a party acting or assuming to act for another. The latter may then adopt or ratify the act of the former, however unauthorized. To adoption and ratification there must be some relation, actual or assumed, of principal and agent." *Ellison v. Jackson Water Company*, 12 Cal. 542, 551. See also *Puget Sound Lumber Co. v. Krug*, 89 Cal. 237, 243, 26 P. 902; *Watkins v. Clemmer*, 129 Cal.App. 567, 570-572, 19 P. 2d 303. No such relationship obtained between plaintiff and the agent Williams.

Both of these principles of California law were applied in *Gandelman v. Mercantile Ins. Co. of America*, D.C.S.D.Cal., 90 F. Supp. 472, 476-477, affirmed by the court of appeals, 9th Circuit, in 187 F.2d 654, 656-

657, certiorari by Supreme Court denied in 342 U.S. 896, 72 S.Ct. 228, 96 L.Ed. 671, holding that acceptance of a fire insurance policy and payment of the premium after loss occurred did not operate retroactively to cover the loss. There was no basis for ratification of the agent's acts in procuring the policy because the agent in so doing did not act or purport to act on behalf of the insured.

[9] Under the circumstances of this case, payment and receipt of the premium after the incurrance of liability did not prejudice plaintiff in any way and did not furnish a basis for estopping Norwich from relying upon the fact that plaintiff had no insurance contract with it at the time of the accident. *Hargett v. Gulf Ins. Co.*, 12 Cal.App.2d 449, 457, 55 P.2d 1258.

In view of this conclusion it is unnecessary to decide other questions raised by Norwich upon this appeal.

It happens that two judgments, each upon a separate set of findings of fact and conclusions of law, were rendered by the trial court. One of them, filed August 19, 1954, awarded costs in favor of cross-defendant Royal Indemnity Company against cross-complainants Northwest Casualty Company and the Norwich Company. No occasion to disturb that judgment has been shown. Indeed, Norwich has virtually abandoned that phase of its appeal by not discussing any phase of it.

The other judgment, filed August 12, 1954, was based upon findings that plaintiff at the time of the accident of June 5, 1951, had insurance contracts with Norwich and with Northwest as well as with St. Paul; that the Northwest and St. Paul policies contained clauses which made them excess over all other insurance and that the Norwich policy contained no "other insurance" clause applicable to this case; and, accordingly, Norwich should bear the loss without contribution by Northwest or St. Paul. Under such circumstances, the portion of this judgment which directly affects Norwich appears inseparable from other portions; wherefore, it must be reversed as a whole, not in part.

The judgment filed August 12, 1954, is reversed and the judgment in favor of Royal Indemnity Company, filed August 19, 1954, is affirmed.

PETERS, P. J., and BRAY, J., concur.



139 Cal.App.2d 121

**Ikalina SHUMATE, Plaintiff and
Respondent,**

v.

**JOHNSON PUBLISHING COMPANY, Inc.,
John H. Johnson, Robert Johnson and
James Goodrich, Defendants,**

**Johnson Publishing Company, Inc., and
John H. Johnson, Appellants.**

Civ. 20971.

**District Court of Appeal, Second District,
Division 3, California.**

Feb. 9, 1956.

Action for libel in a magazine article. From a judgment of the Superior Court of Los Angeles County, Jesse J. Frampton, J., on a jury's verdict for plaintiff, two of four defendants appealed. The District Court of Appeal, Vallée, J., held that evidence supported jury's implied finding that the article, stating that plaintiff's husband testified in divorce action that plaintiff disregarded her marital vows to bestow intimate favors on her employer, that she told court, in defense of her seeking a lover, that she could only refer to Kinsey Report, that she had been guilty of marital misbehavior and unfaithfulness and sexual misconduct, and that she might be one of women who cheat on their husbands and commit unnatural, immoral, abnormal or indecent acts, as stated in such report, was false.

Judgment affirmed.

1. Appeal and Error ⇐110

An order denying motion for new trial is not appealable, so that appeal therefrom will be dismissed.

2. Appeal and Error ⇐171(1)

The theory on which case was tried in court below must be followed on review.

3. Appeal and Error ⇐882(1)

A party cannot take advantage of error committed by trial court at his request.

4. Appeal and Error ⇐882(14)

In action for libel, defendants' request for instructions defining "newspaper" and "magazine" and requiring finding for defendants if jury found that defendants' publication, containing alleged libelous article, was a newspaper, constituted consent by defendants to submission of issue whether it was a magazine or newspaper as fact question for jury.

5. Appeal and Error ⇐882(14)

A party requesting submission of issue to jury as fact question cannot escape consequences thereof on review.

6. Appeal and Error ⇐882(14)

In action for libel, defendants requesting instructions submitting to jury as fact question issue whether defendants' publication, containing alleged libelous article, was a magazine or a newspaper, will not be permitted to urge, on appeal from judgment or jury's verdict for plaintiff, that publication was a newspaper as matter of law, so as to preclude recovery by plaintiff in absence of demand by her for retraction and pleading or proof of special damages. West's Ann.Civ.Code, § 48a.

7. Libel and Slander ⇐101(1)

The law infers that a defamatory publication is false. West's Ann.Civ.Code, § 45.

8. Libel and Slander ⇐101(5)

In action for libel by publication of defamatory article concerning plaintiff in defendants' magazine, burden was on defendants to prove truth of article.

9. Libel and Slander ⇐19, 55

In action for libel, truth of merely part of defamatory publication is no de-

fense, but in determining whether publication is libelous, it must be considered in its entirety and may not be divided into segments and each part treated as separate unit.

10. Libel and Slander ⇨55

In action for libel in magazine article, plaintiff is entitled to recover damages in respect to any material part of article not proved by defendant to be true.

11. Libel and Slander ⇨123(7)

In action for libel in magazine article, whether article was true was question for jury.

12. Libel and Slander ⇨112(3)

In action for libel in magazine article stating that plaintiff's husband testified in divorce action that plaintiff disregarded her marital vows to bestow intimate favors on her employer, told court, in defense of her seeking a lover, that she could only refer to Kinsey Report, had been guilty of marital misbehavior and unfaithfulness and sexual misconduct, and might be one of women who cheat on their husbands and commit unnatural, immoral, abnormal or indecent acts, as stated in such report, evidence supported jury's implied finding in verdict for plaintiff that article was false, though it contained true matters respecting pleadings in plaintiff's separate maintenance action.

13. Evidence ⇨318(1)

In action for libel in article published in defendants' magazine, a newspaper article concerning same matters was hearsay and inadmissible in evidence to establish truth of magazine article, in absence of evidence that such article was founded on or provoked by newspaper article, that writer of magazine article or magazine publisher knew of newspaper article or believed it to be true, that it was a reliable source of information, or that there was any investigation of matter before publication of magazine article.

14. Trial ⇨48

Where offer of evidence includes several different matters, some of which are vulnerable to objection, it is not error to reject whole of such offer.

15. Witnesses ⇨257

In action for libel in article published in defendants' magazine, a newspaper article concerning same matters was not admissible in evidence as necessary to refresh plaintiff's recollection as witness, where she did not refresh her recollection therefrom.

16. Witnesses ⇨257

The opponent of party questioning witness, not such party, has right to admission in evidence of document used to refresh witness' recollection.

17. Libel and Slander ⇨104(1)

In action for libel in magazine article concerning charges in cross-complaint for divorce, filed by plaintiff's husband in her separate maintenance action, a newspaper article respecting such action and newspaper reporter's interview with plaintiff about parties' charges and counter-charges was not admissible in evidence to refute plaintiff's claim of defendants' malice, where it contained nothing tending to show absence of malice and statements therein of what plaintiff said to reporter were fully developed at trial and appeared in magazine article.

18. Libel and Slander ⇨111

In action for libel, evidence aliunde publication sued on is admissible in mitigation of damages only where such evidence manifestly can and will show or tend to show that defendant, in making publication, acted in good faith with honesty purpose and not maliciously.

19. Libel and Slander ⇨110(1)

In action for libel in magazine article concerning charges against plaintiff in counterclaim for divorce, filed by her husband in her separate maintenance action, a newspaper article concerning same matters was not admissible in evidence on ground of its truth, where only evidence of truth of any part thereof concerned statement therein of what plaintiff said to newspaper reporter about Kinsey Report and content of pleadings in separate maintenance action, all of which was in evidence.

20. Libel and Slander ⇨110(1)

In action for libel in magazine article, mere fact that newspaper article, offered in

evidence by defendants, concerning same matters, might be true, did not render it admissible.

21. Witnesses ⇨392(1)

In action for libel in magazine article, a newspaper article concerning reporter's interview with plaintiff about matters involved was not admissible to impeach plaintiff's testimony as to what she said to reporter, who was not called as witness.

22. Damages ⇨87(1)

A plaintiff is never entitled to exemplary damages as matter of right.

23. Libel and Slander ⇨120(2)

To recover exemplary damages for libel plaintiff must prove defendant's malice in fact, that is motive and willingness to vex, harass, annoy or injure plaintiff. West's Ann.Civ.Code, § 3294.

24. Libel and Slander ⇨120(2)

Malice which must be proved to recover exemplary damages for libel, is malice in fact, which is "express" when established by direct evidence and "implied" when established as inference from indirect evidence of its existence. West's Ann.Civ. Code, § 3294.

25. Libel and Slander ⇨101(1)

The trier of facts may infer malice in fact from tenor of publication of libel which is actionable per se.

26. Libel and Slander ⇨120(1)

Exemplary damages for libel may be based alone on a publication which is libelous per se. West's Ann.Civ.Code, § 3294.

27. Libel and Slander ⇨123(10)

In action for libel, defendants' evidence tending to prove absence of actual malice on his part, taken in connection with evidence of malice imputed by law from plaintiff's evidence establishing falsity of libelous publication, presents fact question as to malice, and jury, finding existence thereof, may award exemplary damages. West's Ann.Civ.Code, § 3294.

28. Libel and Slander ⇨123(10)

Whether malice may be inferred from intrinsic evidence afforded by libelous publication, so as to authorize recovery of ex-

emplary damages, is for trier of facts to say. West's Ann.Civ.Code, § 3294.

29. Libel and Slander ⇨112(2)

In action for libel in magazine article, falsely stating that plaintiff's husband testified in divorce action that plaintiff disregarded her marital vows to bestow intimate favors on her employer, though defendant had received copy of husband's apology to employer for such charge, and that wives, typified by plaintiff, were changing sex morals, as shown by Kinsey Report, intrinsic character of publication and other evidence justified jury's implied finding in verdict for plaintiff that defendant was motivated by malice in fact, so as to entitle plaintiff to exemplary damages. West's Ann.Civ.Code, § 3294.

30. Evidence ⇨66

The editor of a publication is presumed to have knowledge of its contents.

31. Libel and Slander ⇨112(2)

A magazine editor and publisher, verifying publishing corporation's original answer, alleging that article, which was libelous per se, in magazine, was true in substance and fact, as defense to action for libel, sanctioned and ratified publication of article with knowledge that plaintiff asserted it to be libelous, and such fact and evidence establishing falsity of charges warranted jury's inference of his oppression, malice, and motive to vex, harass and annoy plaintiff, so as to entitle her to exemplary damages, though he was absent from state at time of publication. West's Ann. Civ.Code, § 3294.

32. Libel and Slander ⇨112(2)

In action for libel, manner of defendant's statement of charges complained of is material on question of malice, and if facts believed to be true are exaggerated, overdrawn or colored to plaintiff's detriment or not stated fully and fairly with respect to plaintiff, court or jury may properly consider such circumstances as evidence tending to prove defendant's actual malice, entitling plaintiff to exemplary damages and they may be sufficient for such purpose without other evidence on subject. West's Ann.Civ.Code, § 3294.

33. Libel and Slander ⇨101(3)

Where plaintiff in libel action offers evidence from which jury may infer existence of malice in fact on defendant's part, burden is on defendant to destroy such inference by proof that he did not authorize publications complained of either by general or particular instructions, nor ratify them, either in fact or by his conduct, when knowledge thereof was brought home to him. West's Ann.Civ.Code, § 3294.

34. Evidence ⇨76

In action for libel in magazine article, jury could infer from defendant magazine editor's and publisher's failure to testify that he intended to injure plaintiff and did not honestly believe in truth of article and hence was motivated by malice in fact, so as to entitle plaintiff to exemplary damages. West's Ann.Civ.Code, § 3294.

Loeb & Loeb, Herman F. Selvin, Allen E. Susman, Los Angeles, and Harry L. Gershon, Beverly Hills, for appellants.

Leo Branton, Jr., Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by defendants from a judgment for plaintiff entered on a jury verdict in an action for libel.

"Jet" is a periodical with national circulation published weekly in Chicago by defendant Johnson Publishing Company.

Defendant John H. Johnson is editor and publisher of "Jet."

Plaintiff and Dr. Lincoln Shumate were married in June 1952. They were well-known Negro residents of Los Angeles. On April 23, 1953, plaintiff filed suit for separate maintenance against Dr. Shumate alleging adultery with a named white woman on a number of occasions. Dr. Shumate cross-complained for divorce, alleging plaintiff had persistently refused to have marital relations with him and had committed adultery on several occasions with one Lorenzo Spencer, the husband of Vaino Spencer, plaintiff's attorney in the separate maintenance action. These charges and countercharges were widely featured in the Negro press of Los Angeles and other cities.

On May 5, 1953, Lorenzo Spencer filed an action against Dr. Shumate for libel based on the allegations of the cross-complaint. Immediately thereafter, Dr. Shumate retracted all of his charges of adultery between plaintiff and Spencer, and signed an agreement which is set out in the margin.¹ He thereupon dismissed the cross-complaint against plaintiff, and Spencer dismissed the libel suit against Dr. Shumate.

On May 6, 1953, James Goodrich, a writer for defendant company and Hollywood editor of "Ebony," a magazine published by defendant company, called on Mrs. Spencer at the direction of the manag-

1. "Agreement Re: Settlement and Dismissal of Lorenzo Spencer V Lincoln Shumate S.C. No. 613 377.

"It is mutually agreed by the parties hereto as follows:

"Lincoln W. Shumate, the defendant in the above mentioned action by these presents agrees and promises in consideration of the Dismissal With Prejudice of the above mentioned action by the Plaintiff, Lorenzo Spencer and his attorneys, to do the following: Said Lincoln W. Shumate agrees at such times and by such means as set forth and requested by the plaintiff, Lorenzo Spencer, and his attorneys, to refute, withdraw, and disclaim, and to state that said statements and all of them were untrue in connection with charges and statements and infer-

ences made by said Lincoln Shumate to the effect that said Lorenzo Spencer was guilty of having engaged in adulterous and illicit conduct and relationships with the present wife of said Lincoln Shumate, Ikalina Shumate. It is agreed and understood further in this connection that said Lincoln Shumate will make a public statement of apology for having made such charges aforesaid in any and all newspapers, or other publications designated by the plaintiff aforesaid and his attorneys. Further said Lincoln W. Shumate agrees to pay for all expenses, including attorney fees and detective fees, incurred by said Lorenzo Spencer in the filing and preparing of the aforesaid action."

ing editor of "Jet." Mrs. Spencer showed Goodrich a copy of the retraction Dr. Shumate had signed and told him Dr. Shumate was dismissing his cross-complaint. Prior to May 14 Mrs. Spencer sent Goodrich at his request a statement of the status of the separate maintenance action, which he forwarded to the Chicago office of "Jet."

On May 14, 1953, Dr. Shumate issued a sworn public apology which is set out in the margin.² On the same day Mrs. Spencer sent a copy of the apology to Goodrich. Goodrich immediately sent the

copy of the apology to the managing editor of "Jet" in Chicago.

In the May 14, 1953, issue of "Jet" there was published an article titled "Wealthy Los Angeles Medic Charges Wife With Adultery," set out in the margin,³ with photographs of plaintiff, Dr. Shumate, Spencer and Mrs. Spencer. In the May 28, 1953, issue of "Jet" there was published an article titled "Calif. Medic Drops Adultery Charge Against Wife," set out in the margin.⁴ Nothing was said in the article about the apology.

2. "Public Apology of Doctor Shumate

"Recently, I made the charge in a cross-complaint for divorce that Lorenzo Spencer was guilty of having engaged in adulterous and illicit conduct and relationships with my present wife, Ikalina Shumate.

"I wish to state publicly that I know now these allegations to be untrue. These charges were made as a defense to a divorce proceeding instituted against me by my wife, Ikalina Shumate.

"The charges, which I now know to be without foundation in fact, were made under the stress and emotion of a domestic upheaval that clouded my judgment. I am now convinced beyond a reasonable doubt that there was nothing improper in the relationship between Lorenzo Spencer and my wife, Ikalina Shumate. For these reasons, I withdraw the allegations and offer by deepest apology to all concerned, and particularly to Lorenzo Spencer for the great wrong I have committed.

"I have instructed my attorneys to withdraw any and all charges of adultery or misconduct against my wife and Lorenzo Spencer. I agree and consent that this statement may be disseminated in any field or medium at the option of Ikalina Shumate and/or Lorenzo Spencer.

"I hope that my apology will in some measure ameliorate the humiliation and embarrassment occasioned to all concerned."

Signed, "Lincoln W. Shumate."

3. The article read: "Wealthy Dr. Lincoln Shumate filed a divorce cross-complaint in Los Angeles domestic relations court, charging that his fourth wife, Mrs. Ikalina Savoy Shumate, persistently refused sex relations with him but was intimate on several occasions with Lorenzo Spencer, a real estate broker with whom she works. Dr. Shumate said his wife told him, 'I don't love you, I never did; I

only married you for assurance of my support, and to obtain the things I desire.' He also charged that she refused to keep a clean home and humiliated him by calling him 'stupid.'

"Dr. Shumate filed his cross-complaint after Mrs. Shumate, his fourth wife in five years, sued him for divorce, charging that he had committed adultery with a white woman, Mrs. Margaret C. Piper, of Long Beach, Calif., the mother of three children. To Dr. Shumate's complaint that she refused to have 'reasonable sex relations' with him, Mrs. Shumate stated: 'I can only refer you to the Kinsey Report.' In her petition, Mrs. Shumate asked the court to restrain Dr. Shumate from disposing of any of his finances and said he was capable of earning \$3,500 a month. Denying all her accusations and claims to alimony, Dr. Shumate said that as a real estate saleswoman, Mrs. Shumate is capable of self-support, earning approximately \$600 a month.

"Both Mrs. Shumate and Spencer were represented by Los Angeles' 'newest and most beautiful' woman lawyer, Vaino Hassan Spencer, who is also the wife of Spencer. The Shumates were married at Las Vegas, Nev., last June 26 and separated on March 19 of this year, according to court records."

4. The article read: "Los Angeles physician-socialite Dr. Lincoln Shumate dropped an adultery charge against his fourth wife, Mrs. Ikalina Savoy Shumate, and realtor Lorenzo Spencer. The retraction followed a closed conference, at which the realtor promised to cancel a \$100,000 libel and slander suit if Dr. Shumate would publicly withdraw adultery charges and pay detective and attorney fees in the case. The wealthy physician had accused his wife of being intimate with Spencer after she claimed in a separate maintenance suit that he committed adultery with white Mrs. Margaret

On August 14, 1953, plaintiff was granted an interlocutory decree of divorce from Dr. Shumate by default on the ground of cruelty. Dr. Shumate did not testify.

In the August 27, 1953, issue of "Jet" there was published the article on which this action is predicated. It reads:

"Are Women Changing Our Sex Morals?"

"By Robert Johnson

"A wealthy Los Angeles physician became the subject of considerable tongue-wagging recently as the result of a divorce action he brought against his pretty socialite wife. He testified that his wife had disregarded her marital vows to bestow intimate favors upon her employer, but had repeatedly refused marital relations with him. The wife, however, countered. In defense of her seeking a lover and rejecting her husband's love-making, she told the court: 'I can only refer you to the Kinsey report.'

"What family secrets the accused wife revealed in her brusque remark became immediately apparent to friends of the couple, but the surprised doctor had not considered that his wife would go to such lengths in defending her marital misbehavior. For like many husbands who cling to the age-old concept of a double standard in marriage morality, he had rushed to a divorce court, secure in the knowledge that it would be the wife who would be held up to public ridicule for her sexual misconduct.

"Today, however, husbands are becoming more and more aware that double standards in sex morals have all but disappeared where wives are concerned, and the old adage, 'What's good for the goose is good for the gander' is a more widely accepted code for modern women. Says New York gynecologist and psychiatrist Dr. Lena Levine: 'It's not a matter of the old-fashioned sex codes being no longer accepted. Rather, among more and more women, the codes are not even considered.'

"Actually, the release this week of information contained in Dr. Alfred Kinsey's

long-awaited report, *Sexual Behavior in the Human Female* (see next page), will point up startlingly that women have changed our sex morals. It will reveal that there remains little correlation between our Puritannical codes and the actual sex adventures of women.

"Experts and counselors in courtship, marriage and family relations also point out that sex morals have become more relaxed because of a behavior trend which points to: 1) increasing premarital sexual adventures and promiscuity among women; 2) increasing marital unfaithfulness among 'emancipated' wives; 3) increasing acceptance of easy divorce and quick remarriage without moral or social stigma.

"Explained one counselor: 'In the past when her mate was not particularly virile, the wife was secretly glad. Today, woman is becoming more released. She very well may go elsewhere when she finds the man not as capable as she might like. The same often holds true for the wife who suspects that her husband is cheating.'

"Sociologist Walter H. Chivers who conducts marriage and family institutes in Negro colleges, has also noted among young people an increased concern over sex mores. Says he: 'On most college campuses, the opinion is that the mores are not as strong as they used to be. Yet, every man wants to believe that infidelity is associated not with his woman, but the other woman.'

On the page on which the article begins there is a sketch of three nude women, each with an arm around the other. Immediately next to the article, the following appears in a box:

"What Kinsey Will Tell About Women

"Pre-marital Relations

"About 50 per cent of married women have premarital sexual relations.

"Unfaithful Wives

"More than one-fourth (26 per cent) of all married women cheat on their husbands and a large percentage of them—mostly col-

C. Piper of Long Beach, Calif. The out-of-court settlement also called for amending Mrs. Shumate's maintenance suit to simple divorce and gave her the two fam-

ily autos plus approximately \$10,000 in cash. Dr. Schumate [sic] paid Spencer approximately \$2,100 plus legal expenses."

lege-educated—plan to continue their infidelities.

"Homosexuality

"Nearly one-fifth of all women (about 19 per cent) have homosexual contacts at some time in their lives.

"Virginity

"While clinging to their 'virginity,' some 32 per cent of women experience an emotional climax through petting with men. Techniques range from simple kissing to unconventional sex practices.

"Love-Making

"During marriage, more than half of all women allow their husbands to practice oral love-making, and about 49 per cent of them engage in similar practices with their husbands.

"Morality

"If sex laws were rigidly enforced, about 85 per cent of all women would be jailed as sex offenders for committing 'unnatural, immoral, abnormal or indecent acts.'"

The evidence is undisputed that the article was published of and concerning plaintiff and that readers derived from the words a defamatory meaning and understood them to refer to plaintiff.

[1] The jury returned a verdict for plaintiff against defendants Johnson Publishing Company and John H. Johnson for \$5,000 general damages and against each of them for \$5,000 exemplary damages. Defendants appeal from the judgment that followed. Defendants also appeal from the order denying their motion for a new trial. Since that order is not appealable, the appeal therefrom will be dismissed.

The assignments of error are: (1) "Jet" is a newspaper as a matter of law and since plaintiff neither demanded a retraction nor pleaded or proved any special damages,

Civil Code, § 48a, precludes recovery. (2) The evidence without contradiction established that the allegedly libelous article was true. (3) The court erred in striking a copy of a Los Angeles newspaper from the evidence. (4) There is no evidence to support the awarding of exemplary damages against either defendant.

[2-6] Defendants may not urge the first assignment of error. The complaint alleged that "Jet" is "a weekly magazine of national circulation." The answer of defendants admitted the allegation. At the opening of the trial defendants were permitted to file an amended answer in which they denied the allegation and alleged "Jet" is a newspaper. In presenting her case in chief plaintiff offered no evidence on that issue except the copy of "Jet" containing the allegedly libelous article and other copies of "Jet." At the close of plaintiff's case in chief defendants made a motion for a judgment of nonsuit on the ground "plaintiff has failed to offer any evidence whatsoever on the issue of whether this is a magazine or a newspaper. I think that plaintiff has alleged that this is a magazine, and that is denied; and that is certainly in issue." The motion was denied. Two witnesses were called by defendants as experts. Each testified over plaintiff's objection that "Jet" is a newspaper. The testimony of one of them was stricken apparently on the ground he was not qualified. Other than the superior court file in the separate maintenance action, defendants' evidence was directed solely to proving that "Jet" is a newspaper and not a magazine. Defendants offered and the court gave three instructions, the effect of which was to submit to the jury as a question of fact whether "Jet" is a magazine or a newspaper.⁵ Plaintiff proffered no in-

5. The instructions offered by defendants and given read:

1. "A newspaper is 'A paper printed and distributed at stated intervals, usually daily or weekly to contain news, advocate opinion, and usually containing also advertisements and other matters of public interest.' It is also defined to be a publication in numbers, consisting commonly of single sheets, and published

at short and stated intervals, conveying intelligence of passing events. A magazine is defined as a periodical containing miscellaneous papers, especially critical and descriptive articles, stories, poems etc., designed for the entertainment of the general readers."

2. "The plaintiff must prove by the preponderance of the evidence that Jet

structions on the question. Defendants tried the case on the theory the question whether "Jet" was a magazine or a newspaper was one of fact. Here they seek reversal on the theory the question is one of law. The theory on which the case was tried in the court below must be followed on review. *Gibson Properties Co. v. City of Oakland*, 12 Cal.2d 291, 299, 83 P.2d 942; *Collins v. Graves*, 17 Cal.App.2d 288, 296-299, 61 P.2d 1198. A party cannot successfully take advantage of asserted error committed by the court at his request. *Jentick v. Pacific Gas & Elec. Co.*, 18 Cal.2d 117, 121, 114 P.2d 343. The request that the jury be instructed as requested by defendants necessarily constituted consent to submission of the issue as a question of fact to be resolved by the jury. *Brown v. Kiely*, 126 Cal.App.2d 191, 193, 271 P.2d 928. A party cannot request that an issue be submitted to a jury as a question of fact and on review escape the consequences. *Cockerell v. Title Ins. & Trust Co.*, 42 Cal.2d 284, 288, 267 P.2d 16; *Knowles v. Roberts-At-The-Beach Co.*, 115 Cal.App.2d 196, 198, 251 P.2d 389. This is not a case of an attorney submitting to an erroneous ruling. Defendants did not introduce responsive evidence to offset or explain erroneously admitted evidence. Cf. *Hoel v. City of Los Angeles*, 136 Cal.App.2d 295, 288 P.2d 989. Their motion for judgment of nonsuit was based on the contention plaintiff had introduced no evidence to the effect that "Jet" was a magazine. Defendants gambled on a favorable verdict and lost. They will not now be permitted to urge that the question is one of law.

[7,8] The second assigned error is that the article complained of is substantially true. In other words, defendants claim the implied finding of the jury that the article is false is not supported by the evidence. "Libel is a false and unprivileged publication by writing * * * which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tend-

ency to injure him in his occupation." Civ.Code, § 45. There can be no question but that the publication is defamatory. The law infers that a defamatory publication is false. 16 Cal.Jur. 32, § 9. The burden of proving the truth of the article was therefore on defendants. *Draper v. Hellman Commercial Trust & Sav. Bank*, 203 Cal. 26, 41, 263 P. 240; *Dethlefsen v. Stull*, 86 Cal.App.2d 499, 506, 195 P.2d 56.

[9-12] Defendants say the article "states in substance that a wealthy Los Angeles physician brought a much publicized divorce action against his pretty socialite wife, that he testified that his wife had bestowed her 'intimate favors' upon her employer rather than her husband, that in defense of such a contention the wife had told the court, 'I can only refer you to the Kinsey report' and that that comment had surprised her husband." They argue that the evidence was undisputed that the article is true in these particulars: 1. Dr. Shumate cross-complained for divorce. 2. Much publicity attended the charges; the case was mentioned in three issues of "Jet" and "in headlines" in three Los Angeles newspapers circulated to the Negro population and in plaintiff's home town newspaper, the Minneapolis "Spokesman." 3. Dr. Shumate had alleged that plaintiff had repeatedly refused marital relations with him and had instead committed adultery with Spencer on a number of occasions. 4. Plaintiff had voluntarily gone to the office of the Los Angeles "Tribune," one of three local Negro publications, and had there given an interview to a reporter about the case and had told the reporter that reference should be had to the Kinsey report for an explanation of the marital problems between her and Dr. Shumate.

Defendants' epitome of the article is inept and incomplete. The article said Dr. Shumate testified that plaintiff "had disregarded her marital vows to bestow intimate favors upon her employer." He had not so testified. True, he had so alleged in his cross-complaint but he had immediately retracted

is a magazine and not a newspaper or you must find for the defendants."

3. "If you find that the publication Jet is a newspaper, you must find for the defendants."

and issued a public apology, no mention of either was made in the article although defendants had knowledge of them—leaving the definite impression in the mind of the reader that there was truth in the charges. The charges were false and defendant company knew the facts. The article says plaintiff, in “defense of her seeking a lover and rejecting her husband’s love-making,” told the court, “I can only refer you to the Kinsey report.” The implication is obvious that plaintiff had admitted she had sought a lover. It was false. The implication is clear that she had rejected her husband’s love-making. There was no evidence she had done so. The article says she had told the court, “I can only refer you to the Kinsey report.” She had made no such statement to the court. It is clearly stated in the article that plaintiff had been guilty of “marital misbehavior,” of “marital unfaithfulness,” of “sexual misconduct,” that she had indulged in “sexual adventures,” and was unchaste. There was no evidence of the truth of any of these statements. They were false. The article refers to the box which follows titled “What Kinsey Will Tell About Women.” A reader of the article, coupled with the box, may reasonably have understood that plaintiff had had “pre-marital sexual relations,” that she is one of those who “cheat on their husbands,” that she may be one who has “homosexual contacts,” that she may be one who commits “unnatural, immoral, abnormal or indecent acts.” There was no evidence of any kind, character, or description that any one of these charges was true in any respect. They were false. No person of ordinary intelligence could fail to perceive that the publication was intended to suggest that plaintiff is a sexual deviate. The fact that the publication contained true matter relative to the pleadings in the separate maintenance action did not justify branding plaintiff as a sexual deviate. See *Newby v. Times-Mirror Co.*, 173 Cal. 387, 160 P. 233; *Newby v. Times-Mirror Co.*, 46 Cal.App. 110, 188 P. 1008. It is no defense that merely a part of a publication is true. In determining whether a publication is libelous, it must be considered in its entirety. It may not be divided into segments and

each part treated as a separate unit. *Stevens v. Storke*, 191 Cal. 329, 334, 216 P. 371. In the case at bar the publication in its entirety includes the title “Are Women Changing Our Sex Morals?”, the sketch of three nude women, the article, and the Kinsey report included in the article by reference. If any material part be not proved true, the plaintiff is entitled to damages in respect to that part. *Odgers, Libel and Slander*, 6th Ed., 149. The truth of the gist or sting of the defamation was not shown. Whether the article is true was for the jury. The evidence fully supports the implied finding that it is false.

[13, 14] Defendants, over plaintiff’s objection that it was hearsay and that no sufficient foundation had been laid for its admission, introduced in evidence a copy of the May 1, 1953, issue of the Los Angeles “Tribune,” a publication circulated among the Negro population. Later in the trial, on motion of plaintiff, the court struck the copy of the “Tribune” from the evidence. Defendants assert error. The “Tribune” contained a lengthy article relative to the action between the Shumates; their love life; Dr. Shumate’s matrimonial adventures; the Spencer libel action; an interview a “Tribune” reporter had had with Vaino Spencer, plaintiff’s attorney in the separate maintenance action; an interview a “Tribune” reporter had had with plaintiff about the charges and countercharges in that action; and running quips and comment by the writer. The article in part said: “Referring to her husband’s charge in a divorce action that she had refused to have ‘reasonable sexual relations’ with him, Mrs. Shumate, 31-year-old real estate saleswoman, mysteriously quipped in a statement issued to the papers Wednesday, ‘I can only refer you to the Kinsey Report.’” At the trial plaintiff testified: “A reporter asked me about the allegation that my husband made against me, to the effect that I was cold and indifferent. When that particular question was put to me, I made a reference to that section of the Kinsey Report, that states that professional men frequently are frigid to their wives, because they are out busy doing their work. At that particular time, it was—it was just a

general reference to the Kinsey Report"; she had given an exclusive interview to a "Tribune" reporter; she did not know at the time the person she talked to was a reporter; she was a real estate sales woman and went to the "Tribune" office to deliver some advertising material and a young woman who, she presumed, was an employee started to talk to her; after the interview the "Tribune" published the article and in it "reference was made to the Kinsey Report."

The argument is that the article "tended to prove that plaintiff, instead of being a reticent, publicity-shy, sensitive woman, as her direct testimony would lead one to believe, was quite the converse," and aided in establishing the truth of the "Jet" story. The "Tribune" article was clearly hearsay and inadmissible. *Wilson v. Fitch*, 41 Cal. 363, 383-385; *Hearne v. De Young*, 132 Cal. 357, 362, 64 P. 576; *Bebbington v. California Western, etc., Ins. Co.*, 30 Cal. 2d 157, 160, 180 P.2d 673, 1 A.L.R.2d 361; *Clark v. North American Co.*, 203 Pa. 346, 53 A. 237, 239; *Hayes v. Press Co.*, 127 Pa. 642, 18 A. 331, 5 L.R.A. 643; *Bragg v. Hammack*, 155 Va. 419, 155 S.E. 683, 687-688; *Hagener v. Pulitzer Pub. Co.*, 172 Mo. App. 436, 158 S.W. 54, 60. There was no evidence that the publication in issue was founded on the "Tribune" article, or that the "Tribune" article provoked the publication sued on, or that the writer of the "Jet" article or the publisher of "Jet" knew of it or believed it to be true, or that it was a reliable source of information, or that there was any investigation of the matter before publication in "Jet." See *Turner v. Hearst*, 115 Cal. 394, 401, 47 P. 129; *Davis v. Hearst*, 160 Cal. 143, 182-183, 189, 194, 116 P. 530. There is nothing in the "Tribune" article suggesting that plaintiff is a woman who is changing sex morals. If the purpose of the offer was to show what plaintiff said to the reporter, and if what she said was admissible, the reporter should have been called. There was no evidence that the reporter who had the interview with plaintiff wrote the article. The article was offered as a whole. Obviously the reporter's interview with plaintiff's lawyer in the separate maintenance action and his

quips and comments throughout the article were not admissible, nor were Dr. Shumate's matrimonial adventures. Where an offer of evidence includes several different matters, some of which are vulnerable to objection, it is not error to reject the whole. *Eaton v. Brock*, 124 Cal.App.2d 10, 16, 268 P.2d 58.

[15,16] It is said it was necessary for plaintiff to refresh her recollection by the article and that that made it admissible in its entirety. On cross-examination of plaintiff, defendants' counsel questioned her, seeking to show she had said to the "Tribune" reporter, "I can only refer you to the Kinsey Report." She answered repeatedly she had not made that exact statement. Defendants' counsel then had her read the first two paragraphs of the article and asked her again whether she had made the statement, "I can only refer you to the Kinsey Report," to the reporter. Plaintiff again answered she did not remember making that exact quotation. Plaintiff did not refresh her recollection from the article. Furthermore, the opponent, not the questioning party, has a right to have admitted in evidence a document used to refresh the recollection of a witness. *Estate of Packer*, 164 Cal. 525, 530, 129 P. 778; *Estate of De Laveaga*, 165 Cal. 607, 631, 133 P. 307; *Hawkins v. Sanguinetti*, 98 Cal.App.2d 278, 284, 220 P.2d 58.

[17-21] Defendants also say the article was admissible to refute the claim of malice. We find nothing in the article which would in the slightest degree tend to show an absence of malice. "The rule is that evidence *aliunde* the publication sued on is admissible, as in mitigation of damages, only where it is manifest that such evidence can and will show or tend to show that the defendant, in making the publication complained of, acted in good faith and with honesty of purpose, and not maliciously." *Newby v. Times-Mirror Co.*, 46 Cal.App. 110, 126, 188 P. 1008, 1014. Everything in the article which purports to be a statement of what plaintiff may have said to the "Tribune" reporter was fully developed at the trial, and it appeared in the May 28, 1953, issue of "Jet." It is also said the article should have been ad-

mitted because it was true. The only evidence as to the truth of any part of the article is that plaintiff made a statement to the reporter about the Kinsey report and the content of the pleadings in the separate maintenance action, all of which is in evidence. In any event, the mere fact that the article might be true would not make it admissible in evidence. It is also said the article was admissible to impeach the testimony of plaintiff. Obviously it was not. If defendants wished to impeach the testimony of plaintiff with respect to what she said to the reporter, the reporter should have been called.

[22-28] The final contention is that the awards of exemplary damages cannot be upheld. "In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." Civ.Code, § 3294. A plaintiff is never entitled as a matter of right to exemplary damages. *Brewer v. Second Baptist Church*, 32 Cal.2d 791, 800-801, 197 P.2d 713. In order that they may be recovered there must be proof of "the presence of malice in fact, that is, the motive and willingness to vex, harass, annoy, or injure." *Davis v. Hearst*, 160 Cal. 143, 162, 116 P. 530, 539. The malice which may be "express" or "implied" is malice in fact; it is "express" when established by direct evidence and "implied" when established as an inference from indirect evidence of its existence. *Freeman v. Mills*, 97 Cal.App.2d 161, 168-169, 217 P.2d 687; 16 Cal.Jur. 134, § 101. The trier of fact may infer malice in fact from the tenor of the publication of a libel which is actionable *per se*. The publication in *Childers v. San Jose Mercury Printing & Publishing Co.*, 105 Cal. 284, 38 P. 903, charged the plaintiff with the commission of a felony. The court declared, 105 Cal. at page 290, 38 P. at page 904:

"In this publication malice in law is not only conclusively presumed, but such malice in fact is implied or presumed as to establish *prima facie* the

right of plaintiff to exemplary damages. In other words, the existence of malice in fact is sufficiently shown by the publication to make the question an issue before the jury. That exemplary damages may be based alone upon a publication libelous *per se*, we have many authorities from many states. [Citations.] In *Warner v. Press Pub. Co.* [132 N.Y. 181, 30 N.E. 393], the principle is thus declared: 'The plaintiff gave evidence of malice when she proved the falsity of the libelous publication; and, in the absence of evidence on the part of the defendant tending to show that it had neither the desire nor the intention to wrong her, it would have been the duty of the court to instruct the jury that the plaintiff might be awarded exemplary damages in their discretion; but testimony was adduced on the part of the defendant tending to prove the absence of actual malice on his part towards the plaintiff, which, taken in connection with the evidence of malice which the law imputed when the falsity of the libel was established, presented a question of fact whether malice existed in the publication. If found to exist, then, in their discretion, the jury could award exemplary damages.' While there may be authority in some states opposed to the principle declared in the foregoing citation, yet in this state, in view of section 3294 of the Civil Code, to which we have adverted, there would seem to be no question as to the true rule."

Also see *Tingley v. Times Mirror Co.*, 151 Cal. 1, 15, 89 P. 1097; *Davis v. Hearst*, 160 Cal. 143, 166, 178-180, 116 P. 530; *Snively v. Record Pub. Co.*, 185 Cal. 565, 576-579, 198 P. 1; *Brewer v. Second Baptist Church*, 32 Cal.2d 791, 799, 197 P.2d 713; *Newby v. Times-Mirror Co.*, 46 Cal.App. 110, 131-132, 188 P. 1008. Whether malice may or may not be inferred from the intrinsic evidence which the publication affords is for the trier of fact to say. *Walker v. Chanslor*, 153 Cal. 118, 125, 94 P. 606, 17 L.R.A., N.S., 455; *Davis v. Hearst*, 160 Cal. 143, 166, 173, 116 P. 530.

[29] The implied finding of the jury that defendant company was motivated by malice in fact is amply justified by the intrinsic character of the publication and the other circumstances shown by the evidence. Defendants introduced no evidence to show the absence of malice on their part in publishing the article. It was published notwithstanding the fact defendant company three months before had received a copy of Dr. Shumate's apology. There was no showing that defendants had any justification or excuse for publishing plaintiff to the world as a typical woman who is changing our sex morals. The substance of the publication is directed toward proving that women are changing our sex morals. It offers three categories as evidence of the fact: (1) a specific example—plaintiff; (2) a general discussion of such women and how they change sex morals, using the term "wife" or "wives," implying that all that is said is applicable to plaintiff; (3) the Kinsey report, to illustrate the extent to which and how women, including plaintiff, are changing sex morals. There is no mention of teen-agers, single women, widows, or any other category that constitutes a group of women, changing our sex morals. Everything in the article is pointed to how a wife, typified by plaintiff, is changing sex morals. Having implied that plaintiff is a sexual deviate and that she is typical of the women who are chang-

ing sex morals, a reader would normally take the statements about the Kinsey report as applicable to her. The appendage of the Kinsey report is obviously a statistical statement showing how many "plaintiffs" there are.

[30-34] Defendant John H. Johnson was the editor and publisher of "Jet" and acting both individually as such editor and publisher and as the agent of defendant company. It has been said the editor of a publication is presumed to have knowledge of its contents. *Smith v. Utley*, 92 Wis. 133, 65 N.W. 744, 745, 35 L.R.A. 620; *Faulkner v. Martin*, 133 N.J.L. 605, 45 A.2d 596; *Fry v. Bennett*, 28 N.Y. 324, 330. Johnson verified the original answer in which it is alleged the publication is true in substance and in fact. He thus sanctioned and ratified the publication after knowledge that plaintiff asserted it to be libelous and when in fact it was libelous *per se*. *Westerfield v. Scripps*, 119 Cal. 607, 611, 51 P. 958; cf. *Davis v. Hearst*, 160 Cal. 143, 168, 116 P. 530.⁶ "The manner of statement is material upon the question of malice, and if the facts believed to be true are exaggerated, overdrawn, or colored to the detriment of plaintiff, or are not stated fully and fairly with respect to the plaintiff, the court or jury may properly consider these circumstances as evidence tending to prove actual malice, and they

6. In *Reynolds v. Pegler*, 2 Cir., 223 F.2d 429, at page 434, Judge Medina wrote:

"The mere fact that there was no proof of personal ill-will or animosity on the part of any of the corporate executives toward plaintiff does not preclude an award of punitive damages. Malice may be inferred from the very violence and vituperation apparent upon the face of the libel itself, especially where, as here, officers or employees of each corporate defendant had full opportunity to and were under a duty to exercise editorial supervision for purposes of revision, but permitted the publication of the column without investigation, delay or any alteration whatever of its contents. The jury may well have found on this evidence a wanton or reckless indifference to plaintiff's rights.

"There is always a certain risk involved in the pleading of truth as a defense, since in proper cases and under

proper instructions the jury may infer malice from the fact that a defendant repeats the defamatory matter, which is later found to be false. But here answers were served on behalf of each defendant, which not only repeated but elaborated upon the matters set forth in the original defamatory publication; even the tone and characteristics of the pleading are reminiscent of the style of the column in suit, although the answer is said to have been composed by one or more of the lawyers. It will not do to beg off on the plea that there is no proof that any of the corporate officers read this pleading before it was filed in court and that it is unverified and bears only the subscription of counsel. Despite all this, the fact remains that those who composed this answer and caused it to be filed were acting within the scope of their authority and what they did is binding upon defendants."

may be sufficient for that purpose without other evidence on the subject.'” *Brewer v. Second Baptist Church*, 32 Cal.2d 791, 799, 197 P.2d 713, 719, quoting from *Snively v. Record Pub. Co.*, 185 Cal. 565, 578, 198 P. 1. The evidence conclusively shows the publication of a libelous article reflecting on plaintiff’s personal moral character and conduct. Johnson affirmed the truth of these charges by justification in the verified answer. Their falsity was established on the trial. There was an entire absence of the truth of any of them. These and other facts and circumstances afforded evidence from which the jury could have inferred the existence of oppression and of malice on the part of Johnson—a motive to vex, harass, and annoy plaintiff. It was not sufficient for defendants to show merely that Johnson was absent from the state to repel the inference. Such a state of facts in the mind of the jury could well coexist with positive instructions from Johnson, the editor and publisher, to publish the article, leaving it to the writer to select the mode of attack. “[W]here the evidence offered by the plaintiff is such that from it the jury may infer the existence of malice in fact, the burden is cast upon the defendant of destroying this inference by proof that, neither by general nor particular in-

structions, were the publications authorized, and that, neither in fact nor by his conduct, were they ratified when knowledge of their publication was brought home to him.” *Davis v. Hearst*, 160 Cal. 143, 168, 116 P. 530, 541. Johnson offered no evidence of this character, nor any explanation of the article, nor any justification for its publication. He could have testified he had no intent to injure plaintiff and to his honest belief in the truth of the article. *Walker v. Chanslor*, 153 Cal. 118, 125, 94 P. 606, 17 L.R.A.,N.S., 455; *Fleet v. Tichenor*, 156 Cal. 343, 348, 104 P. 458, 34 L.R.A.,N.S., 323; *Runo v. Williams*, 162 Cal. 444, 450–453, 122 P. 1082. He did not testify. The jury could infer from his failure to testify that such was not his intent or belief. We cannot say as a matter of law there is no evidence to support the implied finding that Johnson was motivated by malice in fact. *Scott v. Times-Mirror Co.*, 181 Cal. 345, 361–362, 184 P. 672, 12 A.L.R. 1007.

The appeal from the order denying the motion for a new trial is dismissed; the judgment is affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

46 Cal.2d 300

In re Mabel MALOTTE.

Application of Leslie C. GILLEN on Behalf
of Mabel Malotte for a Writ of
Habeas Corpus.

Cr. 5755.

Supreme Court of California,
In Bank.

Feb. 27, 1955.

Habeas corpus proceeding to secure petitioner's release on bail pending determination of her appeal in criminal case. The Supreme Court held that where decision affirming judgment had become final, petitioner was remanded to custody.

Writ denied and prisoner remanded to custody.

Habeas Corpus ⇐109

Where habeas corpus proceeding was instituted to secure petitioner's release on bail pending determination of her appeal in criminal case and Supreme Court's decision affirming the judgment had become final, petitioner was remanded to custody.

Leslie C. Gillen and John R. Golden, San Francisco, for petitioner.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., Thomas C. Lynch, Dist. Atty., Norman Elkington, Chief Asst. Dist. Atty., and Walter H. Giubbini, Asst. Dist. Atty., San Francisco, for respondent.

PER CURIAM.

This proceeding was instituted to secure petitioner's release on bail pending determination of her appeal in *People v. Malotte*, Crim. No. 5761. On January 27, 1956 we filed our decision affirming the judgment in *People v. Malotte*, 46 Cal.2d 59, 292 P.2d 517, which decision is now final. The order to show cause herein is therefore discharged, the petition for the writ is denied, and petitioner is remanded to custody forthwith.

293 P.2d—49½

46 Cal.2d 307

In re William J. McNALLY,
on Habeas Corpus.
Cr. 5783.

Supreme Court of California,
In Bank.

Feb. 28, 1956.

Original proceeding in habeas corpus. The Supreme Court, McComb, J., held that habeas corpus would not lie to obtain release from custody pursuant to a final judgment of conviction valid upon its face, in absence of showing that any constitutional right of relator had been violated.

Order to show cause discharged and petition denied.

Habeas Corpus ⇐22(1)

Habeas corpus would not lie to obtain release from custody pursuant to a final judgment of conviction valid upon its face, in absence of showing that any constitutional right of relator had been violated.

William J. McNally, in pro. per., and Gerald J. Levie, Los Angeles, for petitioner.

Edmond G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

This is an order to show cause why a writ of habeas corpus should not issue. The attorney general has filed a return, which discloses that after defendant pleaded guilty to the crime of burglary, in the Superior Court of the State of California, in and for the County of Los Angeles, the court found the burglary to be of the second degree and judgment was entered accordingly on July 18, 1949, in action No. 126861 of said court; that on August 2, 1949, defendant was received at San Quentin State Prison, and on February 2, 1951, was paroled to Los Angeles County; that on July 25, 1953, his parole was suspended and his term fixed at the maximum; that on October 15, 1953, after trial before a

jury, defendant was found guilty in action No. 156252 in the Superior Court of the State of California, in and for the County of Los Angeles, of the crime of grand theft; that no appeal was taken from either of the foregoing judgments within the time prescribed by law, and they have now become final judgments; and that defendant is now in the custody of the warden of the state prison at San Quentin by virtue of such valid and existing final judgments.

Therefore, since it appears that defendant is being held in custody pursuant to a final judgment valid upon its face and it does not appear that any constitutional right has been violated, the order to show cause is discharged and the petition is denied. (See, *In re Manchester*, 33 Cal.2d 740, 742 [1], 204 P.2d 881; *In re Trombley*, 31 Cal.2d 801, 812 [12], 193 P.2d 734; *In re McInturff*, 37 Cal.2d 876, 880 [3], 236 P.2d 574; *In re Todd*, 44 Cal.App. 496, 502 [3], 186 P. 790.)

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.



46 Cal.2d 227

**In the Matter of the ESTATE of Spencer
H. CHARTERS, Deceased.**

**SECURITY-FIRST NATIONAL BANK OF
LOS ANGELES, as Trustee, etc.,
Petitioner and Appellant,**
v.

**Irene Marie Charters YEAKEL et al.,
Respondents;**

**Laura Hoerner, Legatee and Appellant.
L. A. 23375.**

**Supreme Court of California,
Feb. 17, 1956.**

Proceeding by testamentary trustee for instructions as to disposition of accumulated trust income. The Superior Court, Los Angeles County, John Gee Clark, J., en-

tered a decree from which trustee appealed. The Supreme Court, Traynor, J., held, *inter alia*, that under testamentary trust instrument which directed that minor beneficiary should receive a sum which, in addition to proceeds on testator's life policies, should amount to \$200, which provided for some distribution of principal to beneficiary but established remainders in beneficiary's issue or other persons, and which made no provision for accumulated income, beneficiary was limited to trust payments in amount of difference between proceeds of life policies and \$200, and was not entitled to distribution of accumulated income.

Orders affirmed in part and reversed in part.

Opinion, 284 P.2d 68, vacated.

1. Appeal and Error ⇐151(3)

Trustee had right to appeal from decree in proceeding for instructions as to disposition of accumulated trust income.

2. Trusts ⇐331

Once a decree of probate court settling an account of a trustee becomes final, it is conclusive, in absence of extrinsic fraud, on all parties interested in estate. West's Ann.Prob.Code, § 1123.

3. Judgment ⇐375

A court has inherent power to set aside a decree for extrinsic fraud when a party has been prevented from fully presenting his case and there has therefore been no adversary trial of issue. West's Ann.Prob. Code, § 1123.

4. Judgment ⇐540

Public policy underlying principle of *res judicata* that there must be an end to litigation requires that issues involved be set at rest by final judgment, but there is also a policy that a party should not be deprived of a fair adversary proceeding in which fully to present his case.

5. Trusts ⇐331

Where testamentary trustee was also guardian of a minor beneficiary's estate, and minor beneficiary was not otherwise represented in proceeding on trustee's account, the order settling account was not binding on minor beneficiary, and probate

court, in trustee's proceeding for instructions, could consider matter in account. West's Ann.Prob.Code, §§ 1120, 1123; Surrogate's Court Act N.Y. § 262, subd. 10.

6. Courts ⇨200¼

The Superior Court has full equitable and legal powers.

7. Trusts ⇨191(1), 202

Where testamentary trust provided that minor beneficiary and her guardian should be permitted to occupy testator's residence for so long a time as they might desire, beneficiary had right to occupy house with her guardian until majority, and alone thereafter, nor was the right to occupancy lost by reason of fact that beneficiary and guardian vacated residence, and trustee was without authority to make ex parte sale of residence during beneficiary's minority, and could be required to reinvest proceeds of sale in another home for beneficiary's occupancy.

8. Wills ⇨684(6)

Under testamentary trust instrument which directed that minor beneficiary should receive a sum which, in addition to proceeds on testator's life policies, should amount to \$200 which provided for some distribution of principal to beneficiary but established remainders in beneficiary's issue or other persons, and which made no provision for accumulated income, beneficiary was limited to trust payments in amount of difference between proceeds of life policies and \$200, and was not entitled to distribution of accumulated income. West's Ann. Civ.Code, § 733.

1. "Fifth: In the event my daughter, Irene Marie Charters, survives the final distribution of my estate, I give, devise and bequeath the residue of my estate, real and personal, wherever situated, hereinafter termed the 'trust estate,' to Security-First National Bank of Los Angeles, a national banking association, in trust, to hold, manage and distribute as hereinafter provided:

"(A) (1) Until my daughter, Irene * * * attains the age of Twenty-one (21) years, my Trustee shall distribute to her, or for her use and benefit, such sums or amounts in monthly installments as may be necessary for her proper sup-

9. Trusts ⇨177

An absolute discretion, exercised in good faith by a trustee, cannot be controlled by a court on considerations going to soundness of discretion so exercised.

10. Wills ⇨684(6)

The rights of those unborn are entitled to protection as well as those of the living.

Henshey & Beeman and Howard B. Henshey, Hollywood, for petitioner and appellant.

Lawler, Felix & Hall, William T. Coffin, Brady, Nossaman & Walker and Walter L. Nossaman, Los Angeles, as amici curiae on behalf of petitioner and appellant.

Hill, Farrer & Burrill and William C. Farrer, Los Angeles, for legatee and appellant.

Norman Elliott, Los Angeles, in pro. per., Charles P. Lester, Pasadena, in pro. per., Robertson, Harney & Behr, David Robertson, Ruth Michaelson, Robertson, Harney, Drummond & Dorsey and Vernon W. Hunt, Jr., Los Angeles, for respondents.

TRAYNOR, Justice.

Irene Marie Charters Yeakel is the only child of Irene Meyers Charters and Spencer H. Charters. She was born on June 15, 1931. Her mother died January 2, 1942, leaving her by will the sum of \$4,730.05. Her father was appointed guardian of her estate. On January 25, 1943, Spencer H. Charters died leaving a will dated February 12, 1942, the material provisions of which are quoted below.¹

port, maintenance and education, using therefor so much of the principal of the Trust Estate as may be necessary if the net income available for distribution is insufficient.

"(2) From and after the date upon which my daughter, Irene * * * shall attain the age of Twenty-one (21) years, my Trustee shall pay to my said daughter, during her lifetime or until the termination of the Trust Estate, such sum or amount monthly which, when added to the payments which she may receive from any insurance policies on my life, shall amount to a monthly income of Two Hundred Dollars (\$200.00). If the in-

On February 5, 1943, the Security-First National Bank of Los Angeles was appointed successor guardian of the estate of Irene. On February 1, 1943, the will was admitted to probate. On May 25, 1944, the

decree of distribution was entered declaring the Security-First National Bank of Los Angeles (hereinafter called the trustee) to be the trustee of the testamentary trust created by the will.²

come available for distribution is not sufficient to make the aforesaid monthly payments my Trustee shall use such part of the principal as may be necessary to make such monthly payments.

"(3) My Trustee shall permit my daughter, Irene * * *, and her guardian or such person as may be entrusted with her care, to use and occupy my residence at 1745 North Vista Street, Los Angeles, California, for so long a time as they may desire, without payment of rent and without deduction from any of the payments herein provided. In connection with such use, my said daughter or her guardian or such person as may be entrusted with her care, shall, so long as she or they desire, have the use, without charge, of the household furniture and furnishings, silver, books, pictures, paintings, works of art, and bric-a-brac which may be located in said residence.

"(4) When and at such time as my daughter, Irene * * *, shall cease to occupy my home at the above address the Trustee shall make such disposition of the personal property used in connection with said home as it may deem advisable.

"(5) Should any of my jewelry become a part of the Trust Estate the same shall be distributed to my daughter, Irene * * *, at such time as, in the opinion of the Trustee, she is qualified to receive and care for the same.

"(6) In addition to the payments hereinabove provided for my daughter, Irene * * *, my Trustee shall pay to her the sum of Five Thousand Dollars (\$5000.00) from the principal of the Trust Estate on the date upon which she attains the age of Thirty (30) years, and an additional sum of Five Thousand Dollars (\$5000.00) from the principal of the Trust Estate on the date upon which she attains the age of Thirty-five (35) years, and an additional sum of Five Thousand Dollars (\$5000.00) from the principal of the Trust Estate on the date upon which she attains the age of Forty (40) years of age.

"(7) My Trustee shall distribute to Amelia Meyers, my deceased wife's mother, or pay for her use and benefit, such sums or amounts in monthly installments as may be necessary for her proper support and maintenance during her lifetime, using therefor so much of the principal of

the Trust Estate as may be necessary if the net income available for distribution is insufficient. * * *

"(C) This Trust shall continue until and shall cease upon the death of my daughter, Irene * * *. Upon such termination the entire Trust Estate, including principal and any undistributed income, shall, after payment of any expenses of last illness and funeral for my said daughter, be distributed by right of representation to the issue of my said daughter. * * *

"Should my daughter * * * die leaving no issue then the entire Trust Estate, including principal and any undistributed income, shall, after payment of any expenses of last illness and funeral for my said daughter be distributed as follows:

"(1) Two-fifths (2/5) thereof to Francis Moeller, or to his issue by right of representation should he not then be living;

"(2) Three-fifths (3/5) thereof in equal shares to my brothers, Horace T. Charters and Charles T. Charters, and my sister, Laura Hoerner, or to the survivors or survivor of them should any of them be not then living, or, if none of them be then living, then to Francis Moeller, or to his issue by right of representation should he not then be living."

2. After setting forth the foregoing provisions of the will creating the trust, the decree of distribution provided: "If the payments from the Trust to which Irene Marie Charters, daughter of deceased, may be entitled after she shall have attained the age of Twenty-one (21) years shall, in the discretion of the Trustee, be insufficient to provide her with reasonable support, care and comfort, the Trustee may pay to, apply or expend for her use and benefit so much of the principal up to and including the whole thereof as the Trustee may deem advisable."

After setting forth various "powers and discretions" vested in the trustee, the decree of distribution also provided: "All discretions conferred upon the Trustee shall, unless specifically limited, be absolute and their exercise conclusive on all persons interested in the Trust. The enumeration of certain powers of the Trustee shall not limit its general powers, the Trustee being hereby vested with and having as to the trust estate and in the

In 1946 Irene moved from the family home and went to live with the guardian of her person. On July 16, 1946, the trustee sold the home and added the proceeds to the trust estate. Nine accounts current were filed by the trustee, and orders were entered settling and approving each of them. In the trustee's third account current appears the following:

"(a) The stucco bungalow carried herein at \$11,000.00 was sold for the sum of \$25,000.00. After paying the commission of the real estate broker and the expenses of sale, the transaction resulted in a profit of \$12,615.75."

The ninth account current was approved on September 21, 1953.

[1] On November 6, 1951, Irene married. On October 29, 1952, the trustee was discharged as guardian of her estate. She has been receiving, and it appears that she will continue to receive \$154.52 per month from life insurance policies on the life of her father. The trustee has been paying her \$45.48 per month, which, when added to the payments from the insurance policies, aggregates \$200 per month. Since

she has been receiving only \$45.48 a month from the trust, a considerable amount of income has accumulated. On September 1, 1953, the trustee filed a petition that it be instructed what to do with the accumulated income. At the hearing on the petition, Irene and Laura Hoerner, decedent's sister, appeared by their respective attorneys. Francis Moeller, the other living beneficiary of the trust, did not appear. The court appointed two attorneys to appear and act as guardians *ad litem* of any minor or person of unsound mind, or any person or persons of a designated class who are not ascertained or who are not in being and who may participate in the trust. No testimony was taken at the hearing on the petition except the testimony of the guardians *ad litem* as to their fees. No documentary evidence was introduced except the file in the Matter of the Guardianship of the Estate of Irene Marie Charters. After the hearing, the court on April 30, 1954, made, among others, the findings quoted below³ and entered the following orders:

"1. That petitioner, as Trustee, under the Last Will and Testament of Spencer H. Charters, deceased, and un-

execution of the trust all the rights, powers and privileges which an absolute owner of the property would have."

3. "That on February 5, 1943 the Security-First National Bank of Los Angeles, a national banking association, was appointed guardian of the Estate of Irene Marie Charters (then a minor); that said guardian presented its inventory of the assets of said minor's estate; that the testamentary trust of Spencer H. Charters, deceased, under paragraph Fifth (A) (3) of the Last Will and Testament of Spencer H. Charters, gave the right to the use and occupancy of certain residence property located at 1745 North Vista Street, Los Angeles, California to Irene; that said right was in the nature of a Life Estate and that said right and/or estate was not listed in said inventory as an asset of said minor's estate.

"That on or about the 16th day of July, 1946 the Trustee of decedent's estate under said Last Will and Testament sold the real property at 1745 North Vista Street, Los Angeles, California. That said sale was made without notice to the guardian of said minor's estate, and said

guardian did not file its petition with the Court for authority for it to sell said estate of the minor. That by reason of said sale, the Trustee obtained \$25,000.00, which sum was then made a part of the corpus of said Trust and has since that date and does now make up a portion of the said Trust Estate.

"The Estate * * * was of a value of \$94,308.77 as of the date of distribution based upon the appraised value thereof.

"That the will of the above-named deceased, incorporated in the Decree of Distribution creating the Trust Estate, contains no express provision for the accumulation of undistributed income and no provision for the payment of income as hereinafter mentioned to any beneficiary except Irene * * *.

"That the Court interprets the provisions of the Trust covering the use of said home as a direction to the Trustee to permit Irene to use and occupy said property during the whole of her natural life if she so desired, and that during such period the Trustee is required to bear the expense of said property and the payment of taxes thereon.

"That it was the duty of the Guardian

der the Decree of Distribution made in this cause on or about the 23rd day of May, 1944 be and it is hereby ordered to either purchase a home and residence with suitable furnishings for the occupancy of Irene Marie Charters Yeakel which shall be as nearly equal in value as reasonably possible to the home and furnishings located at 1745 Vista Street, Los Angeles, California, and which were sold by said trustee on or about the year 1946, or to provide Irene Marie Charters Yeakel with a sum sufficient to rent a furnished home of the value, approximate quality and desirability as the residence at 1745 Vista Street, Los Angeles, California which was previously occupied by Irene Marie Charters Yeakel, and sold by the Trustee as aforesaid.

"2. It is further ordered that Paragraph Fifth (A) (2) of the Last Will and Testament of Spencer H. Charters and Paragraph Fifth (A) (2) of the Decree of Distribution made in this cause be interpreted as a direction to the Trustee that Irene Marie Charters Yeakel should receive a minimum of \$200.00 per month, including benefits from insurance policies received from sources outside the Trust Estate as well as income of the Trust Estate.

"3. It is further ordered that petitioner utilize any income remaining after it has provided the minimum of \$200.00 per month including insurance payments received by Irene Charters Yeakel outside of the Trust to meet its

to secure and maintain for the minor any property rights to which she may have been entitled and it appears to the Court that no question of this right, being namely, the right to occupy said residence, was reported to the Court in the Guardianship proceedings, nor was such right on the part of the minor reported to the Court by the Trustee in connection with the sale thereof.

"That permission of the Court in the Guardianship matter was not sought by the Guardian to relinquish the said right of occupancy on the part of Irene.

"That it is the opinion of this Court that had the relinquishment of the right of the minor to occupy said residence been

obligation to provide for Irene Marie Charters Yeakel's reasonable support, care and comfort.

"4. The intent of Spencer H. Charters as found from a reading of his Last Will and the Trust therein contained, and upon analysis of the facts surrounding execution of said Will, is interpreted to mean that excess income, if any, after petitioner has carried out the terms of this Order, shall not be accumulated but shall be distributed to Irene Marie Charters Yeakel."

From these orders the trustee and Laura Hoerner appeal. No briefs were filed on behalf of Laura Hoerner. It is settled, contrary to respondent's contention, that the trustee is entitled to appeal. In re Estate of Ferrall, 33 Cal.2d 202, 204-206, 200 P.2d 1, 6 A.L.R.2d 142.

The trustee first contends that the probate court was without jurisdiction to consider the matter of the sale of the residence on the ground that this sale was approved in the court's order settling the third account current, and since it has long since become final, it is not subject to collateral attack. Irene contends that since she was a minor 16 years old when the third account current was approved and her estate was under the guardianship of the trustee, and since the trustee did not list her right to occupy the residence in its inventory of the assets of the estate or obtain authority of the court for its sale, she was not bound by the order approving the account, which deprived her of the right to use and occupy the residence.

submitted to the Court that the Court would not have given its permission for such relinquishment without adequate consideration given to the Ward.

"That the sum of \$45.48, being the difference between the amount received by Irene from insurance policies on the life of the above-named deceased, and the sum of \$200.00 per month is not a maximum payment but is the minimum amount required to be paid by the Trustee in cash for the support, care and comfort of Irene and the Trustee is entitled, and should be instructed to expend any additional portion of the income, up to the whole thereof, as shall be necessary to meet this obligation."

[2-4] Once a decree of the probate court settling an account of a trustee becomes final, it is conclusive, in the absence of extrinsic fraud, on all parties interested in the estate. Probate Code, § 1123; *Security-First Nat. Bank of Los Angeles v. Superior Court*, 1 Cal.2d 749, 755, 37 P.2d 69; *Ringwalt v. Bank of America*, 3 Cal.2d 680, 685, 45 P.2d 967; *In re McLellan v. McLellan*, 17 Cal.2d 552, 554, 110 P.2d 1034; *Willson v. Security-First Nat. Bank*, 21 Cal.2d 705, 713, 134 P.2d 800. A court has inherent power to set aside a decree for extrinsic fraud, *Cross v. Tustin*, 37 Cal.2d 821, 825, 236 P.2d 142, when a party has been prevented from fully presenting his case and there has therefore been no adversary trial of the issue. *Bacon v. Bacon*, 150 Cal. 477, 491, 89 P. 317; *Howard v. Howard*, 27 Cal.2d 319, 321, 163 P.2d 439. "The public policy underlying the principle of *res judicata* that there must be an end to litigation requires that the issues involved in a case be set at rest by a final judgment * * *. This policy must be considered together with the policy that a party shall not be deprived of a fair adversary proceeding in which fully to present his case." *Jorgensen v. Jorgensen*, 32 Cal.2d 13, 18, 193 P.2d 728, 731. Thus, the question arises at the outset whether the foregoing rule applies, when a trustee that is also the guardian of the estate of a minor beneficiary of a trust (who is not otherwise represented) seeks a final settlement of an account current after selling a trust asset in which the minor beneficiary has an interest.

In *Fisher v. Banta*, 66 N.Y. 468, the same person appeared at a final accounting as the representative of two estates, that of the deceased and that of his beneficiary. After the decree had become final, legatees of the deceased beneficiary, who had not been made parties to the final accounting, sought to set it aside. The court stated:

"It is doubtless true that a decree made on the settlement of Albert Banta's estate, to which the executor of Charles * * * was a party, would, under ordinary circumstances, in the absence of fraud * * *, conclude

them [legatees of Charles' estate]. But the defendant Hubbell was the representative of both estates. So far as the plaintiffs were concerned, the accounting was a proceeding instituted by Hubbell as representative of one estate against himself as the representative of the other estate. It is a familiar principle that a court of equity will require parties having remote interests to be brought in, when necessary to a complete disposition of the matter in litigation [citation], and this, we think, is a case to which this rule applies, and the * * * legatees of Charles * * * [should] have been made parties to the accounting. * * * They ought not to be concluded by a proceeding instituted by himself [Hubbell], against himself, in which they were interested." *Id.*, 66 N.Y. at page 481.

Again in the *Matter of Haigh's Estate*, 125 Misc. 365, 367, 211 N.Y.S. 521, under similar facts, the court held that unless persons interested in the deceased beneficiary's estate were cited, the final decree of the accounting party representing both estates was not conclusive upon them. The rule of the *Fisher* case was subsequently codified in New York. *Surrogate's Court Act*, § 262, subd. 10, *Gilbert-Bliss, Civil Practice of New York* anno., Book 13B, 3rd ed. The purpose of this rule is to prevent a person's escaping liability by taking advantage of his dual relationship in accounting to himself. *Matter of Massimino's Estate*, 143 Misc. 119, 121, 256 N.Y.S. 32, see also, *In re Estate of Clark*, 203 Iowa 224, 212 N.W. 481. "[L]ogic demands that an accounting party be not permitted in another representative capacity to stand between himself and the ultimate beneficiary." *In re Brockway's Will*, Sur., 111 N.Y.S.2d 849, 857.

[5,6] The reasoning of these cases applies here. After a sale of a trust asset in which Irene had an interest, the third account current was rendered to the court and approved, with the trustee accounting to itself as guardian. Thus, since the trustee occupied a dual relationship, and Irene was not otherwise represented, she was de-

prived of the opportunity to present her claims to the court. There being no adversary trial or decision of the issue, the order settling the trustee's third account current is not binding on her, and the probate court therefore had jurisdiction to inquire into it. Having jurisdiction of the controversy between the trustee and the beneficiary of the trust under section 1120 of the Probate Code, the court could "bring to its aid 'the full equitable and legal powers with which, as a superior court, it is invested.'" In re Guardianship of Cornaz, 8 Cal.2d 347, 359, 65 P.2d 784, 790; Schlyen v. Schlyen, 43 Cal.2d 361, 371-374, 273 P.2d 897; In re Estate of Eilert, 131 Cal.App. 409, 414-417, 21 P. 2d 630.

The trustee contends (1) that the right to occupy the residence was given only for the period Irene was under the care of a guardian; (2) that once Irene and her guardian vacated the residence, the right to occupy was lost and could not be reclaimed; and (3) that once the right to occupy was lost, the trustee could sell the residence.

[7] In support of the first proposition the trustee relies on the use of the word "and" with reference to the right to occupy ["The Trustee shall permit Irene * * * *and* her guardian * * * to use and occupy my residence for so long a time as *they* may desire * * *"] (italics added)] as contrasted with the use of the word "or" with respect to the furniture and furnishings. ["My * * * daughter *or* her guardian * * * shall so long as *she or they* desire, have the use * * * of the household furniture and furnishings. * * * (Italics added.)"] In view of the fact that Irene was only 10 years old at the date the will was executed and only 11 years old at the date of the decree of distribution, she would necessarily be under the care of a guardian and could not decide for herself to occupy the residence. The decision to occupy would necessarily be made by her guardian, even if the decree had not referred to the guardian and had provided that Irene could occupy the residence for "so long a time as *she* may desire." The decree made it clear that dur-

ing her minority the decision to occupy was not Irene's alone but that of her guardian. When her minority and the guardianship of her person were over, there would no longer be any need for the care of a guardian or any necessity of a guardian to occupy the residence with her and therefore no longer any need for a guardian's decision as to occupancy. Thus, if Irene and her guardian had occupied the residence during the whole period of her minority and it was Irene's desire thereafter to continue to occupy it, we have no doubt that she would have had the right to do so. The decree cannot reasonably be construed as terminating the right to occupy the residence when she reached 21 and requiring her then to vacate it. The obvious purpose of the provision giving the right to occupy was to provide a home for Irene. If the right to occupy the residence was to be limited to her minority, the decree would have plainly said so and not left the limitation to a vague inference to be drawn from a meticulous comparison of the use of such words as "and", "or", "they", and "she".

The second of the foregoing propositions assumes that the occupancy must be continuous, and that once Irene and her guardian vacated the residence they lost the right again to occupy it. The right to occupy, however, was for "so long a time as they may desire" and there is nothing in the decree to indicate that their desire to occupy could be expressed only once and not for "so long a time" any time they desired. Thus, if the guardian had decided that it was in the best interest of Irene for her and Irene to occupy the residence during the time Irene was in grade school and then for Irene to go to a girls' school, we do not believe that the decree could reasonably be construed as denying them the right thereafter to return to the residence. A disinterested guardian of her estate would have protected the right to occupy the residence during Irene's absences therefrom and made reasonable arrangements with the trustee for the rental thereof when the duration of such absences justified such rental. As noted above, the obvious purpose of the decree was to pro-

vide a home for Irene for so long a time as she desired and not simply for her minority or for one uninterrupted time only. Since Irene and her guardian had the right during her minority to occupy the residence for so long a time any time they desired and since Irene had the right to occupy it so long as she desired on the termination of her guardianship, the trustee had no authority to defeat that right by selling the residence. The court's order number (1) that the trustee purchase a home with suitable furnishings for Irene or provide her with a sum sufficient to rent such a home must therefore be affirmed.

[8, 9] We agree with the trustee's contention that the court's orders number (2) and number (3) that the \$200 monthly payment is only the minimum authorized for Irene's support and that any income in excess of that amount must be used for her support are contrary to the express provisions of the decree of distribution and must therefore be reversed. In re Estate of Van Deusen, 30 Cal.2d 285, 295, 182 P.2d 565. The decree, incorporating the language of the will provides:

"From and after the date upon which Irene * * * shall attain the age of Twenty-one (21) years, the Trustee shall pay to said Irene * * *, during her lifetime or until the termination of the Trust Estate, such sum or amount monthly which, when added to the payments which she may receive from any insurance policies on the life of deceased, shall amount to a monthly income of Two Hundred Dollars (\$200.00). If the income available for distribution is not sufficient to make the aforesaid monthly payments the Trustee shall use such part of the principal as may be necessary to make such monthly payments."

This provision plainly provides for \$200 per month, no more and no less, and cannot reasonably be construed as providing that income in excess thereof shall be used for Irene's support. If any additional sum is to be paid to Irene, it is to be paid under the provisions of the decree that

"If the payments from the Trust to which Irene Marie Charters, daughter of deceased, may be entitled after she shall have attained the age of Twenty-one (21) years shall, in the discretion of the Trustee, be insufficient to provide her with reasonable support, care and comfort, the Trustee may pay to, apply or expend for her use and benefit so much of the principal up to and including the whole thereof as the Trustee may deem advisable." (Italics added.)

Anything paid pursuant to this provision would be in the absolute discretion of the trustee:

"All discretions conferred upon the Trustee shall, unless specifically limited, be absolute and their exercise conclusive on all persons interested in the Trust. The enumeration of certain powers of the Trustee shall not limit its general powers, the Trustee being hereby vested with and having as to the trust estate and in the execution of the trust all the rights, powers and privileges which an absolute owner of the same property would have." (Italics added.)

Thus, as this court stated in In re Estate of Ferrall, 41 Cal.2d 166, 173, 258 P.2d 1009, 1013: "'An absolute discretion, exercised in good faith by a trustee, cannot be controlled by a court on considerations going to the soundness of the discretions so exercised.'" The court could not interfere to review the action of the trustee in the absence of pleadings, proof, and findings of fraud, bad faith, or abuse of discretion. In re Estate of Ferrall, supra, 41 Cal.2d at pages 170-173, 258 P.2d 1009. There are no such pleadings, proof, or findings herein.

We also agree with the trustee's contention that order number (4) that excess income shall be distributed to Irene, is contrary to the express provisions of section 733 of the Civil Code and must therefore be reversed. See In re Estate of LeFranc, 38 Cal.2d 289, 299-301, 239 P.2d 617.

[10] Section 733 of the Civil Code provides:

"When, in consequence of a valid limitation of a future interest, there is a suspension of the power of alienation or of the ownership during the continuation of which the income is undisposed of, and no valid direction for its accumulation is given, such income belongs to the persons presumptively entitled to the next eventual interest."

The decree contains no express direction for the accumulation of income. The provisions thereof that the principal may be used if the net income available for distribution is insufficient for Irene's support during her minority, or to meet the \$200 monthly payments thereafter, or for the support of the deceased wife's mother, and that the trustee may pay taxes and costs of administering the trust out of principal or income, would indicate that it was not contemplated that income was to be accumulated, for normally there would be no expenditures from principal until income had been expended. Thus, even though the court correctly concluded that there was no express or implied direction for the accumulation of undistributed income, it erred in ordering its distribution to Irene, for section 733 plainly provides that the "income belongs to the persons presumptively entitled to the next eventual interest." Irene is the person presumptively entitled to the next eventual interest only as to \$15,000, the sum of the installments of \$5,000 that she is to receive when she attains the ages of 30, 35, and 40, and to her belongs only that proportion of the accumulated income as \$15,000 bears to the value of the total trust estate. The remainder was given to Irene's issue, and as to that they were the persons presumptively entitled to the next eventual interest. If Irene died leaving no issue the trust estate was to be distributed two-fifths to Francis Moeller and three-fifths to Horace T. Charters, Charles T. Charters, and Laura Hoerner as provided in paragraph (C) of the will. See note 1, *supra*. It is immaterial that Irene had no issue at the time of the court's orders, for the rights of those unborn are entitled to protection as well as those of the

living. Furthermore, although the fact that a child was born to Irene on January 26, 1955, does not appear in the record, our attention was called to it in the brief filed by the guardian *ad litem*. Since the court's orders will operate in futuro, cf. *Cal-Dak Co. v. Sav-On Drugs*, 40 Cal.2d 492, 496-497, 254 P.2d 497, that fact may be considered in protecting the rights of the child in the trust estate. See *First Nat. Bank of San Luis Obispo v. Henderson*, 101 Cal. 307, 309-311, 35 P. 899. Distribution of all of the undistributed income to Irene pursuant to the court's orders would defeat the right of that child under the express provisions of section 733 of the Civil Code.

Order number (1) is affirmed. Orders number (2), number (3), and number (4) are reversed. The trustee shall bear the costs of this appeal.

GIBSON, C. J., and SHENK, CARTER. SCHAUER and SPENCE, JJ., concur.



Walter J. STRANGMAN, Petitioner, Judgment-Creditor and Appellant,

v.

George L. DUKE, Defendant, Judgment-Debtor and Respondent.

In the Matter of the Application for the Appointment of Appraisers to Appraise Homesteaded Property.*

Civ. 21442.

District Court of Appeal, Second District, Division 2, California.

Feb. 17, 1956.

Rehearing Granted March 13, 1956.

For Opinion on Rehearing, see 295 P.2d 12.*

Proceeding by judgment creditor to obtain execution against homestead of husband, who held undivided half of certain duplex property in joint tenancy with wife, who held other half as her separate property. The Superior Court of Los Angeles County, Arnold Praeger, J., ordered sheriff's

* Opinion vacated 295 P.2d 12.

sale of undivided one fourth interest in the premises at price to exceed husband's homestead exemption plus tax liens, and judgment creditor appealed. The District Court of Appeal, Ashburn, J., held, *inter alia*, that no issue of alleged fraud of husband in conveying undivided half of property to wife as her separate property was or could have been raised in execution proceeding, and that adjudication that husband held undivided fourth interest in the property could not be *res judicata* in subsequent action to set aside alleged fraudulent conveyance to wife.

Order affirmed.

1. Homestead ⚡62

Amount of homestead exemption is governed by law in effect at time debt is created.

2. Homestead ⚡21, 84, 107

Partition ⚡12(3)

Husband or wife may declare homestead on joint tenancy property without consent of the other spouse, and when it comes to selling the property in a special proceeding against the husband pursuant to statute pertaining to execution against homestead, such sale effects a severance of spouses' interests and only husband's interest can pass to purchaser, while wife becomes a tenant in common with new owner, and if dissatisfied therewith, wife may have partition, whereupon husband's homestead having been terminated, wife may establish new one if requisite facts be present. West's Ann.Civ.Code, §§ 1238, 1245 et seq.

3. Homestead ⚡81

Right to declare homestead does not depend upon nature of declarant's title, so long as he has some interest in property which is freehold vesting in him immediate right to possession, whether joint or exclusive, and one who is entitled to make such declaration is declared to be entitled to exemption from enforcement of debts to specified extent. West's Ann.Civ.Code, § 1238.

4. Homestead ⚡21

Husband and wife cannot have two homesteads, even upon different properties

or upon different interests in same property. West's Ann.Civ.Code, § 1238.

5. Homestead ⚡21

Where husband has declared homestead on property held in joint tenancy with his wife, wife cannot declare homestead, since, under statute, without statement that husband has not made declaration, one attempted by wife is void. West's Ann.Civ.Code, §§ 1238, 1263, subd. 1.

6. Homestead ⚡5

Policy underlying "homestead" legislation is to provide place for family and its surviving members where they may reside free from any anxiety that it may be taken from them against their will, either by reason of their own necessity or improvidence or from the importunity of their creditors, and to this end a liberal construction of the law and facts will be adopted. West's Ann. Civ.Code, § 1238.

See publication Words and Phrases, for other judicial constructions and definitions of "Homestead".

7. Homestead ⚡107

Where husband, who held undivided half of certain duplex property in joint tenancy with wife, who held other half as her separate property, had declared homestead on his undivided interest in the property, and had thereafter incurred judgment, and where judgment creditor sought execution against the homestead, orderly procedure dictated that quantum of husband's interest be ascertained and sale limited thereto, and court properly determined that sale should be limited to one-fourth interest conditioned upon receiving bid therefor exceeding husband's homestead exemption. West's Ann.Civ.Code § 1245 et seq.; West's Ann.Code Civ.Proc. § 187.

8. Judgment ⚡720, 739

Judgment is not adjudication of those matters which were not and could not properly be relied upon and determined in previous action, but is conclusive where requisite jurisdiction exists of all those matters which it clearly adjudicates.

9. Judgment ⚡739

Where husband, who held undivided half of certain duplex property in joint

tenancy with wife, who held other half as her separate property, had declared homestead on his undivided interest in the property, and had thereafter incurred judgment, and where judgment creditor commenced proceeding to obtain execution against homestead, no issue of alleged fraud of husband in conveying undivided half of property to wife as her separate property was or could have been raised in execution proceeding, and adjudication that husband held undivided one-fourth interest in the property could not be res judicata in subsequent action to set aside alleged fraudulent conveyance to wife. West's Ann.Civ.Code §§ 1238, 1245 et seq.

10. Homestead ☞37

Where husband held undivided half of certain duplex property in joint tenancy with wife, who held other half as her separate property, entire duplex need not have been occupied by husband and family in order to qualify for homestead upon declaration of husband. West's Ann.Civ.Code, § 1238.

Snyder, Fletcher & O'Neil, South Pasadena, for appellant.

George L. Duke and Joseph Doyle, Beverly Hills, for respondent.

ASHBURN, Justice.

Walter J. Strangman, judgment creditor, appeals from an order directing respondent's homestead to be sold. On December 2, 1952, Strangman recovered judgment against George L. Duke for \$10,000, plus interest and costs; it was based upon an obligation created in February 1947, at which time the homestead exemption was \$6,000. The judgment did not run against the wife, Esther H. Duke. The spouses owned a certain duplex property in undivided interests, that is, one-half was vested in the wife as her separate property and one-half was held as joint tenancy estate of the two spouses.

[1] On September 15, 1952, said George L. Duke declared a homestead on the property asserting therein "That, it is my intention to use and claim my undivided interest in the said lot of land and premises above described, together with the dwelling houses thereon, and its appurtenances, as a homestead." The wife did not join in the declaration. Strangman, after levy of execution, brought a proceeding pursuant to § 1245 et seq., Civil Code, for appointment of appraisers, sale of the property and payment of his debt out of the proceeds in excess of the statutory exemption. The court, after appropriate preliminary proceedings, found the value of the property to be \$19,500 subject to a tax lien of \$169.85; also that the land could not be divided without material injury; ordered a sheriff's sale of an undivided one-fourth interest in the premises at a price which must exceed \$6,000¹ plus tax liens; distribution of the proceeds of sale was ordered as follows: (1) Payment of tax lien of \$169.85; (2) payment of \$6,000 to judgment debtor, George L. Duke; (3) satisfaction of Strangman's execution; and (4) balance, if any, to homestead claimant.

The arguments presented on appeal revolve around the limited nature of George L. Duke's title and the terms of his declaration.

The homesteading of property owned in undivided interests, such as joint tenancy or tenancy in common, has been a perplexing subject in this jurisdiction until recent years. Section 1238, Civil Code, now declares: "If the claimant be married, the homestead may be selected from the community property or the separate property of the husband or, subject to the provisions of section 1239, from the property held by the spouses as tenants in common or in joint tenancy or from the separate property of the wife. * * * Property, within the meaning of this title, includes any freehold title, interest, or estate which vests in the claimant the immediate right of possession, even though such a right of possession

1. The amount of exemption is governed by the law in effect at the time the debt is created. In *re Rauer's Collection Co.*,

87 Cal.App.2d 248, 253-254, 196 P.2d 803.

is not exclusive." The Supreme Court decided in *Re Estate of Kachigian*, 20 Cal.2d 787, 790, 128 P.2d 865, 867, that "the former rule prohibiting the selection of a homestead from an undivided interest in property during the lifetime of the owner has been abandoned." In this respect *Matter of Estate of Davidson*, 159 Cal. 98, 115 P. 49, which held that one or both of the spouses could not impress a homestead upon the undivided half interest of a husband owned as tenant in common with his wife, has ceased to represent the prevailing rule.

[2] Respondent's assertion in his declaration that he claims as a homestead his undivided interest is in consonance with the rule now prevailing, and cases decided before the change in the law are not controlling. Husband or wife may now declare a homestead on joint tenancy property without the consent of the other spouse. *Watson v. Peyton*, 10 Cal.2d 156, 159, 73 P.2d 906. When it comes to selling the property in a special proceeding against the husband (pursuant to § 1245 et seq., Civ. Code) that sale effects a severance of the spouses' interests and only the husband's interest (in this case one-fourth) can pass to the purchaser; the wife becomes a tenant in common with the new owner. In *re Rauer's Collection Co.*, 87 Cal.App.2d 248, 259, 196 P.2d 803. If dissatisfied therewith she may have a partition; thereupon the husband's homestead having been terminated, the wife may establish a new one if requisite facts such as residence, etc., be present. 40 C.J.S., *Homesteads*, § 13, p. 441; *Spencer v. Geissman*, 37 Cal. 96. In other words, the execution reaches and the sale conveys only the declaring husband's half of the joint tenancy interest. Cf. *In re Rauer's Collection Co.*, supra, 87 Cal. App.2d 248, 256, 196 P.2d 803; *In re Estate of Kachigian*, supra, 20 Cal.2d 787, 792, 128 P.2d 865.

[3-6] In the instant case the entire property was appraised at \$19,500 and the sale limited to a one-fourth interest conditioned upon receiving a bid of more than \$6,000 for said interest. Appellant asserts that respondent was not entitled to the entire exemption because his interest was

only one-fourth of the entire property. There is no provision in our statute for apportionment of the exemption in any situation. See *In re Rauer's Collection Co.*, supra, 87 Cal.App.2d at page 261, 196 P.2d at page 811. And its theory is opposed to such treatment. The right to declare a homestead does not depend upon the nature of the declarant's title, so long as he has some interest in the property which is a freehold vesting in him immediate right to possession, whether joint or exclusive. 25 Cal.Jur.2d § 25, p. 321. And one who is entitled to make such a declaration is declared to be entitled to an exemption from enforcement of debts to a specified extent—in this case \$6,000. Since the statute says that one owning an undivided freehold estate may declare a homestead, and that every homesteader is entitled to a specific exemption, the creditor has no complaint. The statute is aimed at a limited protection against his claim. While it is of no interest to the creditor whether allowance of a \$6,000 exemption to the husband in the case at bar would be prejudicial to the rights of the wife, it is pertinent to inquire into this matter as a test of the soundness of the conclusion above indicated. Husband and wife cannot have two homesteads, not even upon different properties, *Gambette v. Brock*, 41 Cal. 78, 84; *Bullis v. Staniford*, 178 Cal. 40, 44, 171 P. 1064, and of course cannot have two homesteads upon different interests in the same property. The wife could not in the present instance declare a homestead because § 1263, Civil Code, provides: "The declaration of homestead must contain: 1. A statement showing that the person making it is the head of a family, and if the claimant is married, the name of the spouse; or, *when the declaration is made by the wife, showing that her husband has not made such declaration* and that she therefore makes the declaration for their joint benefit". (Emphasis added.) Without the statement that the husband has not made a declaration, one attempted by the wife is void. *Booth v. Galt*, 58 Cal. 254; *Cunha v. Hughes*, 122 Cal. 111, 54 P. 535; *Hansen v. Union Sav. Bank*, 148 Cal. 157, 82 P. 768; *Schuler-Knox Co. v. Smith*, 62 Cal.App.2d 86, 144 P.2d 47; *Crenshaw v.*

Smith, 74 Cal.App.2d 255, 168 P.2d 752; Santa Barbara Lbr. Co. v. Ross, 183 Cal. 657, 659, 192 P. 436. All of this serves the basic policy of the law which is thus stated in the case of *In re Estate of Kachigian*, supra, 20 Cal.2d 787, 791, 128 P.2d 865, 867: "The policy underlying all homestead legislation, whether providing for the selection of a homestead by a person during his lifetime or by the court for his family after his death, is as stated in *Re Estate of Fath*, 132 Cal. 609, 613, 64 P. 995, 997, 'to provide a place for the family and its surviving members, where they may reside and enjoy the comforts of a home, freed from any anxiety that it may be taken from them against their will, either by reason of their own necessity or improvidence, or from the importunity of their creditors,' and to this end a liberal construction of the law and facts will be adopted by the courts." As there is no possible way for the wife to gain an exemption so long as the husband's declaration is in effect, there is no reason for dividing the exemption or for denying the full amount thereof to the husband who alone has filed the declaration.

[7] Appellant complains of the procedure pursued by the trial court, claiming that it was error to find upon the extent of respondent's interest in the premises and to limit the sale to his undivided one-fourth interest. The statute which creates this special proceeding does not prescribe the exact steps to be taken when an undivided interest is involved. Appellant argues that the entire property should be offered for sale, that the buyer is subject to the rule *caveat emptor* and takes what he gets in the way of title. In the present instance the declaration claims only an undivided interest without defining it, and orderly procedure dictates that the quantum of that interest be ascertained and the sale limited thereto. That is all that could pass under appellant's method of sale; why not define it and thus enhance the possible price through advising any prospective purchaser that he does not have to bid on a pig in a poke? There being no defined procedure, the court properly followed § 187, Code of Civil Procedure, which provides: "When jurisdiction is, by the Constitution or this

Code, or by any other statute, conferred on a Court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code."

The gist of appellant's complaint about this procedure is that the finding that respondent owned a one-fourth interest in the premises would be *res judicata* in a later action brought by appellant to set aside as fraudulent the conveyance of the one-half interest to the wife as her separate property. Respondent's own affidavit says that the judgment was based upon "an alleged fraudulent transaction." It appears that the Dukes acquired the property as joint tenants on February 16, 1949, that a one-half interest was conveyed by the two spouses to the wife as her separate property on September 3, 1952, and that the husband's homestead declaration was filed on September 15, 1952. The opening brief asserts that the deed to the wife was made just 15 days before the trial of the action which resulted in judgment in favor of plaintiff on December 2, 1952; that the deed is subject to attack by appellant as a fraudulent transaction and such an attack would be frustrated by the finding at bar under the familiar doctrine of *res judicata*. It appears that all interests in the property are worth \$19,500, that a one-fourth interest would be worth \$4,875, and as a bid of more than \$6,000 must be received at the sale, appellant, the judgment creditor, has no real possibility of realizing anything upon his judgment, whereas, if he sets aside the deed as fraudulent, he may be able to reach a one-half interest worth \$9,750.

[8,9] The rule of *res judicata* does not apply to causes or issues which were not and could not be before the court in the first proceeding. 15 Cal.Jur. § 198, p. 151. "A judgment is not an adjudication of those matters which were not and could not properly be relied upon and determined in the previous action; but is conclusive where the requisite jurisdiction exists, of

all those matters which it clearly adjudicates." *Maxfield v. Burt*, 121 Cal.App.2d 102, 114, 262 P.2d 580, 588. There was no issue of fraud presented to the court in the instant proceeding. No such issue could have been tried herein and the fear of res judicata which appellant voices is unfounded.

[10] Appellant's claim that the entire duplex must be occupied by declarant and his family in order to qualify for a homestead is without merit. 25 Cal.Jur.2d § 38, p. 338.

The order is affirmed.

MOORE, P. J., and FOX, J., concur.



139 Cal.App.2d 529

M. G. PARKER, Plaintiff and Respondent,
v.

Frank LAURICELLA, individually and doing business under the firm name and style of Woodland Olive Products, Defendant and Appellant.

Civ. 8713.

District Court of Appeal, Third District,
California.

Feb. 28, 1956.

Action for balance of commissions allegedly due under oral contract by which plaintiff was to purchase olives for defendant and perform other duties allegedly for commission of \$10 per ton for olives purchased. The Superior Court, Butte County, Dudley G. McGregor, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Peek, J., held that, where most of statements set forth by plaintiff's former wife in affidavit upon which defendant predicated his motion for new trial, were merely cumulative of defendant's testimony, and wife, who had been willing to testify for plaintiff prior to his remarriage, refused to do so thereafter

unless he was paid \$500, denial of defendant's motion for new trial did not constitute an abuse of trial court's discretion.

Judgment affirmed.

1. Contracts ⇨28(3)

In action for balance of commissions allegedly due under oral agreement by which defendant was to purchase olives for defendant and perform certain other duties, evidence was sufficient to sustain trial court's finding that an implied contract existed.

2. Appeal and Error ⇨989

Where, in action on contract, trial court found upon substantial evidence that an implied contract existed, power of the District Court of Appeal on such issue was at end.

3. New Trial ⇨104(3)

Where most of statements set forth by plaintiff's former wife in affidavit upon which defendant predicated his motion for new trial were merely cumulative of defendant's testimony, and wife, who had been willing to testify for plaintiff prior to his remarriage, refused to do so thereafter unless he was paid \$500, denial of defendant's motion for new trial did not constitute an abuse of trial court's discretion.

Neal Chalmers and Roger Sans, Woodland, and Felix Lauricella, San Francisco, for appellant.

Jack M. McPherson, Chico, for respondent.

PEEK, Justice.

This is an appeal by defendant from a judgment in favor of plaintiff awarding him the balance of commissions alleged to be due under an oral agreement. From our examination of the record we conclude the judgment should be sustained.

The record shows that the parties entered into an oral agreement for the 1947-48 olive season, under the terms of which plaintiff, in addition to purchasing olives for defendant was to perform certain other

duties up to the point of actually processing the olives, and that for such services defendant would pay him the sum of \$10 per ton for all olives purchased; that prior to the 1948-49 season a like oral agreement was made except that defendant would open an account in his name, against which plaintiff could draw checks for olives purchased and for other operating expenses, but defendant would pay plaintiff's commissions from a separate personal bank account rather than have plaintiff draw checks for his commissions from an account in his name as he had done during the 1947-48 season; that according to the testimony of plaintiff, except as otherwise agreed upon, the operation would be the same as during the previous season; and that although the duties mentioned above and the mechanics of carrying out the contract were discussed, the commission to be paid was not. This was denied by defendant who, to the contrary, testified that commissions were discussed, and that because of anticipated conditions concerning the 1948-49 crop, a change was made as to commissions; to wit, plaintiff was to receive \$5 per ton plus a bonus in a like amount if defendant was successful in selling all olives not suitable for his purpose and without loss on such resale. In each season, however, the defendant furnished all of the funds used for the purchase of the olives and for the payment of all operating expenses.

The sole question on appeal is essentially an attack upon the sufficiency of the evidence to support the findings. It would appear that the argument of defendant's counsel in support of such contention is one more properly addressed to the trial court, and had that court decided in defendant's favor, this court would have been confronted with the same historic rule on appeal.

As a part of such contention, counsel argues that the trial court, in effect, found an implied contract as to commissions to be paid, and in so doing thereby attempted to make a contract for the parties which they themselves did not intend. We do not so

understand the findings nor the evidence in support thereof.

The record discloses a business relationship between plaintiff and defendant beginning with a detailed agreement under which they successfully operated during the 1947-48 season, and a mutually expressed desire to so continue during the 1948-49 season. Under such circumstances there was no reason for the parties to spell out a completely new agreement. They knew of and conducted themselves in accordance with such mutual understanding during the 1948-49 season. That conduct, the court found, implied an agreement in fact for the 1948-49 season identical to that of the 1947-48 season except as to the mechanics involved in certain phases of their accounting and bookkeeping, which changes were insufficient to nullify the implied agreement.

[1,2] It necessarily follows that since the court found upon substantial evidence the existence of an implied contract, the power of this court is at an end. *Estate of Bristol*, 23 Cal.2d 221-223, 143 P.2d 689.

[3] Defendant finally contends the court erred in denying his motion for a new trial which was primarily predicated upon the affidavit of plaintiff's former wife. He agrees that portions of that affidavit were properly stricken as being confidential communications between husband and wife. A counter affidavit of plaintiff's counsel showed that while his wife was willing to testify for him prior to his remarriage, she refused so to do thereafter unless she was paid the sum of \$500. We find nothing in her affidavit which would warrant us in concluding that the court abused its discretion in denying defendant's motion. At most the statements set forth therein were merely cumulative of defendant's testimony. *Landrum v. Severin*, 37 Cal.2d 24, 230 P.2d 337.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

139 Cal.App.2d 512

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Max STAPLETON, Defendant and
Appellant.

Cr. 900.

District Court of Appeal, Fourth District,
California.

Feb. 27, 1956.

5. Criminal Law §997(5)

Where accused was represented by counsel at preliminary hearing in municipal court, and court appointed same counsel with additional counsel for accused on arraignment, and granted further time for plea, and accused appeared with counsel and entered plea of guilty as charged, there was no showing on petition for writ of error coram nobis of lack of effective aid of counsel.

Proceeding for writ of error coram nobis. The Superior Court, Kern County, Gordon L. Howden, J., denied petition and petitioner appealed. The District Court of Appeal, Griffin, J., held that there was no showing of lack of effective aid of counsel.

Affirmed.

Max Stapleton, in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

1. Criminal Law §997(11, 15)

An application for writ of error coram nobis should make full disclosure of specific facts relied upon and not merely state conclusions as to the nature of such facts and petitioner's burden to overcome strong presumption in favor of validity of judgment requires production of strong and convincing evidence, and a mere naked allegation that constitutional right has been invaded will not suffice. U.S.C.A.Const. Amends. 1, 4-6, 8, 14.

2. Criminal Law §997(15)

Trial court, on petition for writ of error coram nobis, is not required to accept at face value the allegations of petition unsupported by affidavits or other evidence even though the petition is verified and uncontradicted.

3. Criminal Law §997(6)

The office of the writ of error coram nobis is to bring to the attention of the trial court errors of fact which, without negligence on the part of the defendant, were not presented to court at time of trial.

4. Criminal Law §997(2)

Relief in the nature of a petition for writ of error coram nobis does not lie for errors which could be advanced on motions for new trial or on appeal.

Defendant, while represented by counsel, entered a plea of guilty to the charge of murder. The degree was fixed as that of murder in the first degree. Judgment was imposed on February 18, 1955. No appeal was taken. On September 6, 1955, a petition for writ of error coram nobis was filed by defendant, in propria persona, alleging generally that "the judgment is barred by intellectual honesty, repugnant to the 1st, 4th, 5th, 6th, 8th, and 14th amendments to the United States and California Constitutions". He alleges that he was entrapped by "trickery, of search and seizure, contrary to the 4th amendment of the United States Constitution"; that he was convicted on "false *heresay* coerced and conspired against him"; inadequate representation at the trial; suppression of evidence; prejudice of the trial judge; and that he was wrongfully denied his right of appeal. Other similar charges are made. After hearing, the court denied the petition.

The reporter's notes and the minutes of the court in respect to the arraignment of defendant, show that he was presented for arraignment on the indictment on January 19, 1955; that he appeared without counsel; that the court inquired if he had counsel; and he replied that he did, a Mr. Magnus. It appears that Mr. Magnus was present and stated he had been appointed to represent defendant in a preliminary hearing in

the Municipal Court, but had not been retained by him to represent him in reference to the Grand Jury indictment. The court then, apparently with defendant's consent, appointed him and attorney Vizzard to represent defendant, and granted further time for plea. No objections to these appointments were made by the defendant. On February 4th, defendant appeared with his counsel and entered a plea of guilty, as charged. On February 8th a hearing was had, witnesses were sworn, and defendant testified in his own behalf. The probation officer's report was fully considered. Defendant announced he had no legal cause to show why judgment should not be pronounced, and he was sent to the state's prison for the term prescribed by law.

The broadside accusations filed by defendant were not supported by any showing and the record before us does not support those accusations. In fact it negatives most of them.

[1] A petition for writ of error coram nobis places the burden of proof to overcome the strong presumption in favor of the validity of the judgment on the petitioner. This burden requires the production of strong and convincing evidence. A mere naked allegation that a Constitutional right has been invaded will not suffice. The application should make a full disclosure of the specific facts relied upon and not merely state conclusions as to the nature and effect of such facts. *People v. Shorts*, 32 Cal.2d 502, 508, 197 P.2d 330.

[2] In *People v. Martinelli*, 118 Cal. App.2d 94, 257 P.2d 37, it was held that the trial court, in such a proceeding, is not required to accept the face value of the allegations of the petition, unsupported by affidavits or other evidence, even though the petition is verified and uncontradicted.

[3] The office of the writ is to bring to the attention of the trial court errors of fact which, without negligence on the part of the defendant, were not presented to the court at the time of the trial. *People v. Tuthill*, 32 Cal.2d 819, 821, 198 P.2d 505.

[4,5] It is well established that relief in the nature of a petition for writ of error

coram nobis does not lie for errors which could be advanced on motions for new trial or on appeal. *People v. Adamson*, 34 Cal. 2d 320, 210 P.2d 13. There is no showing of lack of effective aid of counsel. *People v. James*, 99 Cal.App.2d 476, 479, 222 P.2d 117.

As to the remaining "grounds" claimed, *People v. Bible*, 135 Cal.App.2d 65, 286 P.2d 524, sufficiently disposes of them.

Order affirmed.

BARNARD, P. J., and MUSSELL, J.,
concur.



139 Cal.App.2d 532

**In the Matter of the Estate of Wells
CONKLIN, Deceased.**

**Beatrice CONKLIN, Administratrix, with
the Will Annexed, Appellant,**

v.

George HARYMAN, Respondent.

Civ. 8736.

**District Court of Appeal, Third District,
California.**

Feb. 28, 1956.

Estate proceeding. Testator willed \$1.00 to sister whom he recognized and left remainder to be divided between three named brothers, two of whom predeceased testator without lineal descendants. The Superior Court, Glenn County, W. T. Belieu, J., decreed that testator died intestate as to that portion bequeathed to two brothers and that two-thirds of estate vested in equal shares in estates of brother and sister and administratrix of brother's estate appealed. The District Court of Appeal, Van Dyke, P. J., held that testator's gifts to brothers were not made to a class and therefore lapsed as to the two who predeceased him without leaving lineal descendants and as to that portion of estate testator

died intestate and surviving heirs were entitled under statutory rules of succession.

Affirmed.

1. Appeal and Error ⇨150(3)

Where testator recognized sister and left her \$1.00 and willed remainder of estate to three named brothers and trial court held that legacies lapsed as to two brothers who predeceased testator without leaving lineal descendants and decreed that two-thirds of estate vested in equal shares in estates of third brother and his sister, administratrix of estates of both testator and third brother could not appeal in capacity of administratrix of testator's estate as in such capacity she had no interest in or claim to estate of testator, but as she had interest in brother's estate appeal would be treated as having been taken in that capacity.

2. Wills ⇨523, 775, 849

Where testator willed \$1.00 to sister whom he recognized and left remainder to be divided between three named brothers two of whom predeceased testator without lineal descendants, the gifts to the brothers were not made to a class and lapsed as to two brothers who predeceased him and as to that portion of estate testator died intestate and surviving heirs were entitled thereto under statutory rules of succession. West's Ann.Prob.Code, §§ 92, 225.

Price & Morony, Chico, for appellant.

Rawlins Coffman, Red Bluff, for petitioner-respondent.

VAN DYKE, Presiding Justice.

This is a judgment roll appeal from a decree establishing heirship and determining the parties' respective interests in the estate of Wells Conklin, deceased.

The decedent's holographic will, which was admitted to probate, provides:

"Newville Glenn Co California
Jan 26 1897

"I hereby will devise and bequeath to my Brothers M. L. Conklin, G. W. Conklin, and A. Conklin all of my

property at the time of my death. I appoint the eldest of my brothers living Executor of this my last and only will without bonds. I recognize my sister Mrs. J. F. Harryman to whom I give one dollar \$1.00

(s) Wells Conklin"

The testator's sole, surviving heirs at the time of his death were: (1) the lineal descendants of his predeceased sister, Mrs. Haryman, and, (2) his since deceased brother, A. Conklin. His other two brothers named in the will predeceased him and left no lineal descendants.

[1] Appellant is the administratrix of the estate of the testator, as well as administratrix of the estate of A. Conklin, deceased. Respondent is the son of the testator's deceased sister, Mrs. Haryman. He brought this proceeding, seeking a declaration of the rights and interests in the estate of the testator. The trial court found that the testator died intestate as to that portion of his estate which he bequeathed to his two brothers who predeceased him. Consequently, it was decreed that two-thirds of the testator's estate was vested in equal shares in the estates of A. Conklin and Mrs. Haryman. Appellant appeals from such decree as administratrix of the testator's estate. This she cannot do. In re Estate of Babb, 200 Cal. 252, 255, 252 P. 1039. In such capacity, she does not have any interest in or claim to the estate of the testator. In re Estate of Lynn, 109 Cal. App.2d 468, 473-474, 240 P.2d 1001. Her only rights therein are as administratrix of the estate of A. Conklin. We shall treat her appeal as having been taken by her in that capacity.

[2] Appellant's sole contention is that the estate of A. Conklin, of which she is the administratrix, succeeded to the entire estate of the testator.

The trial court properly held that the testator's gifts to his brothers were not made to a class and, therefore, lapsed as to the two who predeceased him without leaving lineal descendants. Probate Code, § 92; In re Estate of Murphy, 157 Cal. 63, 67-68, 106 P. 230. As to that portion of his estate he died intestate and his surviving

heirs were entitled thereto under the statutory rules of succession. In re Estate of Dunn, 120 Cal.App.2d 294, 260 P.2d 964. Therefore, the trial court properly decreed that the two-thirds of the estate as to which an intestacy occurred vested in equal shares in the estates of A. Conklin and Mrs. Haryman. Prob.Code, § 225.

The judgment is affirmed.

PEEK and SCHOTTKY, JJ., concur.



139 Cal.App.2d 534

Elmer YOUNG, Plaintiff and Respondent,
v.

JOHN HAAR PICKLE CO., Lady's Choice Foods, George H. Goodale, sued herein as G. H. Gardner, Defendants and Appellants.
Civ. 8782.

District Court of Appeal, Third District,
California.

Feb. 28, 1956.

Rehearing Denied March 29, 1956.

Action against corporate defendants and agent of one of the corporate defendants for damages for breach of contract to buy cucumbers. Defendants moved for change of venue. The Superior Court, Napa County, Harlow V. Greenwood, J., denied motion, and defendants appealed. The District Court of Appeal, Schottky, J., held that venue was properly laid in county in which contract was entered into and in which obligation was to be performed.

Order affirmed.

1. Venue ⇐70

In action for breach of contract to buy cucumbers wherein defendants moved for change of venue, evidence supported implied findings that contract had been made in venue county and that it was to be performed in venue county. West's

Ann.Code Civ.Proc. § 395; West's Ann.Const. art. 12, § 16.

2. Venue ⇐72

Where buyer's agent, who was made party defendant in action for breach of contract, had negotiated contract, and complaint alleged that contract was entered into by all defendants, question of agent's individual liability could not be determined on motion for change of venue.

3. Venue ⇐7

Venue of action against corporate defendants and individual agent of one of the corporate defendants for damages for breach of contract was properly laid in county in which contract was entered into and in which obligation was to be performed. West's Ann.Code Civ.Proc. § 395; West's Ann.Const. art. 12, § 16.

Harry J. Miller, Beverly Hills, for appellants.

Palmer & York, St. Helena, for respondent.

SCHOTTKY, Justice.

This is an appeal from an order denying a motion for change of venue.

Respondent commenced an action in Napa County against defendants to recover damages for failure to accept cucumbers sold by plaintiff under a written contract which provides that respondent is the seller and John Haar Pickle Company is the buyer, by G. H. Goodale, agent. The complaint includes Lady's Choice Foods as a defendant, alleging that the written contract was entered into between respondent and all of said defendants. All of the defendants joined in a motion for a change of venue from Napa County to Los Angeles County, the principal place of business of Lady's Choice Foods, or, in the alternative, to Alameda County where John Haar Pickle Company has its principal place of business and defendant Goodale is a resident. The motion was made upon the ground that none of the defendants were residents of Napa County and that defendants did not contract to perform any

obligation in Napa County but that any contract by any defendant was to perform obligations in Alameda County. Defendants' motion was supported by affidavits and respondent filed a counter affidavit alleging that the contract was entered into and signed at the farm of respondent in the town of Oakville in Napa County.

The contract states that the cucumbers shall be delivered to the pickup point at Rutherford in Napa County and that the buyer will make weekly payments for cucumbers delivered.

[1,2] The court in denying the motion for change of venue made the implied findings that the contract was made in Napa County and that it was to be performed in Napa County. There is ample support for such findings. Appellants assert that the complaint does not state a cause of action against Goodale because he only purported to sign as an agent. However, Goodale did negotiate the contract and the complaint alleges that the contract was entered into by all defendants, and it can hardly be determined upon a motion for change of venue whether he has some individual liability.

[3] Under section 395 of the Code of Civil Procedure the action was properly commenced in Napa County as to the individual defendant Goodale inasmuch as Napa County is the county "in which the contract in fact was entered into" in addition to being "the county where such obligation is to be performed."

The action was also properly commenced in Napa County as to the corporate defendants as section 16 of Article XII of the Constitution provides that a corporation "may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises."

In view of the foregoing there is no merit in the contention of appellants that their motion for change of venue should have been granted.

The order is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

Kent J. WORTHEN and Ruth K. Worthen,
Plaintiffs and Respondents,
v.

Ralph JACKSON, Benton R. Estes, Mrs. Benton R. Estes, Chase and Clark Realtors, a co-partnership, Jack M. Chase, Clyde C. Clark, Doe One, Doe Two and Doe Three, Individually and as co-partners of Chase and Clark Realtors, William Rust, Coast Federal Savings & Loan Association, Doe Four and Doe Five, Defendants,

Benton R. Estes and Mrs. Benton R. Estes,
Appellants.
Civ. 21333.

District Court of Appeal, Second District,
Division 3, California.
Feb. 29, 1956.

Action for rescission. From a judgment of the Superior Court, Los Angeles County, Stanley Mosk, J., rescinding a contract for sale of real property on the ground of fraud, the defendants appealed. The District Court of Appeal, Vallée, J., held that defendants were responsible for the misrepresentations of their agent and that objections not raised in the trial court could not be considered on appeal.

Affirmed.

1. Principal and Agent ⇨158

Rescission of a contract may be had as against even an innocent principal because of unauthorized misrepresentations by his agent.

2. Principal and Agent ⇨158 Trusts ⇨95

An innocent contracting principal will not be permitted to enrich himself by reason of his agent's fraud, and any property received by the principal is held by him as a constructive trustee for the person defrauded.

3. Appeal and Error ⇨173(12)

Where objection that notice of rescission had not been given was not raised in the trial court, it would not be considered on review.

4. Contracts ⇨271

Notice to rescind need not be formal and explicit; it is sufficient if notice clearly shows intention of person rescinding to consider the contract at an end.

5. Appeal and Error ⇨173(10)

Laches cannot initially be asserted on review, but must be presented in some manner in trial court in order that plaintiff may have opportunity to meet it.

6. Cancellation of Instruments ⇨53

In action to rescind for false and fraudulent representations, there was no inconsistency between finding that defendants made false representations and finding that misrepresentations were not maliciously made.

7. Cancellation of Instruments ⇨53**Principal and Agent** ⇨195

In action to rescind for fraudulent representations, trial court's finding of agency of real estate salesman, his making of fraudulent representations, falsity of the representations, intention to induce plaintiffs to enter into the contract, reliance of them on the false representations, damage, timely notice of rescission and offer to restore, sustained judgment for plaintiffs.

Tudor Gairdner, Los Angeles, for appellants.

Fred G. Kennedy, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by defendants from a judgment rescinding a contract of sale of real property on the ground of fraud. The property was improved with a one-family residence.

The elements of fraud were proven and found. The misrepresentations were that the property was not filled earth. Contrary to defendants' contention, it was determined the property was filled earth. A soil engineer testified the earth was filled; the fill varied in depth from about 4 feet to about 12 feet and at some spots it was zero; the house was built on filled ground, except a small part which was on natural

ground. The court found the property was filled earth and not suitable to provide a solid foundation for the building thereon.

[1,2] The misrepresentations were made by defendants' agent, a real estate salesman. It is argued that defendants are not responsible for the representations of their agent. Rescission of a contract may be had as against even an innocent principal because of unauthorized misrepresentations by his agent. *Simmons v. California Institute of Technology*, 34 Cal.2d 264, 273, 209 P.2d 581. An innocent principal so contracting will not be permitted to enrich himself by reason of his agent's fraud, and any property received by the principal is held by him as a constructive trustee for the person defrauded. *Greenberg v. Du Bain Realty Corp.*, 2 Cal.2d 628, 629, 42 P.2d 628; *Weiner v. Roof*, 10 Cal.2d 450, 452, 74 P.2d 736. Defendants are responsible for the misrepresentations of their agent. Furthermore, there was evidence from which the court could infer that defendants knew the house was built on filled earth and that they intentionally concealed the fact from plaintiffs.

[3,4] The complaint alleged plaintiffs notified defendants of their intention to rescind and offered to tender back the property. In their answer defendants admitted the allegation, that is, they admitted they received a notice of intention to rescind and an offer to restore. Defendants claim rescission was not accomplished because plaintiffs merely alleged they gave notice of their intention to rescind and did not allege they gave notice that they actually rescinded. The point is made for the first time on appeal. Plaintiff Kent J. Worthen testified he directed his attorney to send a notice of rescission to defendants and that to his own knowledge this notice was sent. This testimony was not contradicted. An objection that notice of rescission was not given will not be considered on review if not raised below. *Cherry v. Hayden*, 100 Cal.App.2d 416, 420, 223 P.2d 878. Furthermore, it is not necessary that the notice to rescind be formal and explicit; it is sufficient that notice be given which clearly shows the intention of the person rescind-

ing to consider the contract at an end. *McNeese v. McNeese*, 190 Cal. 402, 405, 213 P. 36. Such was the case here.

[5] It is argued for the first time on appeal that plaintiffs were guilty of laches. There is nothing on the face of the complaint to indicate laches. Defendants did not plead any facts giving rise to laches. Laches cannot initially be asserted on review, but must be presented in some manner in the trial court in order that the plaintiff may have the opportunity to meet it. *Reed v. Norman*, 41 Cal.2d 17, 21-22, 256 P.2d 930; 18 Cal.Jur.2d 226, § 52.

[6] Finally, defendants claim the findings are irreconcilably inconsistent. We find no such inconsistency. Defendants first say paragraphs I and II of the findings are inconsistent with paragraph IV thereof. Paragraph I of the findings finds that all the allegations of the first count of the complaint are true except paragraphs VI and XV. Paragraph II of the findings finds that defendants' agent made the false representations for the purpose of deceiving plaintiffs and to induce them to purchase, and that they were known or should have been known to the agent to be false. Paragraph IV of the findings finds that the allegations of paragraph XV of the first count are untrue. Paragraph II of the complaint alleges the making of the false representations by defendants' agent. Paragraph XV of the complaint alleges that defendants acted maliciously and were guilty of a wanton disregard for the rights and feelings of plaintiffs in that they purposely and intentionally misrepresented the condition of the property to plaintiffs and knew that by their wilful, false representations plaintiffs would be damaged, and by reason thereof demanded exemplary damages of \$5,000. In finding that all the allegations of the first count are true except paragraphs VI and XV, the court found the allegations of the elements of fraud are true. When the court found defendants did not act maliciously and did not maliciously misrepresent the condition of the property, it did not find that defendants did not make the false representations. The court merely found there was no malice;

therefore, no exemplary damages. It is not inconsistent to find defendants made false representations and at the same time to find they did not make the representations maliciously.

Defendants say next that paragraph V of the findings conflicts with paragraph VI. Paragraph V finds that defendants' agent made the false representations but that it was not true as alleged in paragraph II of the second count that prior to completion of the sale defendants learned the true facts concerning each of the represented matters and wilfully, maliciously and fraudulently and for the purpose of deceiving plaintiffs and to prevent their cancelling or rescinding the purchase, failed to advise plaintiffs of the true facts about the represented matters. Paragraph VI finds as true that plaintiffs were induced to enter into the agreement of purchase as a result of the false representations. There is no inconsistency here. The court found that defendants' agent made the false representations to plaintiffs and thereby induced them to enter into the contract. The phrase that defendants did not act "wilfully, maliciously and fraudulently," refers to their failing to advise plaintiffs of the true facts allegedly learned by defendants after June 25, 1953—that is, after plaintiffs were induced to enter into the contract, it was not true that defendants "wilfully, maliciously and fraudulently" concealed the true facts.

Defendants contend that certain of the findings respecting allegations in the fourth count of the complaint are inconsistent. The fourth count is against defendant Jackson who built the residence on the property. It alleges he knew the property was fill and negligently constructed the house. The court found these allegations were not true. However, judgment was against defendants Estes only on the first and third counts for rescission. Judgment was for all defendants on all other counts. It is immaterial to the judgment of rescission that plaintiffs failed to prove a case against Jackson.

[7] The court found as to all material issues necessary for a judgment of rescission based on fraud: agency of the real estate salesman, the making of fraudulent

representations, the falsity of the representations, the intention to induce plaintiffs to enter into the contract, reliance by them on the false representations, damage, timely notice of rescission and offer to restore. The evidence supports the findings and the findings support the judgment.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.



PACIFIC SOUTHWEST DEVELOPMENT CORPORATION, a corporation, Plaintiff and Appellant,
v.

WESTERN PACIFIC RAILROAD COMPANY, a corporation, Defendant and Respondent.*
Civ. 20894.

District Court of Appeal, Second District,
Division 1, California.
Feb. 27, 1956.

Hearing Granted April 25, 1956.

Action to recover compensation for services rendered in connection with defendant's procuring of an option to purchase certain real property. From a determination of the Superior Court of Los Angeles County, Clarence M. Hanson, J., adverse to plaintiff, plaintiff appealed. The District Court of Appeal, Fournier, J., held that a contract employing a broker to obtain option to purchase real property does not fall within statute of frauds.

Reversed and remanded.

1. Vendor and Purchaser ⇨57

"Option" to purchase real property is a contract containing an irrevocable and continuing offer to sell at specified price within specified time, and it conveys no interest in land to optionee but vests in him only a right in personam to buy at his

* Opinion vacated 301 P.2d 825.

election; and hence an option contract relating to sale of land is not a sale of property but of a right to purchase.

See publication Words and Phrases, for other judicial constructions and definitions of "Option".

2. Brokers ⇨43(2)

A contract employing a broker to obtain option to purchase real property does not fall within statutory provisions requiring agreements authorizing broker to purchase or sell real estate to be in writing. West's Ann.Civ.Code, § 1624, subd. 5; West's Ann. Code Civ.Proc. § 1973, subd. 5.

Gregory M. Creutz, Los Angeles, for appellant.

Smith, Van Dyke & Hildreth, Los Angeles, for respondent.

FOURTH, Justice.

This is an action in which plaintiff seeks to recover compensation for services rendered in connection with defendant's procuring an option to purchase certain real property. Defendant objected to the introduction of any evidence upon the ground that the agreement sued upon was within the statute of frauds. Plaintiff thereupon made an offer of proof and it was stipulated that the documents pleaded in the amended complaint were deemed to have been offered in evidence, that an objection was made thereto and that the court sustained the objection.

Plaintiff further offered to prove, subject to the same objections, that the negotiations for the purchase of the property in question had from the beginning been conducted by one Cliff A. Nelson, who was then an employee of the Fortune Realty Company in San Jose, California; that Mr. Nelson became an employee of plaintiff on August 15, 1950, at which time these negotiations were still pending; that certain offers were made in connection with the purchase of said property prior to August 15, 1950; that Mr. Nelson, subsequent to his employ by plaintiff, continued to correspond with F. B. Stratton, representing the defendant and that Mr. Stratton met with Gregory M. Creutz, president of plain-

tiff at the Biltmore Hotel on or about September 6, 1950, at which time Mr. Creutz examined a proposed option agreement and subsequently redrafted the option and mailed it to Mr. Stratton; thereafter Mr. Nelson and Mr. Creutz went to San Francisco and met with Mr. Stratton and a few days later Mr. Creutz and Mr. Nelson conferred with Mr. Lenfest, the owner of the property, and his attorney at San Jose concerning the option agreement; at that time Mr. Lenfest objected to the price of \$2,500 per acre contained in the option agreement and subsequently, on or about October 3, 1950, through his attorney declined the offer; the option agreement for the purchase of the property was obtained by Mr. Stratton on December 15, 1950, for the price of \$2,750 an acre.

The court rendered judgment in favor of the defendant, from which plaintiff appeals.

[1,2] The only questions for determination are: (1) Whether an agreement employing a broker to obtain an option to purchase real property falls within the provisions of Subdivision 5, Section 1624 of the Civil Code and Subdivision 5, Section 1973 of the Code of Civil Procedure, and (2) if such an agreement does fall within the statute of frauds, whether there was a note or memorandum thereof sufficient to comply with the statute.

That part of Section 1624 of the Civil Code which is pertinent to the instant action reads as follows: "The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent: * * * 5. An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission; * * *." The same provision is contained in Section 1973, subdivision 5, of the Code of Civil Procedure.

An option to purchase real property is a contract containing an irrevocable and continuing offer to sell at a specified price within a specified time. It conveys no interest in land to the optionee, but vests in him only a right in personam to buy at his

election. Hence, an option contract relating to the sale of land is not a sale of property but of a right to purchase. *Hicks v. Christeson*, 174 Cal. 712, 716, 164 P. 395; *Warner Bros. Pictures v. Brodel*, 31 Cal.2d 766, 772, 192 P.2d 949, 3 A.L.R.2d 691; *Seeburg v. El Royale Corp.*, 54 Cal.App.2d 1, 4, 128 P.2d 362; *Kritt v. Athens Hills Development Co.*, 109 Cal.App.2d 642, 646, 241 P.2d 606. It follows that an option contract not being a contract for the purchase or sale of real estate, a contract employing a broker to obtain the option does not fall within the provisions of Section 1624, subdivision 5, of the Civil Code, or Section 1973, subdivision 5 of the Code of Civil Procedure.

In view of our conclusion that the alleged agreement does not fall within the statute of frauds, it is unnecessary for us to consider whether there was a sufficient memorandum thereof in writing.

The judgment is reversed and the cause remanded for trial on the merits.

WHITE, P. J., and DORAN, J., concur.



139 Cal.App.2d 500

PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Donald R. PARKINSON, Defendant and
Appellant.
Cr. 5589.

District Court of Appeal, Second District,
Division 1, California.

Feb. 27, 1956.

Proceeding on motion and supporting affidavit for augmentation of record on appeal. The District Court of Appeal held that where the motion contained several offers of proof which defendant desired to make on appeal but none of them were

presented to the trial court, they could not be considered on appeal.

Motion denied.

1. Criminal Law §1110(1)

Where examination of reporter's transcript revealed that any reference to defendant's prior convictions were made outside presence of jury, and defendant failed to indicate what reference to defendant as an ex-criminal and ex-convict was made by counsel in arguments to jury, a transcript of the arguments of counsel would not be ordered transmitted to reviewing court.

2. Criminal Law §1110(1)

Where instructions contained and filed in original file of trial court did not contain alleged improper instruction on doubt, but on contrary proper instructions were issued on reasonable doubt, trial court's instructions to jury would not be ordered transmitted to reviewing court.

3. Criminal Law §1110(1)

Defendant's request for complete transcript of all motions together with trial court's holdings thereon would be denied when examination of reporter's transcript in defendant's possession contained all motions made and rulings thereon and defendant failed to point out any motion not contained in the transcript which he claimed was made.

4. Criminal Law §1110(1)

Where transcript of preliminary examination was furnished to defendant at time of his arraignment in superior court, and such transcript was not before trial court, such transcript would not be added to record on appeal.

5. Criminal Law §1110(1)

Defendant's request that there be added to the record on appeal all evidence, letters, papers, books, and tapes which were suppressed and seized by counsel for prosecution would be denied where examination of the record revealed that no such charge was made at trial and defendant mentioned no specific documents or papers that were suppressed, and record showed that tape, instead of being suppressed, was played before jury at defendant's request.

6. Criminal Law §1128(4)

Where appellant's motion contained several offers of proof that he desired to make on appeal, but none of the offers of proof were presented to trial court, they could not be considered on appeal.

Donald R. Parkinson, in pro. per.

Edmund G. Brown, Atty. Gen., for respondent.

PER CURIAM.

Appellant has filed a motion and supporting affidavit for augmentation of the record on appeal, by adding thereto:

"(1) Opening statement of counsel for the prosecution;

"(2) Closing statements of counsel for the prosecution;

"(3) Closing statements of counsel for the defendant;

"(4) Trial court's instructions to the jury;

"(5) Complete transcript of all motions, together with the trial court's rulings thereon, made in open court, or in chambers, at any time prior to, and during trial;

"(6) Appellant further moves that a copy of the transcript of preliminary hearing previously held in Municipal Court be made a part of the record on appeal herein;

"(7) That all evidence—letters—papers—books—tapes—which were seized and suppressed by the counsel for the prosecution—be ordered by this court to be made a part of this action in appeal."

[1] In support of his request for a transcription of the arguments to the jury by counsel for the People and his own attorney, appellant states that he expects to prove thereby that references were therein made to the fact that he had "previously been convicted of a crime and was therefore an ex-criminal and ex-convict, without, however, specifying the nature of said person's offense or eliciting any of the details thereof." However, an examination of the reporter's transcript reveals that throughout the trial, any reference to appellant's prior convictions were made out-

side the presence of the jury, and in the absence of any showing by appellant as to what reference was made thereto by counsel in their respective arguments to the jury, we are not disposed, under the state of the record herein, to order a transcript of the arguments of counsel for the People and appellant transmitted to this court.

[2] In support of his request for the instructions given to the jury, appellant states that he expects to show thereby that the jury was instructed "that in the event of any doubt as to the guilt or innocence of the defendant, such doubt should be resolved in favor of the People and against the defendant, and a finding of guilty as charged should thereupon be returned by said jury." We have examined the instructions contained and filed in the original file of the Superior Court and find therein no such instruction. On the contrary, the court specifically instructed the jury that "a defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal." The court then correctly advised the jury as to the definition of reasonable doubt.

[3] As to appellant's request for "a complete transcript of all motions, together with the trial court's rulings thereon", he is now in possession of a reporter's and clerk's transcript. We have examined the reporter's transcript and find therein contained all motions made and rulings thereon. Appellant has failed to point out any motion not contained in said transcript, which he now claims was made.

[4] Concerning appellant's request that a copy of the transcript of the preliminary examination be added to the record on appeal, it need only be said that such transcript was not before the trial court, and furthermore, appellant was furnished with a copy thereof at the time of his arraignment in the Superior Court.

[5] As to appellant's final request, "that all evidence—letters—papers—books—'tapes'—which were seized and suppressed by the counsel for the prosecution—be ordered by this court to be made a part of

this action in appeal", we have examined the record and find that no such charge was made at the trial, and appellant in his present motion mentions no specific documents or papers that were suppressed. Insofar as the "tapes" are concerned, the record reflects that such recordings, instead of being suppressed, were played before the jury at appellant's own request.

[6] Appellant's motion contains several "offers of proof", which he desires to make in this court on his appeal, but none of them were presented to the trial court and therefore cannot be considered on appeal.

The motion to augment the record on appeal is denied.



139 Cal.App.2d 527

O. K. KENDALL, Plaintiff and Respondent,
v.

J. F. SHARP, J. F. Sharp Lumber Company,
and Rupert Sharp, Defendants and
Appellants.
Civ. 8711.

District Court of Appeal, Third District,
California.

Feb. 28, 1956.

Action for damages for depreciation of value of plaintiff's property as the result of contamination of air and stream due to drainage from defendants' mill pond into stream. The Superior Court, Siskiyou County, Claude E. Gillis, J., rendered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Schottky, J., held that evidence sustained finding that contamination had resulted from the drainage.

Judgment affirmed.

Waters and Water Courses ¶49

In action by riparian owner for damages on account of depreciation of value of

land caused by contamination resulting from drainage from defendant's mill pond into stream, evidence sustained finding that contamination had resulted from the drainage.

Barr & Hammond, Yreka, for appellants.

Tebbe & Correia, Yreka, for respondent.

SCHOTTKY, Justice.

Defendants have appealed from a judgment awarding plaintiff damages sustained as a result of the depreciation in the value of his land caused by the contamination of the air and of the water in his well due to the maintenance of a contaminated mill pond by defendants and for expenses incurred in constructing a new well.

It appears from the record that the property involved was purchased by the respondent in August, 1947, and included a house built in 1929. The property is located west of U. S. Highway 99 and for the most part south of the small creek known as Greenhorn Creek. The creek is usually dry during the summer but begins to flow after the first heavy winter rains and continues to flow until it dries up in the late spring. A part of the property is riparian to this creek. The water supply for domestic purposes was furnished from a well located upon respondent's premises at a point between the residence and Greenhorn Creek. The bottom of the creek was estimated to be approximately six or seven feet below the top or ground surface of the well, and the well was at least 20 feet deep.

From the time respondent purchased the property until the time he left when he rented to Glenn and Sarah Whipple in 1950, the water used in the house and upon the premises contained no offensive odors and did not have any discoloration. At the time of respondent's purchase, appellants owned and maintained a mill pond located to the north of respondent's premises, and for several years prior to 1949 permitted waters to drain in an easterly direction across their premises to the highway and not into Greenhorn Creek. In the spring of 1949 appellants installed a pipe from the mill

pond to Greenhorn Creek and caused surplus waters therefrom to drain into the creek at a point above and upstream from the well of respondent. After the first fall rain of 1950 the waters in the well became noticeably discolored and were so offensive in taste and smell that the occupants could not and did not use the same for household purposes. The smell of the water in the house and the air outside the house was very similar to the smell of the water in the pond, which depreciated the value of the property and necessitated the construction of a new well and installation of a new pump.

The court found that the maintenance of the contaminated mill pond by the appellants and the diversion of waters therefrom into the creek had percolated, permeated and seeped into the well of the respondent, greatly contaminating it in addition to the air surrounding respondent's premises. The court also found that at the time the residence was built upon the respondent's land there were few, if any, industrial businesses located in the vicinity, and that at the present time the respondent's property was still suitable for residential purposes because industrial activity does not predominate in the neighborhood.

Appellants' contentions are: "That after considering all the evidence most favorable toward respondent, it is still shown that it is a physical impossibility for the water to have gotten from the mill pond into the well, and that the uses made by respondent were the normal uses that would have been made in an industrial area."

Both of these contentions are so lacking in merit as to cause this appeal to border on the frivolous. The evidence not only supports the judgment of the court but clearly preponderates in favor of respondent. Issues of fact are determined in the trial court and it is difficult to understand how anyone can seriously contend that there is not ample evidence to support the judgment. It is clear that the water in respondent's well was uncontaminated until appellants began to drain water from their mill pond into Greenhorn Creek. Even if this

were an industrial area, which the evidence shows it was not, appellants would not have any right to drain the water from their mill pond into Greenhorn Creek without being held responsible for the damage done to plaintiff by such action.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



139 Cal.App.2d 623

David T. KINGSTON and Virginia Kingston, his wife, Plaintiffs and Appellants,
v.

Harold E. COLBURN and Marie T. Colburn, his wife, Defendants and Respondents.
Civ. 8791.

District Court of Appeal, Third District,
California.
Feb. 29, 1956.

Action by landlords to recover rent alleged to be due by tenants under a written lease for a term of five years. The Superior Court, Amador County, Ralph McGee, J., entered judgment for tenants and landlords appealed. The District Court of Appeal, Peek, J., held that where a writing purporting to be a lease was entirely devoid of any description of the realty involved, parol evidence could not be introduced to supply the missing description, and the purported lease was void under the statute of frauds.

Judgment reversed and remanded.

1. Frauds, Statute of §110(1)

To satisfy the statute of frauds, a writing affecting realty must so describe the realty that it can be identified with reasonable certainty.

2. Frauds, Statute of §110(1)

A description of realty fulfills requirement of the statute of frauds that such realty be identified with reasonable certainty if it furnishes the means or key by which the description may be made certain.

3. Evidence §460(7)

Where a writing is devoid of even a means or key by which a description of realty may be made certain, parol evidence may not be used to supply the necessary description and then apply the descriptions supplied by parol evidence to a particular portion of the earth's surface.

4. Frauds, Statute of §110(1), 158(3)

Where a writing purporting to be a lease was entirely devoid of any description of the realty involved, parol evidence could not be introduced to supply the missing description, and the purported lease was void under the statute of frauds.

5. Reformation of Instruments §36(2)

Where landlords' complaint for recovery of rent alleged to be due by tenants under a written lease for a term of five years contained no supplementary allegations in aid of a lack of any description of the realty involved, the complaint furnished the court with no basis for ruling on admissibility of evidence offered to identify property, and court's refusal to reform lease upon ground of mutual mistake was proper.

6. Frauds, Statute of §144

Where there was no showing by landlords of any changed position on their part because of reliance upon the acts of tenants, tenants who went into possession of realty under a purported lease and paid rent during their possession were not estopped to set up the defense of the statute of frauds to action for rent under purported lease under which they took possession.

7. Frauds, Statute of §144

Before tenants could be estopped to rely upon the statute of frauds it must appear that landlords had been placed in such a

changed position that to allow tenants to assert the statutory defense would be to work an unjust and unconscionable loss upon landlords.

8. Frauds, Statute of $\S$ 123(3)

One who enters into possession of premises under a lease which is void or defective under the statute of frauds, and pays rent under the contract for a time, becomes a tenant from month to month.

9. Landlord and Tenant $\S$ 116(5)

Where tenants entered into possession of premises under a lease which was void under the statute of frauds and paid rent under the contract for a time, they were tenants from month to month and therefore could terminate their tenancy by giving at least 30 days' written notice thereof at any time. West's Ann.Civ.Code, $\S$ 1946.

10. Landlord and Tenant $\S$ 116(5), 195(1)

Where tenants were in possession of premises on the basis of a month to month tenancy, notice by tenants on January 11 of their termination of the tenancy on January 10 was insufficient and not in compliance with statute requiring giving of at least 30 days' written notice, and therefore tenants who vacated the premises on January 10 and gave notice on January 11 were liable to landlord for rent due for period up to February 10. West's Ann.Civ.Code, $\S$ 1946.

Pierce Deasy, Jackson, for appellants.

Angelo J. DePaoli, Jackson, for respondents.

PEEK, Justice.

Plaintiffs sought to recover rent alleged to be due under a written lease for a term of five years at a monthly rental of \$125. Defendants' answer denied the existence of a lease and affirmatively pleaded the statute of frauds. At the conclusion of the trial, judgment was entered in favor of defendants, and plaintiffs appeal.

From the record before us it appears that the lease which was introduced in evidence by plaintiffs was entirely devoid of

any description of the real property; that plaintiffs sought to introduce parol evidence to supply the missing description; and that defendants objected thereto on the ground that it violated the parol evidence rule and was in conflict with the statute of frauds, which objection was sustained. No attempt was made by plaintiffs to seek reformation of the agreement.

[1-4] It is plaintiffs' first contention that the court erred in refusing to admit parol evidence to supply the missing description. It has long been the rule that to satisfy the statute of frauds, the writing "must so describe the land that it can be identified with reasonable certainty." Also the description fulfills the test if "it furnishes the 'means or key' by which the description may be made certain * * *." *Beverage v. Canton Placer Mining Co.*, 43 Cal.2d 769, 774, 278 P.2d 694, 698. But where, as here, the writing is devoid of even "the means or key," parol evidence may not be used to "supply the necessary description and then apply the description supplied by parol evidence to a particular portion of the earth's surface." *Gordon v. Perkins*, 108 Cal.App. 336, 342, 291 P. 644, 646.

[5] Plaintiffs' second contention is essentially that even in the absence of appropriate pleadings to that effect, the court should have reformed the lease upon the ground of mutual mistake. The question so raised also finds answer in the *Beverage* case where the court held that, "Since the complaint contained no supplementary allegations in aid of the defective description, it furnished the court with no basis for ruling on the admissibility of evidence offered to identify the property the parties had in mind." 43 Cal.2d 769, 775, 278 P.2d 698.

[6,7] The final contention of plaintiffs is that since defendants went into possession and paid rent during their possession, they were estopped to set up the defense of the statute of frauds. It is the rule that before defendants could be estopped to rely upon the said statute, it must appear

PEOPLE of the State of California,
Plaintiff and Respondent,
v.

Samuel C. D. STONOM, Jr., Defendant and
Appellant.
Cr. 1053.

District Court of Appeal, Fourth District,
California.

Feb. 23, 1956.

that plaintiffs had been placed in such a changed position that to allow defendants to assert the statutory defense would be to work an unjust and unconscionable loss upon plaintiffs. *Mason v. Home Ins. Co.*, 10 Cal.App.2d 696, 698, 52 P.2d 491. Here there is no showing whatsoever of any changed position on the part of plaintiffs because of reliance upon the acts of defendants.

[8-10] It must be noted, however, that the court in finding number 5 found that on January 10, 1954, the defendants vacated the land and notified the plaintiffs that they were leaving. The undisputed evidence in this regard is shown by the letter dated January 11 addressed to the plaintiff David Kingston and signed by the defendant Harold Colburn, wherein the plaintiffs were informed that defendants had moved from the property as of January 9. Since one who enters into possession of premises under a lease which is void or defective under the statute of frauds, such as in this case where the entry was under a lease for a term of years at a monthly rental, and pays rent under the contract for a time, he thereby becomes a tenant from month to month. *Psihozios v. Humberg*, 80 Cal.App.2d 215, 220, 181 P.2d 699. As a tenant from month to month under the provisions of section 1946 of the Civil Code, defendants could terminate their tenancy "by giving at least 30 days' written notice thereof at any time and the rent shall be due and payable to and including the date of termination." Necessarily therefore the notice of January 11 was insufficient and not in compliance with the statute so as to terminate the tenancy on January 10, but that is not to say it would not have been effective as of February 10.

The judgment is reversed and the cause is remanded to the trial court with instructions to enter judgment in favor of plaintiffs in the sum of \$125. Both parties are to bear their own costs.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

Defendant was convicted of murder. The Superior Court, San Diego County, John A. Hewicker, J., denied defendant's motions to set aside judgment and for appointment of counsel, and defendant appealed. The District Court of Appeal, Barnard, P. J., held that motion to set aside final judgment of conviction on ground that defendant had been induced and persuaded to change his plea was insufficient for failure to specify nature of the persuasion or connection between persons named and officials authorized to act in connection with the action, and failure to show lack of knowledge at time of judgment, or due diligence in attempting to obtain the knowledge.

Purported appeals dismissed; order denying motion affirmed.

1. Criminal Law Ⓒ998

Matters which would have been reviewable on appeal were not proper ground for motion to set aside judgment of conviction.

2. Criminal Law Ⓒ998

Motion to set aside final judgment of conviction on ground that defendant had been induced and persuaded to change his plea was insufficient for failure to specify nature of the persuasion or connection between persons named and officials authorized to act in connection with the action, and failure to show lack of knowledge at time of judgment, or due diligence in attempting to obtain the knowledge.

3. Criminal Law Ⓒ997(6, 12)

Availability of a writ of error coram nobis depends upon the facts relied upon for

relief being unknown to petitioner at time of trial and petitioner's exercise of due diligence after discovering facts, and a showing of time and circumstances under which facts were discovered, in order that due diligence may appear.

4. Criminal Law §998

Where defendant's motion to set aside judgment, submitted in propria persona, did not disclose any matters which would require trial judge to conduct a hearing, and did not disclose that defendant was without funds or unable to employ counsel, trial judge was not required to have counsel appointed. West's Ann.Pen.Code, § 987.

J. Robert O'Connor, Jr., San Diego, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with the murder of his wife. Counsel was appointed by the court and he entered a plea of not guilty. On the second day of the trial, with the permission of the court, he withdrew his plea of not guilty and pleaded guilty. A hearing was then held for the purpose of enabling the court to fix the degree of murder, at which exhibits were introduced and a number of witnesses examined, including the defendant and another witness on his behalf. The court fixed the degree at first degree murder. A motion for a new trial was denied and the defendant was sentenced to life imprisonment, the judgment being entered on February 16, 1955. No appeal was taken from the judgment.

The defendant filed, in propria persona, a verified motion to set aside the judgment. While this is dated August 28, 1955, it was filed on September 28, 1955. It was accompanied by a motion for the appointment of counsel. On September 28, 1955, the court entered an order denying the motion to set aside the judgment, and denying the motion for appointment of counsel.

On October 5, 1955, the defendant, in propria persona, gave notice of appeal from the final judgment of conviction entered in the action, from the order denying his motion for a new trial, and from the order denying his motion to set aside the judgment. The defendant filed an opening brief and thereafter requested this court to appoint counsel to represent him on this appeal. This court appointed the same attorney who had represented him at the original trial, and this attorney then filed another brief.

The motion to set aside the judgment sets forth a large number of grounds upon which it is based, including the insufficiency of the evidence, errors in connection with the admission of evidence, and prejudice on the part of the trial judge. Among the grounds stated was the following: "The defendant was influenced to change his plea of not guilty to guilty through fear of the death penalty by Coroner J. C. Canale. Defendant was further persuaded to change his plea by Officer Creason as to his belief."

[1] It clearly appears that most of the grounds alleged as a basis for the motion are without merit, being matters which would have been reviewable on an appeal. People v. Adamson, 34 Cal.2d 320, 210 P.2d 13. The appellant now contends, however, that the allegation in his motion to set aside the judgment that he was influenced to change his plea by Coroner J. C. Canale, and further persuaded by Officer Creason, was a sufficient allegation under the rules governing an application for a writ of error coram nobis; that if the court had originally been informed of the facts in that connection it would not have permitted him to withdraw his plea of not guilty and enter a plea of guilty; that the court erred in failing to grant his request for the appointment of counsel to represent him in that stage of the proceedings; that the defendant was then confined in the state prison where he could not properly prepare and present this motion; and that had he been afforded appointment of counsel to assist him in presenting that matter the writ should have been granted.

[2, 3] While the motion to set aside the judgment was verified, the allegation here in question was not only a pure conclusion but it set forth no statement of fact with sufficient clarity or definiteness to have enabled the parties named to properly answer or deny the same had they been called upon to do so. The motion was not properly supported by any allegations made therein. *People v. Campos*, 3 Cal.2d 15, 43 P.2d 274. What was said by the persons named which caused the defendant to be influenced or persuaded is in no way stated or even indicated. Moreover, nothing is stated to indicate any connection between the persons named and the officials authorized to act in connection with the action. So far as the record shows, the situation is the same as though some indefinite statements had been made to the defendant by outsiders who had no connection with the prosecution of the case. *People v. Martinez*, 88 Cal.App. 2d 767, 199 P.2d 375; *People v. Gilbert*, 25 Cal.2d 422, 154 P.2d 657. In addition, it is well settled that it is essential to the availability of such a writ that the facts relied upon for relief were not known to the petitioner at the time of the trial, that he has used due diligence after discovering the facts, and that the application for the writ should also set forth the time and circumstances under which the facts were discovered, in order that the court can determine whether due diligence has been used. *People v. Shorts*, 32 Cal.2d 502, 197 P.2d 330. No showing as to lack of knowledge at the time of judgment, or as to the matter of diligence, was here made and no explanation of the delay was offered.

[4] So far as anything that appears in the record is concerned, the motion to set aside the judgment was not sufficient to require the trial judge to call these persons in or conduct a hearing in the ordinary sense. Under these circumstances, there was nothing before the court which would require the appointment of an attorney. It may further be observed in this connection that the request for the appointment of counsel which accompanied the motion stated as a reason therefor that the defendant was unable to protect his rights "because of his ignorance of procedures of

the law and its intricate process." There was no allegation or statement that the defendant was without funds or that he was unable to employ counsel. Pen.Code, § 987. So far as the record shows he may have been well able to do so.

In our opinion, the showing here made is not sufficient to justify a reversal of the order denying the motion to set aside the judgment. However, there is nothing to prevent the making of a proper application in that regard, if fact exist which would warrant that action.

The purported appeals from the judgment and from the order denying a new trial are dismissed. The order denying the motion to vacate the judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



139 Cal.App.2d 429

**The PEOPLE of the State of California,
Plaintiff and Respondent,**

v.

**Dave SHERMAN and Russell E. Lana,
Defendants,**

**Dave Sherman, Appellant.
Cr. 5459.**

District Court of Appeal, Second District,
Division 2, California.

Feb. 24, 1956.

Prosecution for robbery. The appealing defendant was convicted in Superior Court, Los Angeles County, Allen T. Lynch, J., and appealed. The District Court of Appeal, Fox, J., held that, although the defendant contended he was physically incapable of running out of a store as charged by prosecution witnesses, testimony that the doctor at the county jail made the arrangements whereby defendant came to court in a wheelchair was immaterial and that the report of a physician who examined de-

fendant to determine if he was able to continue trial was likewise immaterial.

Affirmed.

1. Criminal Law Ⓒ382

In robbery prosecution, wherein defendant contended he was physically incapable of running out of store as charged by prosecution witnesses, testimony that doctor at county jail had made the arrangements whereby defendant came to court in a wheelchair was immaterial.

2. Criminal Law Ⓒ382, 419(12)

In robbery prosecution, wherein defendant contended he was physically incapable of running out of store as charged by prosecution witnesses and wherein trial court ordered physical examination to determine whether defendant was physically able to continue with trial, the report of such physical examination was immaterial and hearsay and was properly excluded. West's Ann.Code Civ.Proc. § 1871.

3. Criminal Law Ⓒ595(4), 593(7)

In robbery prosecution wherein defendant contended he was physically incapable of running out of a store as charged by prosecution witnesses, and wherein there was no showing that doctor who had examined defendant to determine if he was able to continue trial had been subpoenaed, trial court did not abuse discretion in denying continuance to produce the doctor, in absence of showing that his testimony would be material and that diligence had been exercised to procure his attendance. West's Ann.Code Civ.Proc. § 1871.

Morris Lavine, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

FOX, Justice.

Defendant Sherman appeals from the judgment of conviction on two counts of armed robbery.

Count 1 involves the robbery of Melvin W. Keel, manager of Cole's Market in Long Beach, of \$12,580.00 on October 17, 1954. Sherman and his codefendant Lane* were identified by the victim and Joe Forest, the coca-cola man.

Count 2 relates to the robbery of Charles M. Bailey, manager of Market Town, in Gardena, of \$5,800 on July 28, 1954. Bailey and John Halsey, delicatessen manager of the market, identified Sherman.

Defendant took the stand and denied participation in each of these robberies. He testified he was at home resting on the dates of the robberies.

Defendant came into court in a wheelchair and wearing a mask over his mouth, such as is used by tubercular patients. In addition to his alibi defense, he also contended that, due to his physical condition, he could not exert himself and therefore could not run out of a store rapidly, as prosecution witnesses testified the robbers did.

To rebut defendant's story that he was physically unable to participate in the robberies, the People called George Longanecker, an apartment-house owner in Long Beach where defendant had resided from July 15, 1954, to the time of his arrest on November 10, 1954. This was a two-story building. Longanecker related that he wanted a television installed, and that defendant assembled the antenna on the ground, then carried it up a ladder and installed it on the roof without anyone's help. Defendant denied having climbed the ladder and insisted that a television man had installed the antenna.

Defendant bases his claim for a reversal on (1) the exclusion of certain evidence, and (2) the refusal of the trial court to grant a continuance to enable Dr. Crahan, the County Jail physician, to appear and testify in his behalf.

Defendant complains of the exclusion of two items of evidence. The first relates to the means the county jail doctor provided for him to come to court; the second is

* Lane withdrew his plea of not guilty and entered a plea of not guilty by reason of insanity. He is not involved in this

appeal. Sherman will therefore be referred to herein as the defendant.

the exclusion of Dr. Crahan's medical report on him.

[1] As previously noted, defendant appeared in court wearing a tubercular mask. He testified he was wearing it pursuant to the order of Dr. Mark of the County Jail; that prior to entering jail he was suffering from tuberculosis for which he had been treated for two and a half years in a Denver sanitarium; that while in that institution he had an operation on his lungs, during which a sponge was inserted in his right lung; and that since the operation he had been unable to run or walk rapidly.

As also previously noted, defendant came into court in a wheelchair. He was asked by his attorney: "Have you been brought over here to court in a wheelchair?" An objection was sustained. Counsel then asked him: "Did the doctor at the County Jail arrange for some means of your coming to court other than walking or running?" Objection was sustained to this question on the ground of immateriality. Counsel stated it was part of the defense that by reason of defendant's physical condition he could neither walk nor exert himself in the manner prosecution witnesses had described and therefore defendant was entitled to show he had been brought into court by means of a wheelchair which the doctor at the jail ordered and not because he himself had selected that means of getting to court. The court held this proposed evidence was immaterial. The ruling was correct for it was clearly immaterial whether the doctor at the County Jail had arranged for defendant to come to court in a wheelchair.

[2] When the case came on for trial on February 8, 1955, the court appointed Dr. Crahan, under section 1871, Code of Civil Procedure, to examine the defendant with particular reference to any chest condition, for the purpose of determining whether or not he was physically able to continue with the trial. The report did not indicate in

any way that defendant was physically unable to proceed with the trial. Near the conclusion of the trial the defendant offered this report in evidence. The trial judge examined the report and held it was immaterial because it did not indicate "that the condition therein reported was a condition existing at the time of the alleged offense, or that in anywise incapacitated or interfered with the defendant's ability to do the things and perform the acts that he is alleged to have performed at the time of the alleged robberies." The report was not only immaterial but it was also hearsay. It was therefore not an abuse of discretion to exclude it. *Decter v. Stevenson Properties, Inc.*, 39 Cal.2d 407, 420, 247 P.2d 11.

[3] At approximately the conclusion of the trial, defendant made a motion for a continuance in order to produce Dr. Crahan, who was said to be engaged in another court that day, to testify along the lines of the above-mentioned report which he had previously submitted to the court relative to the ability of defendant to go to trial. For the reasons stated above, the court ruled that such testimony would be immaterial. The court also noted there was no return showing service of a subpoena on Dr. Crahan. For these reasons the motion was denied. In the absence of a showing that the testimony that Dr. Crahan would give was material, *People v. Mellon*, 40 Cal. 648; *People v. Walton*, 97 Cal.App. 782, 276 P. 426, and that diligence had been exercised in an attempt to procure his attendance, *People v. Jocelyn*, 29 Cal. 562, there was no abuse of discretion in denying a continuance. *People v. Northcott*, 209 Cal. 639, 289 P. 634, 70 A.L.R. 806; *People v. Collins*, 195 Cal. 325, 233 P. 97; *People v. Floriano*, 100 Cal. App.2d 140, 223 P.2d 79.

The judgment is affirmed.

MOORE, P. J., and ASHBURN, J., concur.

139 Cal.App.2d 461

Leo ZWEIG and Cella Zwelg, his wife,
Plaintiffs and Appellants,

v.

FIREMAN'S FUND INDEMNITY COMPANY, a corporation, Robert E. Allen and William C. Allen, individually and as co-partners doing business as Allen Bros., Defendants and Respondents.

Robert E. ALLEN and William C. Allen, doing business as Allen Bros., Plaintiffs and Appellants,

v.

Leo ZWEIG and Cella Zwelg, his wife,
Defendants and Respondents.

Civ. 16343.

District Court of Appeal, First District,
Division 2, California,

Feb. 27, 1956.

Action by construction contractor to foreclose contractor's lien. Owners counterclaimed for damages for breach of contract. The Superior Court, San Mateo County, Gregory P. Maushart, J., rendered judgment against each party on his claim, and both parties appealed. The District Court of Appeal, Dooling, J., held that general findings of failure of substantial performance by contractors and of unjustified interference with performance by owners were fatally conflicting and did not support judgment that each party take nothing, in absence of more specific findings as to nature of alleged breaches.

Judgment reversed.

1. Trial ⇨395(2), 396(1), 398

Trial court findings should be framed with sufficient definiteness to enable appellants to point out to a reviewing court intelligibly particulars in which they are not supported by evidence, and findings should not be contradictory on material issues, and should cover all material issues raised by pleadings.

2. Contracts ⇨295(1)

Where a construction contractor is guilty of substantial failure of compliance, contractor may not recover contract price,

and owners may insist on compliance before work proceeds to a point where compliance would be impossible.

3. Contracts ⇨354

Mechanics' Liens ⇨290(5)

In construction contractors' action to foreclose contractor's lien, wherein owners sought to recover damages for breach of contract, general findings of failure of substantial performance by contractors and of unjustified interference with performance by owners were fatally conflicting and did not support judgment that each party take nothing, in absence of more specific findings as to nature of alleged breaches.

4. Contracts ⇨303(4)

That owner, for whom construction contractors were building home, personally performed certain unskilled work did not excuse or prevent performance of contract, but at most went to mitigate damages.

5. Contracts ⇨304(2)

Where owners, for whom construction contractors were building home, made it plain that they were dissatisfied with work and wanted it corrected, that owners made declaration of homestead did not constitute an acceptance of the work done.

6. Contracts ⇨303(4)

Where owners and construction contractors who were building home continued to negotiate concerning alleged breaches after owner sent a certain telegram, contractors could not later treat the telegram as a stop notice.

7. Contracts ⇨322(4)

In action by contractors to foreclose contractor's lien, wherein owners counterclaimed for damages for breach of contract, evidence was sufficient to support a finding that contractors had abandoned the contract, excusing owners from giving five day notice to complete as required by contract.

Boyd Oliver, San Francisco, for appellants.

Millington & Dell'Ergo, Redwood City, for respondents.

DOOLING, Justice.

Cross-appeals by plaintiffs-appellants Leo Zweig and Celia Zweig and by plaintiffs-appellants Robert E. Allen and William C. Allen, doing business as Allen Bros., from a judgment of the superior court entered in actions No. 57770 and No. 57201, consolidated for trial, that the parties to the said actions should take nothing.

Appellants Allen, general contractors, brought an action to foreclose a contractors claim of lien against Leo and Celia Zweig with whom they had contracted for the construction of a home. The Zweigs answered and set up a counterclaim. They then filed a complaint on a contractor's bond joining the Allens and Fireman's Fund Indemnity Company, surety on the building contract between the Allens and themselves, as defendants. These two actions were consolidated for trial.

The building contract out of which these actions arose was entered into on October 6, 1950, between Leo Zweig and Celia Zweig, his wife, as owners, and Robert E. Allen and William C. Allen, copartners doing business as Allen Bros., as contractors and builders. The Allens were to construct a home for the Zweigs on a lot owned by the latter in San Mateo. The labor and materials were to be supplied by the contractors (Allens) and the work was to be completed within seventy-five working days after October 23, 1950, the day set for work to begin. The contract price was \$15,475 to be paid in installments as the work progressed.

On October 9, 1950, a completion bond conditioned on the performance of the contract in accord with the plans and specifications was entered into by Fireman's Fund Indemnity Company and the Allen Bros. and delivered to the Zweigs.

The Allens commenced construction of the house about October 23, 1950, as was agreed in the contract. Mr. Zweig apparently began to notice certain deviations from the plans and specifications and certain imperfections in the material being used by the contractors rather early in the building process. He testified that he made known to Robert Allen, one of the contrac-

tors, his objections to the way the work was being done. He stated that he made these objections both orally and in writing to the contractors as he became aware of the imperfections and deviations, as it was his understanding of the contract that it would be necessary for him to call such matters to the Allens' attention before the work progressed beyond the phase of construction involving the particular objections. As work on the house progressed Zweig's objections to the performance of the contractors multiplied. A series of letters and other communications relative to these complaints were exchanged between the parties. An arbitration of these differences as provided in the contract was attempted by the parties but proved ineffectual. Work on the house by the Allens ceased about the end of January, 1951, or the middle of February, 1951. By this time three progress payments had been made by the owners to the contractors in an amount of \$9,285. The house was later completed by another contractor, William C. Smith, in February of 1952.

The Zweigs, owners, sought to recover in their action \$2,819 which they alleged was the cost to them of completion of the house in excess of the original contract price plus "special damages" (comprising fifty separate items) in the sum of \$6,868.89. The Allens, contractors, sought to recover a judgment of \$4,472.60 and to impose a lien on the property for this amount alleging that this sum represented the value of labor and materials furnished by them pursuant to the contract for which they had received no compensation.

The court made the following findings:

"VII

"On or about October 23, 1950, defendants Allen Bros., pursuant to said contract, started the construction work provided for in said contract, but failed, neglected and refused to furnish materials and perform the labor in compliance with the said contract and in accordance with said plans and specifications or within the time prescribed in said contract, but in violation of said contract and said plans and specifications said defendants, Allen Bros., furnished cer-

tain materials and labor inferior in quality and standard to that called for and required by said contract and plans and specifications, and said defendants Allen Bros. failed, neglected and refused to follow said contract and plans and specifications and failed, neglected and refused to construct said dwelling house and garage in compliance therewith, and failed, neglected and refused to furnish the quality and quantity of materials required in said contract and there was a material departure from the plans and specifications in the construction of said dwelling house.

"VIII

"That the acts of the plaintiff Leo Zweig, in constantly criticizing the work of the contractors and in demanding that work be stopped until the details of the plans and specifications were complied with in accordance with his interpretations, constituted an unwarranted and unreasonable interference with the Allen Bros. in their performance of the contract.

"IX

"That the unskilled performance by plaintiff Leo Zweig of the unauthorized work of applying a certain priming preparation to the outside window frames and the installation of insulating materials between the ceiling joists in said house contributed to his damages.

"X

"That on the 19th day of January, 1951, the plaintiffs, Leo and Celia Zweig, filed and recorded a Declaration of Homestead on said property in the office of the County Recorder, San Mateo County, California."

From the above findings the court concluded that the Allens were not entitled to recover any further sums under the contract because of their material departure from the plans and specifications; that the Allens were prevented in the performance of the building contract by the unwarranted and unreasonable interference of Leo Zweig; that the unskilled performance of unauthorized work on the building by Leo Zweig contributed to his damages and that the Allens and Fireman's Fund Indemnity Company were not responsible for any loss

he may have sustained; that the filing and recording of a homestead on the premises by the Zweigs constituted an acceptance of the Allens' work; that the Zweigs were entitled to recover nothing from the Allens or Fireman's Fund Indemnity Company in their action.

We confess to an inability to determine from the findings, in the very general way in which they are framed, how the court could reach the conclusion that it did that neither set of parties was entitled to any recovery. If the contractors, as found, departed from their contract in substantial particulars not only were they not entitled to recover on their contract, but the owners were certainly entitled to insist that the contractors perform the contract according to its terms and rectify the deviations from the contract to make the building conform to the plans and specifications. On the other hand if the interference of the owners prevented the contractors from performing according to the terms, resulting in the substantial departures from the terms found by the court, that would seem to excuse these substantial defects.

[1] Courts should frame their findings with sufficient definiteness to enable the appellants to point out to an appellate court intelligibly particulars in which they are not supported by the evidence, the findings should not be contradictory on material issues, and the court should find on all material issues raised by the pleadings. *Andrews v. Cunningham*, 105 Cal.App.2d 525, 528-529, 233 P.2d 563.

The evidence, which was sharply conflicting in most particulars, covered a host of claimed deviations from the contract, many of which were minor. We single out three which in our judgment would support the finding that the contractors were guilty of substantial breaches of their contracts, without determining that there are not others. 1. The concrete foundations were not carried into the soil to the depth required by the plans; 2. one supporting pier under the center girder was omitted thus resulting in a greater space between piers and a greater danger of future sagging; 3. the siding on the house was not clear-heart redwood as required.

It is impossible from the findings to determine whether the trial court found any one of these omissions to be a substantial departure from the contract or not. As to No. 1 the contractors produced evidence that where the foundation did not go to the depth specified it was on solid rock and it was good practice not to blast out the rock but to pour the foundation on top of it. Did the trial court accept or reject this testimony? Did the trial court find that this was a substantial departure or not? As to No. 2 there was evidence for the contractors that the omission of one pier would not weaken the structure. The same questions are left open by the findings. As to No. 3 it was established that clear-heart redwood as called for by the contract should have no knots and no sap-wood, which is light in color and will show through a stain. (The contract called for a grey stain on the exterior.) The owners' evidence was that the siding was not clear-heart redwood and contained many knots and much sap-wood and that as a result the siding had to be painted to conceal these since they would have shown through the stain. The contractors' evidence was that the siding, with the exception of two or three boards, which could have been easily replaced, was clear-heart redwood. The same questions are again left open by the findings.

A principal dispute between the parties had to do with this siding and whether or not the owners were justified in insisting that it be rectified before the work proceeded. The findings leave this, as well as the other issues discussed and many more, in such a state that we cannot determine how the court found on them. Without more specific findings we are at a complete loss to determine the actual issues on which the court based its judgment or its finding that the contractors were guilty of substantial and material departures from the contract.

[2] If, as we have suggested, there were substantial failures of compliance the contractors would not be entitled to recover, and the owners would be within their rights in insisting on such compliance before the work proceeded to a point

where the compliance would be impossible. *Underhill v. Hoag*, 91 Cal.App.2d 185, 188, 204 P.2d 354; *Morel v. Simonian*, 103 Cal. App. 490, 494-495, 284 P. 694; 17 C.J.S., Contracts, § 509, p. 1089. It is undisputed that the stoppage of the work was primarily due to the dispute over the siding. If the court should find that there was a substantial failure of performance in this particular the owners' insistence that it be rectified was justified. We cannot tell from the findings how the court determined this issue. And if the other two defects discussed were substantial they could hardly be rectified except at unreasonable cost in an almost finished building. The owners' minor complaints and suggestions would thereafter become unimportant in view of the contractors' fundamental departures from the contract which were practically irreparable. The court found substantial departures from the contract. As to these, of course, the owners' complaints were justified. But what were these substantial departures and hence which complaints were justified and which were not? We look in vain to the findings for an answer. Since many of the complaints concerned trivial matters and could not have substantially interfered with the completion of the building this becomes important.

[3] Our conclusion is that the general findings of failure of substantial performance on the one hand and unjustified interference of performance on the other are apparently hopelessly conflicting and in the absence of more specific findings do not support the judgment.

[4] The unskilled work by plaintiff Zweig did not excuse or prevent the performance of the contract but at most caused some delay and inconvenience to the contractors and some possible damage to the building. This could only go to mitigate damages and standing alone could not defeat all recovery by the owners. This covers finding IX.

[5] The declaration of homestead on the property referred to in finding X could not constitute an acceptance. The parties continued their efforts to reach an agreement including the unsuccessful arbitration

long after January 19, 1951, and it is too clear for argument that the owners made it abundantly plain to the contractors that they were dissatisfied with the work done and wanted it corrected. The evidence shows that the owners were not accepting the unfinished home on that date and the contractors knew that they were not accepting it. *Machinery & Electrical Co. v. Y. M. C. A.*, 22 Cal.App. 416, 134 P. 724.

[6] The same may be said of a telegram of January 12, 1951, which the contractors now seek to treat as a stop notice. The negotiations between the parties dragged on for months thereafter, neither parties treating the contract as at an end by reason of this telegram.

[7] Finally the contractors claim that no five day notice to complete was given them as required by the contract. The court made no finding on this subject and the contractors having refused for many months to finish the building the court might well find that they had abandoned the contract.

Judgment reversed.

NOURSE, P. J., and KAUFMAN, J.,
concur.



139 Cal.App.2d 326

**Max WOHLGEMUTH, Plaintiff and
Appellant,**

v.

**Paul MEYER, M. D., Mortimer, Weiss, M. D.,
Felix Feraru, M. D., Sutter Medical Serv-
ice Company, a corporation, doing busi-
ness under the fictitious name and style of
Doctor's Hospital, et al., Defendants and
Respondents.**

No. 16379.

**District Court of Appeal, First District,
Division 1, California.**

Feb. 20, 1956.

Malpractice action by husband for
death of wife allegedly caused by negli-

gence of defendants doctors and hospital. The Superior Court, City & County of San Francisco, *H. A. Van der Zee, J.*, sustained a general demurrer without leave to amend, and plaintiff appealed. The District Court of Appeal, *Bray, J.*, held, in part, that the statute of limitations applicable to actions for wrongful death is procedural, not substantive, and that the trial court abused its discretion in sustaining the general demurrer without giving plaintiff opportunity to amend his complaint to allege more clearly facts required to toll statute of limitations.

Judgment reversed with instructions.

1. Death ☞38

Statute of limitations applicable to actions for wrongful death is procedural, not substantive; it bars remedy but not the right itself. *West's Ann.Code Civ.Proc. §§ 340, subd. 3, 377.*

2. Limitation of Actions ☞179(2), 180(4)

Where wrongful death action complaint, based on alleged malpractice of defendants doctors and hospital in causing death of plaintiff's wife, did not contain allegations of circumstances under which plaintiff discovered alleged negligence, but merely stated that because of plaintiff's reliance on defendants' assurances, plaintiff did not and could not have ascertained negligence until certain date, complaint would be subject to special demurrer. *West's Ann.Code Civ.Proc. §§ 340, subd. 3, 377.*

3. Pleading ☞225(1)

Wrongful death action complaint, based on alleged malpractice of defendants doctors and hospital in causing death of plaintiff's wife, alleged sufficient facts to require court, in sustaining general demurrer, to permit plaintiff to amend complaint to allege omitted facts, relating to circumstances under which plaintiff discovered negligence. *West's Ann.Code Civ.Proc. §§ 340, subd. 3, 377.*

4. Appeal and Error ☞1040(3)

Limitation of Actions ☞180(4)

Though allegations in wrongful death, malpractice action complaint might have been more explicit as to reason for not discovering cause of action earlier, where it

did not appear that complaint could not be amended to meet such objection, trial court committed reversible error by sustaining general demurrer without leave to amend. West's Ann.Code Civ.Proc. §§ 340, subd. 3, 377.

5. Limitation of Actions ⇨95(1)

In malpractice cases, the statute of limitations only starts to run from date of discovery of, or date when by exercise of reasonable diligence plaintiff should have discovered, the wrongful act. West's Ann. Code Civ.Proc. §§ 340, subd. 3, 377.

6. Physicians and Surgeons ⇨15(8)

The doctor-patient relationship is a fiduciary one, and it is incumbent on doctor to reveal all pertinent information to his patient.

7. Hospitals ⇨5

The hospital-patient relationship is a fiduciary one; and it is incumbent on hospital to reveal all pertinent information to the patient.

8. Hospitals ⇨5

Physicians and Surgeons ⇨7

In the event of death of patient while under care of doctor and hospital, spouse has right to know cause of death.

9. Limitation of Actions ⇨95(1)

Where, upon death of spouse while under care of doctor and hospital, information is withheld from surviving spouse, such withholding is, in a sense, a misrepresentation, within rule tolling statute of limitations applicable to action for malpractice until discovery of negligence basis of action.

10. Appeal and Error ⇨863

Upon review of order sustaining general demurrer to wrongful death, malpractice action complaint, court would not consider hospital record detailing medical history of deceased, since in determining sufficiency of complaint, it alone may be considered.

11. Limitation of Actions ⇨180(4)

In malpractice action by husband for death of wife allegedly caused by negli-

gence of defendants doctors and hospital, trial court, upon general demurrer, abused its discretion in sustaining demurrer without giving plaintiff opportunity to amend his complaint to allege more clearly facts required to toll statute of limitations. West's Ann.Code Civ.Proc. §§ 340, subd. 3, 377.

Shirley, Saroyan, Calvert & Peterson, by Sanford N. Diller, San Francisco, for appellant.

Peart, Baraty & Hassard, by Robert D. Huber, San Francisco, for respondents.

BRAY, Justice.

Plaintiff appeals from a judgment entered upon an order sustaining demurrer without leave to amend.

Questions Presented.

1. Does the statute of limitations (Code Civ.Proc. § 340 subd. (3) applicable to the wrongful death statute (Code Civ.Proc. § 377) act as a bar to the right or only to the remedy?

2. If the limitation is merely procedural, were sufficient facts pleaded to toll the statute?

Record.

The amended complaint charged all defendants with malpractice in negligently causing the death of plaintiff's wife. She died July 4, 1952. The action was filed more than one year later, December 4, 1953.¹ Defendants demurred on the ground that the amended complaint did not state sufficient facts to constitute a cause of action "in that it is barred by the statute of limitations."

1. Bar to Right or Remedy?

Generally "wrongful death statutes" have been construed as either creating a cause of action new to the common law, or permitting an action to survive which abated at common law. A provision therein limiting the time within which the action may be brought has been held to be technically not a statute of limitations, but a condition of the right to maintain the action which

¹ See hereafter for discussion of matter purporting to tell the statute of limitations.

condition must be strictly complied with. There are many jurisdictions following the same rule even where the limitation is in a separate statute. See *Brookshire v. Burkhart*, 141 Okl. 1, 283 P. 571, 67 A.L.R. 1070; *Smith v. Eureka Pipe Line Co.*, 1941, 122 W.Va. 277, 8 S.E.2d 890, 132 A.L.R. 292.

The precise question has not been determined by the California courts although in analogous cases as will hereafter be shown our courts have declined to follow the majority rule. As early as 1907, a federal circuit court in *Gregory v. Southern Pac. Co.*, C.C., 157 F. 113, traced the history of our wrongful death statute and the limitation of actions applicable to it and held that it was the intention of the California Legislature to make the limitation procedural only. It pointed out that the first statute on the subject was adopted in 1862, an act "requiring compensation for causing death by wrongful act, neglect, or default." Stats.1862, p. 447. "The action given by the California statute is in effect the same as that accorded by Lord Campbell's act. It is a new action—that is, one that had not previously obtained under the common law—and not a continuation or revival of an old action, or one that subsisted prior to the death. It is founded upon the injury causing death as it affects the heirs and personal representatives, and not as it affects the decedent individually." *Id.*, 157 F. at page 115. The statute limited actions to two years after death. In 1872 as a result of the work of the previously appointed Code Commission, a Code of Civil Procedure was adopted. Section 377 of this code codified the right to bring an action for wrongful death. It, however, did not include any limitation of time. The limitation for commencing an action for wrongful death was placed in section 339. In 1905 the period was reduced to one year and placed in section 340, Stats.1905, p. 232, and included in the limitations were other actions such as libel, slander and the like. After considering a number of cases enforcing the general rule which placed importance upon the limitation being in the death statute itself, the court held that up to the time that the limitation was placed

in the general statute of limitations, such limitation "constituted a condition attending the bringing of the action, and was designed as a part and parcel of the liability created, and could not have been considered apart from the act giving the right of action as a limitation statute simply." 157 F. at pages 118–119. The court then discussed the effect of completely segregating the limitation from the statute giving the right of action, and held, 157 F. at page 119: "Furthermore, the limitation was formerly from the time of the death of the party injured, while now it begins to run from the time the cause of action accrued; showing that, by a rearrangement of the statutes, and their adoption in that form, a different purpose was to be subserved, and we must ascribe to such statutes, therefore, another and different intendment. That intendment, manifestly, is to place the right of action accorded by section 377 in the category of other causes, and to apply the statute of limitations to that action in manner and substance as applied to all other civil actions, treating it as a part of the remedy only, and not as a condition to the cause."

That the California courts do not favor the general rule concerning limitations in statutes granting rights not existing at common law, is shown in *Myers v. Stevenson*, 125 Cal.App.2d 399, 270 P.2d 885. There, the court was asked to hold that section 29, Civil Code, providing a 6-year limitation in actions brought by a minor for personal injuries sustained prior to birth, which limitation is in the same section which gives the right of action, came within the general rule above mentioned and to hold that the limitation barred the right of action rather than the remedy. The court declined so to do and held to the contrary. It pointed out that "Latterly a tendency to relax this harsh rule at least in certain cases has become apparent", 125 Cal.App.2d at page 404, 270 P.2d at page 888, and that in *In re Estate of Caravas*, 40 Cal.2d 33, 250 P.2d 593, our Supreme Court held that the limitation in section 1026, Probate Code, of 5 years within which an alien might appear and demand property to which he was entitled, was not a substantive statute of limitation but

merely a procedural one. Referring to certain cases from outside the state the court said, 125 Cal.App.2d at page 405, 270 P.2d at page 889: "These cases show a judicial trend, joined in by our own supreme court in the Caravas case, to ameliorate the harshness of the rule that under no circumstances can the time limited for bringing suit be extended where the time limitation is construed as a condition of the remedy created. They indicate a tendency to hold that where actual or practical access to the courts is prevented the distinction between so-called substantive and procedural statutes of limitations may be disregarded."

It is significant that in the Caravas case, supra, 40 Cal.2d at page 41, 250 P.2d at page 597, the court approved the decision in *State of Maryland to Use of Burkhardt v. United States*, 4 Cir., 165 F.2d 869, which refused to follow the general rule above mentioned and quoted the language of the latter court in holding such rule " * * * to say the best of it, technical and legalistic reasoning, which is not followed in all the states."

Persuasive on this question is the determination the courts of this state have made that limitations on other rights of action are procedural and not substantive. *Farrell v. County of Placer*, 23 Cal.2d 624, 145 P.2d 570, 153 A.L.R. 323, ninety-day limitation on filing a claim against a governmental body for injury resulting from the dangerous or defective condition of public property. To the same effect, *Schulstad v. City and County of San Francisco*, 74 Cal.App.2d 105, 168 P.2d 68; *Rounds v. Brown*, 121 Cal.App.2d 642, 263 P.2d 620.

[1] Thus it is clear that California does not follow the restrictive general rule but the more reasonable and logical one that the limitations on actions for wrongful death are procedural and not substantive.

2. Sufficiency of Pleading.

On the issue of tolling the statute the amended complaint alleges the relationship of doctor and patient between plaintiff's wife and the defendants other than the

hospital, and the relationship of hospital and patient between her and the hospital defendant; that at all times from the commencement of her treatment until her death all defendants falsely assured her and plaintiff and continued thereafter to assure plaintiff that they had correctly diagnosed, treated and cared for her illness, and that her death was unavoidable; that because of decedent's reliance, in her lifetime, and plaintiff's reliance on said assurances, plaintiff with due diligence could not have ascertained and did not ascertain defendants' negligence until on or about December 3, 1953.

[2,3] The amended complaint is far from being a model of pleading and would be subject to a special demurrer; for example, no statement is given of the circumstances under which plaintiff discovered the alleged negligence. See *Original Min. & Mill. Co. v. Casad*, 210 Cal. 71, 75, 290 P. 456. However, no such demurrer was interposed. As against a general demurrer there were sufficient facts alleged to require that in sustaining the demurrer the court should have permitted plaintiff to amend to set up, if he could, the omitted facts.

[4,5] Plaintiff alleged the professional relationship between defendants and the decedent and her and his reliance on their assurances. As said in *Myers v. Stevenson*, supra, 125 Cal.App.2d at page 402, 270 P.2d at page 887: "If the allegations might be more explicit as to the reason for not discovering the cause of action sooner, it does not appear that they could not be amended to meet any such objection and this being so the sustaining of the demurrer without leave to amend would be reversible error, if it appears that a cause of action could be stated." Especially is this so when it is remembered that "It is a further settled rule in malpractice cases that the statute of limitations only starts to run from the date of discovery of, or the date when by the exercise of reasonable diligence the plaintiff should have discovered, the wrongful act." 125 Cal.App.2d at page 402, 270 P.2d at page 887.²

2. The California cases so holding dealt with malpractice cases brought by the living. As heretofore shown, there is no

reason why the same rule should not apply in actions under the wrongful death statute.

[6-9] The doctor-patient relationship is a fiduciary one and it is incumbent on the doctor to reveal all pertinent information to his patient. The same is true of the hospital-patient relationship. In the event of the death of the patient while under the care of the doctor and the hospital, the spouse has a right to know the cause of death. Withholding information would in a sense amount to misrepresentation. See *Stafford v. Shultz*, 42 Cal.2d 767, 270 P.2d 1, for a full discussion of the requirement that a physician make full and fair disclosure of all facts which materially affect the patient's rights and interests, and of the fact that because of the relationship between the doctor and the patient the patient is entitled to rely on the doctor's assurances and that "facts which would ordinarily require investigation may not excite suspicion, and that the same degree of diligence is not required" as where such relationship does not exist. 42 Cal.2d at page 777, 270 P.2d at page 7. "If, however, the court can determine that the complaint may be amended to state a cause of action it would be an abuse of discretion to sustain the demurrer without leave to amend. *Wennerholm v. Stanford Univ. School of Medicine*, 20 Cal.2d 713, 719, 128 P.2d 522, 141 A.L.R. 1358." *Gaglione v. Coolidge*, 134 Cal.App.2d 518, 522, 286 P.2d 568, 571.

Augmentation.

[10] A motion to augment the record was heretofore granted by us allowing defendants to file proceedings taken in the superior court to perpetuate testimony including the deposition of Thomas Arthur Taylor, reserving our ruling as to their relevancy. We now find that they are completely irrelevant to the issues before us and may not be considered. The evidence relates to the hospital records and apparently is offered to show that the decedent was a relatively young woman having no history of prior serious illness. Defendants desire to argue therefrom that these facts put

plaintiff on notice that required him to investigate immediately after her death whether her death might not have been the result of negligence and that because of his failure to investigate immediately the statute was not tolled. Without discussing the merits of this contention we need only point out that in determining the sufficiency of the complaint it alone may be considered. In *Colm v. Francis*, 30 Cal.App. 742, 159 P. 237, where the correctness of the order of the trial court in sustaining a demurrer to a complaint was being considered and the respondent requested the court to consider certain documents, the court said, 30 Cal. App. at page 752, 159 P. at page 241: "It is only the statement of a proposition plainly within the realm of commonplaces to say that, in passing upon the question of the sufficiency or insufficiency of a complaint to state a cause of action, it is wholly beyond the scope of the inquiry to ascertain whether the facts stated are true or untrue. That is always the ultimate question to be determined by the evidence upon a trial of the questions of fact. Obviously, the complaint, when appropriately challenged, whether for want of sufficient facts or for an insufficient or inartificial statement of the facts, must stand or fall by its own force." See also *Baker v. Littman*, 138 Cal.App.2d 510, 292 P.2d 595.

[11] It was an abuse of discretion for the trial court to sustain the demurrer without giving plaintiff an opportunity to amend his complaint to set up more clearly the facts required to toll the statute of limitations. See for such requirements *Original Min. & Mill. Co. v. Casad*, supra, 210 Cal. 71, 75, 290 P. 456.

The judgment is reversed and the trial court is directed to permit the filing of an amended complaint in accordance with this opinion.

PETERS, P. J., and FRED B. WOOD, J., concur.

139 Cal.App.2d 294

G. C. BERKER, Plaintiff and Appellant,
v.

Robert A. BARNES and Pauline Barnes,
Defendants and Respondents.

Civ. 8655.

District Court of Appeal. Third District,
California.

Feb. 17, 1956.

Rehearing Denied March 9, 1956.

Hearing Denied April 11, 1956.

Action by alleged partner against alleged co-partner and alleged partnership's bookkeeper for an accounting. The Superior Court, Sonoma County, Charles J. McGoldrick, J., entered judgment decreeing that alleged partner was not in partnership with alleged co-partner and that alleged partner did not have any property interest in assets obtained and used by alleged co-partner in alleged partnership business, and alleged partner appealed. The District Court of Appeal, Van Dyke, P. J., held that, where record on appeal revealed two hearings held on alleged partner's motion based on his objections to conduct of investigations by referee, but record did not reveal what court then considered, and referee finally reported that, on evidence before him, conditions preceding to creation of alleged partnership had not occurred, and trial court adopted these conclusions and entered judgment against alleged partner, judgment in absence of further record than court's adoption of referees finding of fact.

Judgment affirmed.

1. Appeal and Error ⇨907(3)

Where record presented on appeal was only a partial record, usual presumption of regularity in proceedings in trial court and before referee would be accorded to respondents unless errors claimed appeared on face of record. West's Ann.Rules on Appeal, rule 52; West's Ann.Code Civ.Proc. § 639.

2. Appeal and Error ⇨907(3)

Where oral proceedings had before court made its interlocutory decision were not presented on appeal, the district court

of appeal would have to assume that findings made as to status of appellant were substantially supported and such findings could not be attacked on appeal. West's Ann.Rules on Appeal, rule 52.

3. Appeal and Error ⇨671(4)

Where, upon appeal in action by alleged partner against alleged co-partner and bookkeeper for alleged partnership to obtain an accounting, record on appeal revealed two hearings held on alleged partner's motion based on his objections to conduct of investigations by referee, but record did not reveal what court then considered, and referee finally reported that, on evidence before him, conditions preceding to creation of alleged partnership had not occurred, and trial court adopted these conclusions and entered judgment against alleged partner, judgment against alleged partner could not be held erroneous in absence of further record than court's adoption of referee's finding of fact.

Howard B. Crittenden, Jr., San Francisco, for appellant.

Golis & Fredericks, Santa Rosa, and Francis M. Passalacqua, Healdsburg, for respondents.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment decreeing that plaintiff-appellant, contrary to the allegations of his complaint, was not in partnership with defendant Robert A. Barnes in conducting a business of remanufacturing lumber; and further adjudging that he had no property interest in any of the assets obtained and used by Barnes in that business.

Appellant G. C. Berker, hereinafter called "Berker", alleged that he and respondent Robert A. Barnes, hereinafter called "Barnes", had formed a partnership, with Barnes contributing cash, and Berker contributing services; that pursuant to the partnership agreement machinery costing \$28,400 was purchased upon the credit of the partnership; that respondent Pauline Barnes, the wife of Barnes, had acted as bookkeeper for the

firm, but had fraudulently kept improper records that did not reflect the firm's affairs; that Barnes had refused to account and had excluded appellant from partnership affairs. By answer Barnes and wife denied the existence of a partnership and denied that Berker had any interest in the assets obtained and used by Barnes in the lumber remanufacturing business. A trial was had on the issues of partnership and property interests of Berker and at the conclusion thereof the trial court filed a written opinion in which it stated its conclusion that, although appellant and Robert A. Barnes had been associated in the lumber remanufacturing business, the association rested upon a contractual relationship which, when certain conditions had been met, would result in "a partnership between the two. The court stated these conditions as follows: That if between the inception of the enterprise in February of 1950 and July 21, 1950 there had been a profit from the business sufficient to pay for the equipment purchased and to reimburse Barnes for his advances, the association would ripen into a partnership wherein each partner would own a half interest. Therefore, the court stated, Berker was entitled to an accounting "to determine whether or not the contingencies here found to exist were realized on July 21, 1950." A reference was ordered, the order of reference reading that the referee should take an accounting between the parties under the directions of the court: To determine the capital investment of the parties in the business venture; to ascertain the profits; to ascertain if the profits were sufficient to reimburse Barnes for capital expenditures made by him and also to pay for the equipment, material and other capital expenditures of the venture; to determine the drawing and expense accounts of the parties; and to report to the court whether the records of the business were complete enough so that under any accepted method of accounting the true condition of the business would be reflected. The court declared that the reference was made pursuant to Section 639 of the Code of Civil Procedure and ordered the parties to make

available to the referee all their pertinent books, records and vouchers.

The referee filed what he denominated "Reply to Order of Reference" wherein he advised the court that he was unable to determine capital investment because the record of the transactions of the venture had been intermingled with all business records of respondents; that he could not ascertain profit or loss for want of separate records and that, although he found memos of transactions related to the venture, there was nothing to substantiate the memos; that with no record of receipts and disbursements he found it impossible to determine whether or not there had been profits sufficient to retire capital indebtedness; that due to incomplete records he was unable to determine drawing and expense accounts of the parties; that due to there being no separate business records which reflected the venture it was his opinion there would be no accepted method of accounting that could be applied to truly reflect the actual transactions. He concluded this reply by stating: "In conclusion, in spite of incomplete records, it is my opinion that no profit possibly could have been made on that volume of business." To this "Reply" Berker filed lengthy exceptions which we summarize: He alleged that there had been a meeting of the parties before the referee whereat the parties had discussed with the referee the appropriate accounting procedure, Berker contending that the accounts kept by Mrs. Barnes for the venture were purposely kept so as to be incomplete and inconclusive and that, therefore, the referee should adopt the method of accounting which, Berker asserted, was used in income tax cases, charging against Barnes, as income from the venture, all expenditures made by the Barneses during the period, leaving them to explain and to show what part of the total was not income from the venture. Berker asserted that it was understood at the meeting that the referee would examine such records and documents as were available and then a further conference would be held, but that no such conference had been called or held and that he had been

given no opportunity to participate in the accounting before the "Reply" was filed. Berker averred that the records had been kept so as to conceal the true receipts from the venture and that some of the receipts had been converted to the personal use of Barnes; that the machinery and equipment purchased and installed for the venture had been bought on the joint liability of both himself and Robert Barnes; that Barnes had used workmen paid by the venture to help him redesign and re-equip his own sawmill and that in many ways Barnes had taken advantage of venture income to further his personal interests, including purchase of an automobile and construction of a dwelling. Berker demanded that the referee be ordered to charge as income all money passing through the hands of Barnes and Mrs. Barnes except such as could be proved should be allocated to other sources than the venture, or that, in the alternative, the court itself determine that Barnes was charged with keeping proper records, that, since he had not done so, the presumption of suppression of evidence had arisen and that, in the absence of explanation, the court "determine the issues favorably to the plaintiff". While it does not affirmatively appear from the record, it seems to be assumed that a hearing was held on these exceptions and that the matter was remanded to the referee. The record does not show what further directions, if any, were given the referee. Thereafter the referee filed a report which may be summarized as follows: That on March 3, 1953 a meeting between the referee, the parties and their counsel was heard, "at which meeting evidence was taken regarding the accounts to be inquired into and counsel made their arguments regarding the accounting methods"; that on March 12th following on notice and at the place of business of Barnes the referee had read, inspected and made inquiry into the Barneses' books and records pertaining to the venture operations; that thereafter the exhibits introduced in evidence by the parties at the trial before the court had been made available to him and that "after hearing said evidence, said arguments and

after reading, inspecting and making inquiry into said books, records and exhibits, and being fully advised in the premises" the referee reported as follows: That due to the incompleteness of the records the amount of capital investment by each party could not be determined exactly, but Barnes, only, had made capital investment and his investment was not less than \$10,-800; that the net profits amounted to \$2,-100 without considering capital investments; that due to incompleteness of the records the referee could not compute exactly either capital expenditures made by Barnes or payments made by him for equipment, material and other capital expenditures, but that the referee found from such records and other evidence as he had before him that profits could not have been sufficient to reimburse Barnes for capital expenditures and also to pay for equipment and material purchased and used; that for the same reasons he could not determine exactly what the drawing accounts and expenses had been, but did find that they were nominal and so slight as not to affect his other findings; that so incomplete were the records that no accepted accounting method would truly reflect the actual transactions of the venture, but nevertheless he found that the venture could not have made a profit and that it did not make a profit sufficient to reimburse Barnes for sums advanced.

By stipulation appellant took the same exceptions to the last report as he had taken to the "Reply" which preceded it and a hearing was held before the court on these exceptions. Thereafter the court made findings of fact as follows: There was no partnership, but there had been a contractual relation beginning about February 26, 1950 and ending July 21, 1950, the contract being an oral one, and being concerned with the operation of a business for the remanufacture of lumber. The parties had agreed as follows: Barnes was to supply necessary capital and credit to purchase equipment, material and other items of capital expenditure to establish and operate the business and that he did so; that appellant was to work in the supervision and operation of the plant

and should receive \$10 per week, living quarters and the use of an automobile; that in the event that the following conditions occurred, and not until all had occurred, defendant was to become a half owner in the assets of the business, excluding the real property on which the business was located, which conditions were: 1. That the business operate profitably; 2. That profits be sufficient to reimburse Barnes for all contributions to the business and to pay for all equipment purchased for the business; 3. That these conditions must have occurred on or before July 21, 1950. The court further found that during the period mentioned the capital investment by Barnes was not less than \$10,800, whereas the net profits without considering capital expenditures was only \$2,091.99; that the profits were insufficient to reimburse Barnes. The court concluded as a matter of law that Berker had not achieved the status of a partner and should take nothing.

Barnes had cross-complained, alleging that Berker had, while managing the business, collected \$453.53, and the court awarded Barnes judgment on the cross-complaint in that sum. Berker moved for a new trial, which was denied.

In support of his appeal appellant designated that the following matters constitute the record: The complaint, the answer and counterclaim, the court's opinion, the order of the referee, "Reply to the Order of Referee", the exceptions, the final report of the referee and the exceptions thereto, findings of fact and conclusions of law, the notice of intention to move for a new trial, the order denying the same and the notice of appeal.

[1] The record presented is a partial record. Concerning such a record Rule 52, Rules on Appeal, provides: "If a record on appeal does not contain all of the papers, records and oral proceedings, but is certified by the judge or the clerk, * * * it shall be presumed in the absence of proceedings for augmentation that it includes all matters material to a determination of the points on appeal. On an appeal on the judgment roll alone, or on a partial or complete clerk's transcript,

the foregoing presumption shall not apply unless the error claimed by appellant appears on the face of the record." On the record here presented, unless the errors claimed appear on the face of the record, the usual presumption of regularity in the proceedings in the trial court and before the referee must be accorded to respondents. We quote the following from *White v. Jones*, 136 Cal.App.2d 567, 288 P.2d 913, 915:

"Effective January 1, 1951, Rule 52 was amended by adding thereto the following sentence: 'On an appeal on the judgment roll alone, or on a partial or complete clerk's transcript, the *foregoing presumption* shall not apply unless the error claimed by appellant appears on the face of the record.' Under the rule as amended the presumptions in support of the judgment that were made prior to the adoption of the Rules on Appeal apply except as expressly limited by Rule 52, and it is not presumed, in the absence of the oral proceedings being made a part of the record on appeal pursuant to one of the methods provided for by the Rules, that the record on appeal contains all matter material to the determination of the appeal."

We have concluded that the claimed errors do not appear on the face of the partial record presented.

It appears that counsel for the appellant sensed the inadequacy of the record when he came to write the opening brief. That brief contained a statement of facts which contains many references to oral proceedings asserted to have occurred. We will mention a few by way of example. The brief contains assertions as to testimony by Barnes, by Berker and by Mrs. Barnes. References are made to the transcript, but these references are seen to be to the trial court's opinion. The trial court's opinion, although it may be made a part of the record, cannot be taken as a report of oral proceedings. Reference is made to the testimony of eleven other witnesses, and this court is in each instance referred to the trial court's opinion in substantiation of the averments as to what these wit-

nesses testified to. No record has been presented of the oral proceedings that took place before the court made its interlocutory ruling. Concerning the preliminary meeting before the referee, it is asserted that it was there stated by respondents that they had a full and complete record of all financial transactions of the venture and the reference is to a like assertion made in appellant's exceptions to the referee's report. It is asserted that the parties understood after the preliminary meeting the referee would examine records and documents and would then call a second meeting which was not done. Again the reference is to the exceptions to the report. It is asserted that during the period between the beginning and the end of the venture Barnes had maintained and paid a crew of men who were working in his lumber operations outside the venture and that he paid the costs and wages of the crew from the proceeds of the venture operation and no substantiation whatever is furnished for this assertion. It is factually asserted that Barnes used venture funds to pay off \$2,000 worth of personal obligations and like assertions are made touching the conversion of other venture funds by the Barneses. There may have been evidence of these matters, but the record does not disclose it.

Respondents, challenging the sufficiency of the record, assert that in fact the trial court heard the exceptions taken by appellant to the referee's report to the court and in doing so received oral evidence of which no transcript is presented. They point out the following recitals in the final report of the trustee: That at the first meeting between the referee, the parties and their counsel evidence was taken regarding the accounts to be inquired into; that thereafter, after giving notice of time and place, the referee at the place of business of the respondents read, inspected and made inquiry into the records pertaining to the venture; that thereafter the exhibits received in evidence at the court trial were delivered to him and that he had read, inspected and inquired concerning them; and finally that after hearing evidence and arguments, reading, in-

specting and inquiring about the records and being fully advised he made his report. Respondents assert that this court does not have before it the record of the proceedings before the referee, and in this we agree.

[2] Since the oral proceedings had before the court made its interlocutory decision have not been presented, we assume, as we must, that these findings as to the status of Berker were substantially supported and on this record cannot be attacked.

Berker by his complaint had sought to establish a partnership and the right to an accounting and asked that an accounting be ordered. He did not to the satisfaction of the court establish the formation of a partnership at the beginning of his association with respondents; nevertheless he did establish that the parties had agreed to such a relationship and to equal ownership of assets between the two if certain conditions were met within a certain period. The trial court considered that appellant was entitled to an accounting to determine whether or not these conditions had been met and that was the purpose of the reference. While he may not have agreed to the interlocutory findings concerning his contractual status, nevertheless Berker was obliged either to refuse to enter the accounting proceedings before the referee, or to attend thereat and participate therein; and if he had evidence material thereto he was obligated to make it available or at least to seek an opportunity to do so. He could not, as he appears to have done, rest content with his claim that a certain method of accounting had to be followed by the referee. He was, of course, advised that the reference had been made and that it was not a reference to take an exact account but for the purpose of accounting sufficient to determine whether or not the conditions of his status as partner and half owner in the assets had been met. It was not necessary to this reference that exact accounting should be had. The inquiry was limited by the order of reference to ascertain whether or not these conditions had been met.

While Berker asserts in his brief that he was given no opportunity to introduce evidence, he has not made that to appear by the record presented. We quote the following from *Doudell v. Shoo*, 20 Cal. App. 424, 452-453, 129 P. 478, 489:

"* * * But what we intended to say was that, if neither counsel nor the defendants were given notice of the hearings [before the referee], they should have called the court's attention to that fact before the findings were made and filed, they having been given ample notice of the filing of the report to have done so, and that the court (although no procedure of this sort is expressly authorized), in the exercise of its discretion, and in the interest of justice, would have doubtless caused the referee to proceed de novo in the matter of his investigations so that the parties could have all been present thereat, if they so desired. As stated in the former opinion, the defendants did not elect to take that course."

The opinion proceeds to state that there were conflicting affidavits on a motion for new trial, among which were affidavits that it was not necessary to take testimony or examine witnesses other than the plaintiff in that action since the records before the referee were sufficient to serve the purposes of the reference. The court said then 20 Cal.App. at page 454, 129 P. at page 490:

"* * * [U]pon that showing alone the court below was justified in refusing to set aside the findings upon the ground here urged against the report of the referee."

In *Spadoni v. Maggenti*, 121 Cal.App. 147, 159-160, 8 P.2d 874, 880, it was said:

"* * * Having had due and timely notice of the reference of the cause for the purpose of taking an accounting, it became the duty of the defendants to exercise reasonable diligence to ascertain the time and place of hearing, and to procure the presence of any witnesses whom they

desired to be examined. A failure on the part of the defendants to exercise such diligence is a waiver of the right to complain of the lack of notice or the opportunity to present desired evidence, particularly since this opportunity was afforded the defendants at the time the referee's report was subsequently heard and adopted by the court."

[3] As we have noted, it appears from the record before us that the court held two hearings on motion of appellant based upon his objections to the conduct of investigations by the referee, and the record presented is silent as to what the court then considered. It does appear from the referee's first "Reply to Order of Reference" and from his final report that he did not have before him sufficient accounting data from which to make an audit of the venture in which appellant and respondent Robert A. Barnes had been engaged, but such an audit was not required. What the court wanted to know was whether or not the conditions he had stated as being conditions precedent to any creation of a partnership had occurred. The referee finally reported that from his investigation and from, as he said, the evidence before him the conditions had not occurred. The court adopted these conclusions and entered judgment against appellant. On this record we cannot say that error has been made to appear. It is easy to argue and to argue well that this was in fact a reference to ascertain facts, that the referee ought to have noticed hearings and afforded fully opportunity for the parties to present such qualified testimonial and documentary evidence as they wished to have received. But a failure of the referee to do so made it appropriate that application be made to the court, either for an interim order specifically instructing the referee, or that the referee's conduct be made the subject of exceptions to his report. This latter was the method adopted, and the exceptions placed the matter in the hands of the trial court. What the court did or failed to do has not been presented. In the ab-

sence of any further record than the court's adoption of findings of fact we cannot say that the judgment against appellant was the result of error.

The judgment appealed from is affirmed.

PEEK and SCHOTTKY, JJ., concur.



139 Cal.App.2d 353

Ienar E. ELM, Plaintiff and Appellant,
v.

William A. McKEE, Harriet (Hattie) McKee,
and **Sam Barsamlan, also known as Serop**
Barsamlan, Defendants and Respondents.

Civ. 16577.

District Court of Appeal, First District,
Division 2, California.

Feb. 21, 1956.

Rehearing Denied March 22, 1956.

Hearing Denied April 18, 1956.

Action by plaintiff for injuries received when, while proceeding along a sidewalk, he struck his head against a barber pole attached to the defendants' premises. The Superior Court, City and County of San Francisco, Theresa Meikle, J., entered judgment for defendants and plaintiff appealed. The District Court of Appeal, Kaufman, J., held, *inter alia*, that where defendants admitted knowledge of the location of the barber pole, and that they never filed for a permit for it, and plaintiff showed no permit was obtained for it as far back as 49 years, under such circumstances, violation of city ordinances regulating erection of barber poles was not excusable or justifiable, and therefore instruction pertaining to excuse or justification for violation of such ordinances was improper.

Judgment reversed.

1. Municipal Corporations $\S$ 818(3)

Where evidence that a barber pole upon which plaintiff struck his head was on

a building when acquired by defendant was admissible under plaintiff's first cause of action for negligent maintenance of the pole as a dangerous and unlawful obstruction of a public street, no error was committed in its admission, even though such evidence may not have been properly admissible under plaintiff's cause of action for violation of ordinances regulating the erection of barber poles.

2. Appeal and Error $\S$ 882(8)

Where counsel for plaintiff acquiesced in ruling of trial court on admission of certain testimony, on appeal he could not complain that such testimony introduced issues not properly before the jury.

3. Trial $\S$ 54(3)

Where plaintiff, after using a prior written statement by a witness for impeachment purposes, introduced it in evidence as an exhibit and placed no restriction on the purpose of its admission in evidence, in absence of plaintiff's request for an instruction limiting jury's consideration of it to impeachment purposes only, the statement could be used as competent proof of the truth of the contents of the statement.

4. Appeal and Error $\S$ 1066

Even though an instruction is in proper form, if it finds no support in the evidence, it is prejudicial error to give it if it is calculated to mislead a jury.

5. Municipal Corporations $\S$ 777, 822(1)

In action for injuries received when plaintiff struck his head against a sidewalk barber pole attached to defendants' premises, where defendants admitted knowledge of the location of the barber pole, and that they never filed for a permit for it, and plaintiff showed no permit was obtained for it as far back as 49 years, violation of city ordinances regulating erection of barber poles was not excusable or justifiable, and therefore instruction pertaining to excuse or justification for violation of such ordinances was improper.

6. Municipal Corporations $\S$ 818(1)

In action by plaintiff for injuries received when he struck his head against a sidewalk barber pole attached to defendants' premises, testimony by one of the

defendants that he didn't think it was up to him to obtain a permit for the pole and that the man who put the pole up should have obtained the permit was inadmissible.

7. Negligence ⚖6

Ignorance of the law would not excuse a defendant's violation of an ordinance requiring a permit for erection of a barber pole.

8. Municipal Corporations ⚖822(2)

In action by plaintiff for injuries received when he struck his head against a barber pole attached to defendants' premises, instruction relating to whether the pole was an obstruction which was unreasonable and made the sidewalk unsafe was improper. West's Ann.Civ.Code, § 3479.

9. Municipal Corporations ⚖692

Test of what constitutes maintenance of a nuisance is whether an obstruction unlawfully obstructs free passage or use of any street. West's Ann.Civ.Code, § 3479.

10. Municipal Corporations ⚖821(20)

In action by plaintiff for injuries received when he struck his head against a sidewalk barber pole attached to defendant's premises, question of plaintiff's contributory negligence was for the jury.

11. Appeal and Error ⚖1064(1) Negligence ⚖140

When it is for the jury to decide whether an injury was proximately caused by the negligence of a defendant, giving of an instruction on unavoidable accident is proper, but where the negligence of a defendant is established as a matter of law the giving of such an instruction is prejudicially erroneous.

12. Appeal and Error ⚖1064(1) Municipal Corporations ⚖822(1)

In action by plaintiff for injuries received when he struck his head on a sidewalk barber pole attached to defendants' premises, where the barber pole was maintained on defendants' premises in violation of an ordinance, giving of an instruction on unavoidable accident was prejudicial error.

13. Landlord and Tenant ⚖169(10)

In action by plaintiff for injuries received when he struck his head against a sidewalk barber pole attached to a building owned by one defendant and leased by codefendant, instruction that a verdict against one defendant did not necessarily compel a verdict against the other defendant and that the liability of each defendant must be based upon the negligence of each was not improper.

14. Master and Servant ⚖301(1)

In action by plaintiff for injuries received when he struck his head on a barber pole attached to a building owned by one defendant and leased by codefendant, doctrine of respondeat superior did not apply.

15. Appeal and Error ⚖1064(4)

Municipal Corporations ⚖816(7)

Trial ⚖229

In action by plaintiff for injuries received when he struck his head against a sidewalk barber pole attached to defendants' premises, contributory negligence was a proper defense, and even though eight instructions were given on contributory negligence, where they stated the law correctly they did not unduly emphasize contributory negligence and were not prejudicial.

16. Trial ⚖296(4)

In action by plaintiff for injuries received when he struck his head against a barber pole attached to defendants' premises, contributory negligence instruction which used the term "ordinary care" rather than ordinary care under the same or similar circumstances was not misleading where negligence and contributory negligence were correctly defined in other instructions.

17. Trial ⚖260(8)

In action by plaintiff for injuries received when he struck his head on a sidewalk barber pole attached to defendants' premises, instructions pertaining to plaintiff's right to assume sidewalk was in a safe condition and unobstructed, and instruction regarding safety of leased prem-

ises were properly refused where covered by other instructions.

18. Municipal Corporations ⚡822(4)

In action by plaintiff for injuries received when while proceeding along a sidewalk he struck his head against a barber pole attached to defendants' premises, where plaintiff testified fully as to his own conduct, instruction on presumption of due care in plaintiff's favor was properly refused.

Peter A. Ribar, San Francisco, for appellant.

Barfield & Barfield, San Francisco, for respondents McKee.

John K. Hagopian, San Francisco, for respondent Barsamian.

KAUFMAN, Justice.

Ienar E. Elm appeals from a judgment rendered after jury verdict in favor of defendants in an action brought to recover damages for personal injuries sustained by him when he struck his head against a barber pole attached to respondents' premises. The building was owned by respondent McKee and leased by him to respondent Barsamian as a barber shop.

The complaint contained three causes of action: (1) Negligent maintenance of the barber pole in a manner constituting a dangerous condition of the premises; (2) violation of ordinances of the City and County of San Francisco regulating the overhang of barber poles; (3) maintenance of a nuisance.

The accident was alleged to have occurred on November 26, 1951, between 2:45 and 3:00 o'clock in the afternoon on a day when it was raining heavily. It is agreed by both parties that the projection of the barber pole from the face of the building was not more than 14 inches and its lowest point was 5 feet 6 inches above the sidewalk. The barber pole was attached to a barber shop on the south side of 22nd Street in San Francisco, between Bartlett and Valencia about 75 feet west of the 22nd Street exit from the premises of the trade school attended by appellant.

Appellant's car was parked a short distance away. When he was leaving school for the day it was raining heavily so he decided to run to his car. He was a man 6 feet in height, 56 years of age. He was wearing a baseball type cap with a visor. As he turned west the rain was coming down heavily toward him, and he lowered his head to protect his eyes and glasses from the rain, running as close to the buildings as he could. He could see that there was no one on the sidewalk moving in either direction. As his vision was limited upward, somewhat, he struck his head against the barber pole and fell to the sidewalk. There was medical testimony that such a blow probably caused the damages alleged.

Appellant testified that this was the only accident he had ever had with this barber pole and that he had not run into it prior to November 25, 1951. A witness, Daniel Dyer, who formerly lived in an apartment building owned by appellant and who usually rode to the trade school with appellant, testified that he had been with appellant on one occasion in October 1951, when appellant hit his head against the pole. On that day there had been a heavy mist blowing toward them. Appellant's knees buckled as a result of the blow, but he did not fall to the sidewalk. Appellant's counsel used a prior written statement made by this witness in order to impeach him. He then asked that this statement be introduced in evidence as plaintiff's Exhibit No. 4. This statement related that the accident which Dyer had witnessed occurred in November, and that later that month, during a period when the witness had missed school, appellant told him that he had struck the pole again.

The record does not show when the building was built or when the barber pole was installed. It was stipulated at the trial that respondents McKee acquired the property on August 23, 1923. The barber pole was there at that time and has remained there continuously. No permit for the pole was ever obtained by the owners or by the tenant barber, respondent Barsamian.

Appellant's complaint set forth certain sections of an ordinance of the Building Code of the City and County of San Fran-

cisco. Section 321(a) of said ordinance provided that no barber pole may hereinafter be placed or maintained upon or in front of any building without a permit therefor. Section 4307 provided that hereafter it would be unlawful to maintain any sign, bulletin board, barber pole, etc. wholly within the property line or projecting beyond it unless it should be included in the classification of Section 4310. This section further provided it should not render unlawful the maintenance of any sign erected under a lawful permit prior to October 19, 1936. Section 4310(d) provided that barber poles "may project not more than fourteen inches from the face of the building, and shall not have their lowest point less than eight feet above the sidewalk." The answer admitted that the Building Code contained this ordinance but alleged that it had no application because defendant believed the barber pole to have been erected prior to the enactment of the ordinance. At the trial it was shown that this ordinance was enacted in 1948.

[1] Appellant contends that prejudicial error was committed in the admission of evidence that the barber pole had been on the premises when respondent McKee acquired the building in 1923. It is true that the negligence pleaded in the complaint is for negligent *maintenance* of the pole as a dangerous, unreasonable and unlawful obstruction of a public street. However, in the first count which is for negligently maintaining the pole, it is alleged that "the defect existed for such a length of time, and created such a dangerous condition in said public street and way that danger to persons lawfully travelling over and upon said sidewalk in the usual mode might reasonably have been apprehended at any time by defendants, and defendants knew or should have known that the same was dangerous." This testimony would appear to have been advantageous to appellant under this count to establish knowledge of the condition on the part of the respondent for a considerable length of time prior to the accident. Since it was properly admissible under the first cause of action, no error was committed.

It is claimed that the trial court erred in admitting hearsay evidence that appellant had a prior accident with the same barber pole. Counsel for respondents in cross-examining appellant's doctor brought before the jury an alleged accident with the same barber pole prior to November 26, 1951, while appellant was in the company of the witness Dyer. Objection having been made, the court stated that she would consider it a mistrial unless respondents produced such testimony. Later, the witness Dyer on direct examination testified to a somewhat similar accident to appellant which he asserted had happened in October 1951, and which he had witnessed. Appellant's testimony was that he was alone at the time of the accident, that only one accident had occurred, and that had been on November 26, 1951. Dyer was asked if appellant had complained to him of dizziness, nausea, and the like sometime in October. He answered in the affirmative, and the following then occurred:

"Q. Now can you tell us this, Mr. Dyer: At any time following that particular occurrence here in October of 1951—just answer me yes or no now—was it ever brought to your attention that in November of 1951 Mr. Elm had struck his head against that barber pole? A. Well, it was only through hearsay, however; I wasn't present.

"Mr. Ribar. I will object to that, your Honor, and ask that the answer be stricken.

"The Court. It may go out.

"Mr. Barfield: May the first, just the 'yes', your Honor, remain?

"The Court. Yes, that will remain.

"Mr. Ribar. That's what I mean, after the 'yes'.

"The Court. Yes."

[2] From the exchange of court and counsel it clearly appears that counsel for appellant acquiesced in the ruling of the court and he cannot now complain that evidence of another accident was not properly before the jury.

[3] Appellant after using a prior written statement by Dyer for impeachment

purposes, then introduced it in evidence as plaintiff's exhibit 4, placing no restriction on the purpose of its admission in evidence. That statement contained the information that the accident which Dyer had witnessed occurred in November, that later that month he missed school for a week, and during that period appellant told him that he had struck the pole again. It is urged that since this statement was admissible for impeachment only, it is not competent proof of the truth of the statements, citing *Kropin v. Huston*, 79 Cal.App.2d 332, 344, 179 P.2d 575. However, if appellant wished the jury's consideration of this statement limited to impeachment purposes only, he should have asked for an instruction so limiting the use of this evidence. 27 Cal.Jur. 169, sec. 143. There is nothing in the record to indicate that such an instruction was requested.

At appellant's request the jury was instructed as follows:

"You are instructed that at the time of the accident in question, an ordinance of the City and County of San Francisco provided that it shall be unlawful for anyone to place or maintain upon, or in front of, or attach to, any building or premises, any barber pole which has its lowest point less than 8 feet above the sidewalk.

"In this connection, you are instructed that the violation of this ordinance is a violation of a rule of positive law and is negligence in itself."

"You are further instructed that at the time of the accident in question, and ordinance of the City and County of San Francisco provided that it shall be unlawful for anyone to place, maintain upon or in front of, or attach to any building, structure or premises, any barber pole without securing a permit therefor from the Central Permit Bureau of the Department of Public Works.

"A violation of this ordinance is a violation of a rule of positive law and is negligence in itself."

This was followed by a short instruction on contributory negligence, and immediately thereafter, the following instruction requested by respondents was given:

"You are instructed that the violation of a statute or municipal ordinance is presumptively an act of negligence unless such violation, if any, may be excused or justified and it is a question of fact for you to decide whether or not the violation of an ordinance or a statute, if any there was, was excused or justified under all the facts and circumstances of this case."

[4] The instruction on justification is attacked as being inapplicable in the present case, since the record contains no evidence of excuse or justification. Even though an instruction is proper in form, if it finds no support in the evidence, it is prejudicial error to give it if it is calculated to mislead the jury. *Davenport v. Stratton*, 24 Cal.2d 232, 254, 149 P.2d 4.

Respondents say that it was a question of fact for the jury to decide whether the violation of the ordinance was excusable or justifiable under the facts and circumstances of this case. They also cite *Nevis v. Pacific Gas & Electric Co.*, 43 Cal.2d 626, 633, 275 P.2d 761, for the proposition that "nonnegligent ignorance of the facts which bring a regulation into operation will support a finding that violation thereof is civilly excusable." In the cited case a safety order prohibited operation of a derrick in close proximity to high voltage wires, and it was argued that plaintiff in so operating the derrick was guilty of contributory negligence as a matter of law. Plaintiff there testified that he had not seen the wires before he was injured. In the present case there is no comparable "nonnegligent ignorance of facts", for respondents in their brief state the following:

"It was stipulated at the trial that these defendants and respondents acquired the property on which the barber shop was located on August 8, 1923. The barber pole was there at the time and they permitted it to remain. They never applied for or received a permit to maintain it. The projection of the barber pole from the face of the building was not more than 14 inches and its lowest point was 5 feet 6 inches above the sidewalk."

In view of these admissions it cannot be said that there is any fact question as to

the location of the barber pole or the knowledge of respondents as to its existence at that location. Respondents argue that long user permitted the inference that the barber pole was constructed and maintained under a permit, citing 2 Shearman & Redfield, 872, sec. 358. That section, however, states further that this presumption may be dispelled by proof that a permit has, in fact, never been issued. In the instant case appellant proved that no permit had been issued back as far as 1906 by bringing in the records of the City and County department concerned therewith. Respondents' testimony established only that the pole was there since 1923. Therefore, in this case, on the basis of the above evidence, the jury would not be allowed to infer that the pole was maintained under a permit.

[5-7] Since there is no evidence in the record to establish justification or excuse the instruction on this subject was misleading and prejudicial. See, *Davenport v. Stratton*, *supra*. Appellant also notes that respondent McKee testified that he didn't get a permit, that he didn't think it was up to him, that the man who put the barber pole there should have obtained the permit. This testimony which was being read to the jury from a deposition by the court and counsel for appellant was objected to by appellant's counsel. His objection was based on the ground that the testimony was incompetent, irrelevant and immaterial, but the objection was overruled and he was ordered to read the answer. The objection was good. Ignorance of the law could not excuse the violation of the ordinance, see, *Carlson v. Shewalter*, 110 Cal.App.2d 655, 658, 243 P.2d 549, and in view of the instruction on excuse and justification this incompetent evidence might lead to speculation that perhaps respondents were excused if they did not know that a permit was required or believed the duty to obtain one was on some person other than themselves.

Appellant maintains that conflicting instructions were given in regard to the law governing nuisance. At appellant's request the following instruction was given:

"It is the law of this state that anything which unlawfully obstructs the free passage or use, in the customary manner, of any street, is a nuisance. * * * The maintenance of the barber pole projecting over the street more than 8 inches and at a distance of approximately 5 feet 6 inches above the sidewalk was a nuisance."

Then at respondent's request the court instructed as follows:

"I instruct you that not every obstruction constructed or maintained in the area between the curb and the property line constitutes a nuisance. The test is whether such obstruction is unreasonable and does it make the sidewalk unsafe for use by the public in the customary manner."

[8-10] The latter instruction appears to have been improper in this case. The test is not "whether such obstruction is unreasonable and does it make the sidewalk unsafe for use by the public in the customary manner", but the test is, as defined by section 3479, Civil Code, and as set forth in the first instruction, whether it *unlawfully* obstructs "the free passage or use, in the customary manner" of any street. In *Curtis v. Kastner*, 220 Cal. 185, 188, 30 P.2d 26, 28, the court declared that "The court's finding that defendant could not have anticipated that an accident would result from the projecting eaves and rafters might relieve her were negligence the basis of plaintiff's right of recovery, but it does not defeat liability arising from a condition which constitutes a nuisance, irrespective of negligence in its creation or maintenance." Here, the ordinance has established that the barber pole projecting out over the sidewalk 14 inches and at a height of 5 feet 6 inches was unlawfully maintained. The jury were first plainly told that this was true, and then were told in an instruction shortly thereafter that a fact test was to be applied by them in determining whether or not a nuisance existed. Although there is sufficient evidence in this case on which the jury could have made a finding of contributory negligence on the part of appellant, it cannot be said that he was guilty of contributory negligence as a

matter of law. Under these circumstances, the conflicting and erroneous instruction constituted prejudicial error.

[11, 12] An instruction on unavoidable accident was given at respondents' request. They contend that it was properly given, citing *Hughes v. MacDonald*, 133 Cal. App.2d 74, 283 P.2d 360. That was a case in which it was proper for the jury to decide whether there was justification for violation of certain sections of the Vehicle Code by defendant. It was held that it was not error to have given the instruction since it could not be held as a matter of law that the violation of the ordinance was a proximate cause of the injury. In the instant case, if the jury believed that the accident did in fact happen to appellant, the presence of the barber pole at the illegal height necessarily was a contributing factor. When it is for the jury to decide whether the injury was proximately caused by the negligence of a defendant, the giving of such an instruction is not error. In *Parker v. Womack*, 37 Cal.2d 116, 122, 230 P.2d 823, it was pointed out that in cases where the negligence of defendant is established as a matter of law (and we assume that means negligence proximately causing the accident) the giving of such an instruction is prejudicially erroneous. And, see, *Driver v. Norman*, 106 Cal.App.2d 725, 236 P.2d 6. Under the evidence in this case the giving of the instruction on unavoidable accident was prejudicial error.

[13, 14] The instruction which told the jury that a verdict against one defendant did not necessarily compel a verdict against the other defendant, and that the liability of the owner and the liability of the tenant must be based upon the negligence of each was not erroneous. This was not a case in which the doctrine of respondeat superior was to be applied. Furthermore, the jury were provided with verdict forms for a verdict against both defendants, one for a verdict against the tenant Barsamian only, and one for a verdict against only the defendants McKee and another for a verdict for all defendants. Appellant made no ob-

jection to the forms of verdict. Respondents note that there is no showing of prejudice in view of the fact that the verdict was returned in favor of both defendants.

[15] Appellant complains of the large number of instructions, eight in all, given on contributory negligence, contending that this issue was unduly emphasized. Contributory negligence was, however, a proper defense to each of the three causes of action pleaded. If the instructions have stated the law correctly, no prejudicial error has been committed. *Ornales v. Wigger*, 35 Cal.2d 474, 480, 218 P.2d 531.

[16] It is asserted that two of the instructions on contributory negligence were erroneous because they were formula instructions and omitted the essential element of ordinary care "under the same or similar circumstances." They simply used the term "ordinary care." That term was properly defined in another instruction, and the jury was given the customary instruction that the entire charge must be considered as a whole. Negligence and contributory negligence were also correctly defined in other instructions, hence it does not appear that the jury could have been misled.

[17, 18] There was no error in refusing to give appellant's instruction that "plaintiff had a right to assume that the sidewalk was in a safe condition and would be unobstructed", since this was covered by another instruction even more favorable to appellant. The instruction on the presumption of due care in appellant's favor was properly refused since appellant testified fully as to his own conduct. *Ford v. Chesley Transportation Co.*, 101 Cal.App.2d 548, 552, 225 P.2d 997. Finally, the instruction refused regarding the safety of leased premises, was adequately covered by another instruction.

Prejudicial error appearing in the record before us, the judgment must be reversed.

Judgment reversed.

NOURSE, P. J., and DOOLING, J., concur.

139 Cal.App.2d 345

Leroy DEVERS, Plaintiff and Respondent,
v.

**M. S. A. GREENWOOD, Merchants and
Manufacturers Escrow, Title and Mort-
gage Corporation, Florence Shaffer, Sarah
Riley, et al., Defendants,**

**M. S. A. Greenwood and Merchants and Man-
ufacturers Escrow, Title and Mortgage
Corporation, a corporation, Appellants.**

Civ. 21022.

**District Court of Appeal, Second District,
Division 1, California.**

Feb. 20, 1956.

Rehearing Denied March 19, 1956.

Hearing Denied April 18, 1956.

Action for declaratory relief, cancellation or reformation of three notes and trust deeds and various escrow instructions and authorizations to pay charges in connection with escrows, damages for fraud and usury, and quieting of plaintiff's title to real property. From a judgment of the Superior Court of Los Angeles County, A. Curtis Smith, J., for plaintiff against defendants real estate broker and escrow corporation, they appealed. The District Court of Appeal, Fourn, J., held that complaint stated cause of action against appealing defendants for constructive fraud and that pleadings and evidence were sufficient to support judgment against defendant broker for exemplary damages and judgment against both defendants for balance of net loan proceeds, held by them in trust for plaintiff, after allowance to defendants of reasonable value of their services to plaintiff.

Judgment affirmed.

1. Fraud ⇨43

In action to cancel or reform plaintiff's notes and trust deeds for loans secured by defendant real estate broker, recover damages for fraud and quiet title to mortgaged realty, complaint stated cause of action for constructive fraud in broker's addition of 10 per cent interest, as well as agreed bonus, to amount of one note without plaintiff's knowledge or consent, procurement of plaintiff's execution of another note and trust deed for which he received

no consideration, and payment of loan proceeds to broker and defendant escrow corporation for commissions and services without plaintiff's authorization or knowledge. West's Ann.Civ.Code, § 1573.

2. Fraud ⇨6

"Constructive fraud" consists in any breach of duty whereby person in fault, without actual fraudulent intent, gains advantage by misleading another to his prejudice. West's Ann.Civ.Code, § 1573.

See publication Words and Phrases, for other judicial constructions and definitions of "Constructive Fraud".

3. Trusts ⇨231(1)

Existence of fiduciary relationship between parties precludes party in whom trust and confidence is reposed from participating in profit or advantage resulting from parties' dealings.

4. Fraud ⇨6

"Constructive fraud" exists where conduct, though not actually fraudulent, should be treated as such because it has all actual consequences and legal effects of actual fraud.

5. Trusts ⇨231(1)

One holding confidential relation toward another will not be permitted to take advantage of such relation in favor of himself or deal on terms of his own making with other party to relation.

6. Brokers ⇨38(4)

In action against real estate broker and escrow corporation, of which he was president and escrow agent, to cancel or reform plaintiff's notes and trust deeds for loans secured by defendant broker, recover damages for fraud, and quiet plaintiff's title to mortgaged realty, pleadings and evidence were sufficient to support judgment awarding plaintiff exemplary damages against broker on grounds of his breach of obligations arising from his fiduciary relation to plaintiff and malicious placing of cloud on plaintiff's realty with intent to oppress and defraud him, though defendants caused reconveyance of realty to plaintiff after action was filed. West's Ann.Civ.Code, § 3294.

7. Trial ⇨404(2)

A trial court's fact finding will be treated as such, though mistakenly placed among court's conclusions of law.

8. Usury ⇨23

A loan of \$2,000, for which borrower executed a note in blank, which real estate broker, employed by borrower to refinance his real property, filled in for principal sum of \$2,200, with interest at 10 per cent per annum, was usurious. West's Ann.Civ. Code, § 1916-2; West's Ann.Const. art. 20, § 22.

9. Usury ⇨42

A bonus paid for making loan must be considered as interest and taken out of principal when loan is made and interest then computed on remainder of principal, and if interest so computed, plus bonus, exceeds 12 per cent per annum, contract is usurious. West's Ann.Civ.Code, § 1916-2; West's Ann.Const. art. 20, § 22.

10. Appeal and Error ⇨1071(6)

Where trial court makes findings on issues which determine cause, other issues become immaterial and court's failure to find thereon does not constitute prejudicial error.

11. Appeal and Error ⇨1071(6)

An appellant cannot complain of trial court's failure to make finding which would necessarily have been against appellant.

12. Appeal and Error ⇨766

Whether trial court failed to make findings on all material issues cannot be determined by appellate court, where appellants do not allege that omitted findings, if made, would have been in their favor, refer to reporter's transcript, or point out in their brief where evidence supporting their contentions may be found.

13. Appeal and Error ⇨757(3)

An appellate court is not required to search record for evidence supporting appellants' contentions.

14. Appeal and Error ⇨766

Where appellant fails to point out in his brief any particular issues on which trial court omitted to find or what par-

ticular findings of court were unsupported by evidence and particulars in which they were unsupported, appellate court owes no duty to investigate such questions.

15. Appeal and Error ⇨757(3), 931(1)

An appellant contending that there is no substantial evidence to sustain trial court's fact finding must point out evidence and finding in his brief and show wherein evidence does not sustain finding, which otherwise is presumed to be correct and will be upheld by appellate court.

16. Appeal and Error ⇨761

The provisions of Rule on Appeal that points in brief shall appear separately under appropriate headings, which should be concise and generally descriptive of subject-matter, and that statement of any matter in record shall be supported by appropriate reference thereto, are not mere technical requirements, but are prescribed to facilitate disposition of cases on appeal and direct appellate court's attention to specific errors of law allegedly committed by trial court, and appellant must not only properly raise point in his brief, but must point out error, specifically showing accurately wherein lower court's action is deemed erroneous. West's Ann.Rules on Appeal, rule 15(a).

17. Trusts ⇨110

In action against real estate broker and escrow corporation to cancel or reform plaintiff's notes and trust deeds for loans secured by defendant broker and recover damages for fraud, evidence supported trial court's findings that plaintiff never authorized payment of any funds as loan charges, broker's commissions or escrow fees, with exception of specified sum, and that defendants held balance of net loan proceeds, after allowing them reasonable value of services rendered, in trust for plaintiff, so as to authorize judgment for him in amount of such balance.

Barry Sullivan, Los Angeles, for appellants.

Vaino Hassan Spencer, Los Angeles, for respondent.

FOURT, Justice.

This is an action for declaratory relief, cancellation and reformation of instruments, damages for fraud and usury, and to quiet title. From a judgment rendered in favor of plaintiff and against defendants Greenwood and Merchants and Manufacturers Escrow, Title and Mortgage Corporation in the sum of \$560.87, and against defendant Greenwood in the sum of \$500, exemplary damages, said defendants have appealed.

The record discloses the following facts: Plaintiff was the owner of certain real property situated in the city of Los Angeles, California. Defendant M. S. A. Greenwood, hereinafter referred to as Greenwood, was a real estate broker doing business as the Greenwood Mortgage Company, and defendant Merchants and Manufacturers Escrow, Title and Mortgage Corporation, hereinafter referred to as the escrow corporation, was a California corporation of which Greenwood was president and agent.

About March 28, 1952, plaintiff employed Greenwood, in his capacity as a real estate broker, to refinance plaintiff's property. Thereafter, in connection with such refinancing, two escrows were opened with the escrow corporation. All of plaintiff's negotiations and dealings were directly with Greenwood in his dual capacity as real estate broker and as escrow clerk for the escrow corporation. No agreement was ever reached between plaintiff and defendants relative to the amount or payment of brokerage commissions or escrow fees and charges with regard to any of the transactions in question.

Defendant Greenwood procured for plaintiff a loan from the Whittier Savings and Loan Association in the principal sum of \$5,000, secured by a first deed of trust on plaintiff's property; Greenwood also obtained a loan of \$2,000 from defendant Florence Shaffer, secured by a second deed of trust on the same property. The note evidencing this \$2,000 loan was executed by plaintiff in blank and was subsequently filled in by Greenwood as follows: "For the principal sum of \$2200.00, with interest

thereon at 10% per annum in favor of Florence Shaffer, principal and interest payable in installments of \$35.00 per month, due on the 15th of each month, beginning July 15, 1952 and continuing to September 15, 1952, at which time the then remaining balance, plus accrued interest, shall become due and payable at once." The note was dated June 17, 1952, with interest due from that date. The total amount loaned by Florence Shaffer to the plaintiff as consideration for the note was \$2,000, of which sum \$175 was repaid.

Greenwood also obtained plaintiff's signature to another note and trust deed, both of which were executed in blank and were thereafter completed to create a \$400 promissory note in favor of defendant Sarah Riley, who was the agent of Greenwood, and a third trust deed on plaintiff's property. No consideration was paid to plaintiff for this note and trust deed and he had no knowledge thereof until several months after the deed of trust was recorded. (Subsequent to the filing of the instant action the defendant escrow corporation, as trustee on the third deed of trust, executed a reconveyance to plaintiff.)

In addition to the above-mentioned promissory notes and deeds of trust which respondent executed in blank, defendant Greenwood obtained plaintiff's signature in blank to various escrow instructions and authorizations to pay invoices and charges in connection with the escrows herein involved. These documents were filled in by Greenwood, without plaintiff's knowledge or consent, directing the payment of plaintiff's loan proceeds to defendant Greenwood as commission for services allegedly rendered; to defendant escrow corporation for fees and charges, and to defendant Florence Shaffer as repayment for a purported cash advance to respondent, which advance in fact was never made.

None of the proceeds of the loans were paid to plaintiff, who made numerous demands upon the escrow corporation for a closing statement regarding his account between July 24, 1952, at which date the refinancing was completed and the escrow closed, and October of 1952. It was not

until January 5, 1953, that the escrow corporation furnished plaintiff with the closing statement.

[1-5] Defendants contend that "fraud was not pleaded, proved or adjudged," since the element of damages is lacking both in the pleadings and in the findings and judgment. Such contention is devoid of merit. The allegations set forth in plaintiff's complaint are sufficient to state a cause of action for constructive fraud, which consists in any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, by misleading another to his prejudice. Civil Code, § 1573. Where there is between the parties a fiduciary relationship, the very existence of such relationship precludes the party in whom the trust and confidence is reposed from participating in profit or advantage resulting from the dealings of the parties to the relation. *In re Estate of Cover*, 188 Cal. 133, 143, 204 P. 583. Constructive fraud exists in cases in which conduct, although not actually fraudulent, ought to be treated as such, having all the actual consequences and all the legal effects of actual fraud. *In re Estate of Arbuckle*, 98 Cal. App.2d 562, 568, 220 P.2d 950, 23 A.L.R.2d 372. One who holds a confidential relation toward another will not be permitted to take advantage of such relation in favor of himself or deal with the other party to that relation upon terms of his own making. *Sparks v. Sparks*, 101 Cal.App.2d 129, 136, 225 P.2d 238.

In his complaint plaintiff alleged that he employed defendant Greenwood, in his capacity as a real estate broker, to refinance plaintiff's property; that there was no agreement between them as to fees and commissions; that at Greenwood's request he executed certain documents in blank; that without his authorization or knowledge Greenwood caused certain of these documents to be filled in so as to direct the payment of certain of plaintiff's loan proceeds to Greenwood as commissions for services allegedly rendered, to the escrow corporation for fees and charges, and to Florence Shaffer as repayment for a purported cash advance which plaintiff never received, and

to create a promissory note in the sum of \$400 and a third deed of trust in favor of defendant Sarah Riley for which plaintiff received no consideration; that Sarah Riley was the agent of Greenwood; that defendant Greenwood caused said third deed of trust to be recorded, thereby creating a cloud on the title to plaintiff's property.

The court found all of the foregoing allegations to be true and found that a fiduciary relationship existed between plaintiff and defendant Greenwood in his capacity as a real estate broker, and between plaintiff and defendant escrow corporation in its capacity as escrow agent; that Greenwood and the escrow corporation had charged plaintiff's account in the sum of \$1,281.96, of which sum plaintiff had authorized charges in the amount of \$144.28; that the sum of \$310, although not authorized by respondent, was reasonable compensation for services rendered; that although plaintiff was charged with the sum of \$1,281.96, the amount actually withheld by Greenwood and the escrow corporation was \$1,015.15, and the amount due and owing to plaintiff was \$560.87. The court further found that in creating and causing to be recorded a third deed of trust against plaintiff's property, defendant Greenwood acted deliberately, maliciously and with intent to defraud plaintiff. Defendants have not, in their brief, attacked any of the findings of the trial court.

Defendant Greenwood's conduct clearly reflects a breach of the duty which he owed to plaintiff in the confidential relationship which existed between them. He caused plaintiff to execute notes and trust deeds in blank. On the \$2,000 note in addition to the bonus of \$200 to which plaintiff had agreed, Greenwood added 10% interest, without the knowledge or consent of plaintiff. Plaintiff received no consideration for the \$400 note and the third deed of trust created a cloud on the title to his property. The proceeds of plaintiff's loans were paid to defendants for commissions and services without plaintiff's authorization or knowledge. That plaintiff suffered damage as the result of Greenwood's acts is obvious, and it was both pleaded and found.

[6] Defendants maintain that the evidence is insufficient to support the judgment of \$500 exemplary damage, that the pleadings are insufficient to show exemplary damage, and that exemplary damage can not be allowed for breach of obligations arising out of contract. This contention is likewise without merit. Section 3294 of the Civil Code provides as follows: "In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." The trial court specifically found that defendant Greenwood breached obligations toward the plaintiff, not arising from contract, but arising from his fiduciary obligation to the plaintiff, and that he deliberately and maliciously, with intent to oppress and defraud the plaintiff, placed a cloud upon the real property of the plaintiff. That defendants caused a reconveyance to be executed after this action was filed does not alter the fact that defendant Greenwood was guilty of a breach of a fiduciary duty and of constructive fraud.

[7-9] Defendants assert that there is no finding or judgment of usury. The trial court found that defendant Greenwood, on plaintiff's behalf, negotiated a loan with the defendant Florence Shaffer for the sum of \$2,000; that the plaintiff executed a promissory note in blank, which was filled in by defendant Greenwood for the principal sum of \$2,200, with interest thereon at 10% per annum; that the total amount loaned by the defendant Florence Shaffer to the plaintiff as consideration for said promissory note was the sum of \$2,000; that the total sum repaid by the plaintiff to defendant Florence Shaffer was \$175. The court concluded that said note in favor of defendant Florence Shaffer is usurious, and the present unpaid balance thereon is \$1,825.

A finding will be treated as one of fact although mistakenly placed among the conclusions of law. *Lande v. Southern Cal. Freight Lines*, 85 Cal.App.2d 416, 426, 193 P.2d 144; *Janise v. Bryan*, 89 Cal.App.2d

Supp. 933, 941, 201 P.2d 466; *Johndrow v. Thomas*, 31 Cal.2d 202, 205, 187 P.2d 681. The loan was clearly usurious. Section 2 of the Usury Law, Stats. 1919, p. lxxxiii, Deering's Gen.Laws, Act No. 3757, West's Ann.Civ.Code, § 1916-2, provides that any contract to pay more than 12 per cent per annum renders the entire interest provision null and void. Article XX, Sec. 22 of the Constitution prohibits any devices whereby the lender by charging a "fee, bonus, commission, discount or other compensation" will receive more than 10 per cent per annum for any loan of money. "When a bonus is paid for the making of a loan, it must be considered as interest, and taken out of the principal at the time of the making of the loan, and interest then computed upon the remainder of the principal. If upon such calculation, the interest so computed, plus the bonus, exceeds 12 per cent. per annum, the contract is usurious, and, if not, there is no usury." *Otis v. I. Eisner Co.*, 7 Cal.App.2d 496, 499-500, 46 P.2d 235, 236.

[10-13] Defendants contend that the trial court failed to make findings on all material issues. Where findings are made upon issues which determine a cause, other issues become immaterial and a failure to find thereon does not constitute prejudicial error. Also, an appellant cannot complain of the lack of a finding where such finding, if made, would necessarily have been against him. *Chamberlain v. Abeles*, 88 Cal.App.2d 291, 300, 198 P.2d 927. Defendants do not allege that the findings, if made, would be in their favor. They have not made any reference to the reporter's transcript and this court is unable to ascertain by reading their brief where the evidence may be found. An appellate court is not required to search the record itself to see if there is any evidence to support their contentions. *Grayson v. Grayson*, 132 Cal.App.2d 471, 472, 282 P.2d 565; *Wallace v. Thompson*, 129 Cal.App.2d 21, 22, 276 P.2d 108.

[14, 15] Where the appellant fails to point out in his brief any particular issue or issues upon which the court omitted to find, or what particular finding or findings

were unsupported by evidence, and the particulars in which they were unsupported, it is not the duty of the appellate court to investigate those questions. *Kyle v. Craig*, 125 Cal. 107, 116, 57 P. 791. The rule is aptly stated in *Rinker v. McKinley*, 65 Cal. App.2d 109, at pages 110-111, 149 P.2d 859, at page 860, as follows: “* * * when an appellant contends that there is not any substantial evidence to sustain a finding of fact he must point out in his brief the (a) evidence, (*Brovelli v. Bianchi*, 136 Cal. 612, 613, 69 P. 416; *People v. One 1938 Buick Sedan*, 39 Cal.App.2d 42, 45, 102 P.2d 447.) (b) particular finding claimed to be unsupported (*Kyle v. Craig*, 125 Cal. 107, 116, 57 P. 791; *Cooper v. Weatherholt*, 28 Cal. App.2d 321, 325, 82 P.2d 524.) and (c) show wherein the evidence does not sustain the questioned finding; (*Duncan v. Ramish*, 142 Cal. 686, 689, 76 P. 661; *Wieczorek v. Texas Co.*, 45 Cal.App.2d 450, 457, 114 P.2d 377; *Glass v. City of Fresno*, 17 Cal.App.2d 555, 559, 62 P.2d 765.) otherwise the finding of the trial court is presumed to be correct and not erroneous and it will be upheld by an appellate court.”

Defendants have not shown the particular finding or findings that they claim are unsupported by the evidence nor wherein the evidence fails to sustain the findings.

[16] Furthermore, defendants have failed to comply with rule 15(a), Rules on Appeal, 36 Cal.2d 1, 15. As stated in *Richard v. Richard*, 123 Cal.App.2d 900, 902, 267 P.2d 867, 868, “[t]he provisions of this rule are not mere technical requirements, but are prescribed for the purpose of facilitating disposition of cases upon appeal and directing the court’s attention to the specific errors of law alleged to have been committed by the trial court. Not only must an appellant raise the point in his brief properly but he must point out the error specifically showing accurately wherein the lower court’s action is deemed erroneous. (See cases cited in 4 Cal.Jur.2d (1952), Appeal and Error, § 480, note 4, p. 311.)”

[17] Defendants assert that the court erred in giving judgment to the plaintiff for the sum of \$560.87. The court found

that with the exception of the sum of \$144.28, plaintiff had never authorized the payment of any funds as loan charges, commissions or escrow fees. There having been no agreement between plaintiff and defendants with respect to commissions and escrow fees, the court allowed defendants the reasonable value of the services rendered and found that the balance of the net loan proceeds defendants held in trust for plaintiff. The evidence supports the findings of the trial court.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.



139 Cal.App.2d 282

Donald C. COCHRAN, Petitioner and Appellant,

v.

CITY OF LONG BEACH, etc., et al., Respondents.

Civ. 21113.

District Court of Appeal, Second District,
Division 2, California.

Feb. 17, 1956.

Proceeding in mandate to compel the City of Long Beach to grant petitioner a disability pension as a retired police patrolman in amount of half of salary attached to his rank at time of his retirement. From so much of a judgment of the Superior Court of Los Angeles County, Beach Vasey, J., as limited monthly amount of pension granted petitioner by court to half of his average monthly salary during five years immediately preceding his retirement, he appealed. The District Court of Appeal, Ashburn, J., held that 1951 city charter provision that amount of pension thereafter granted shall be based on applicable percentage of pensioner’s average monthly salary during five years immediately preceding his retirement, thus substituting pen-

sion of fixed amount for fluctuating type previously guaranteed by repealed provision for payment of yearly pension of half of amount of salary attached to rank held by pensioner at time of his retirement, could not be validly applied to petitioner, who entered police department in 1941, while such repealed provision was in effect, and retired in 1952.

Judgment reversed with directions.

1. Municipal Corporations ☞187(7)

The provision of Long Beach city charter for payment to retired disabled police department employee of annual pension equal to half of amount of salary attached to rank or position held by him at date of retirement order provided for fluctuating pension increasing or decreasing as salaries paid to active employees of department increased or decreased. St.1925, p. 1335, § 187(3).

2. Officers ☞94

Pension payments to retired public employees are deferred compensation.

3. Officers ☞94

Statutes providing for payment of pensions to retired public employees must be liberally construed to effectuate their beneficent purpose.

4. Officers ☞94

A public pension system is subject to implied qualification that governing body may make reasonable modifications before pensions become payable, and employee, until such time, has no right to any fixed or definite benefits, but only to substantial or reasonable pension.

5. Officers ☞94

Any one or more of various pension benefits offered public employees, including interests created for third persons, may be wholly eliminated before they become payable, if employees retain right to substantial pensions.

6. Officers ☞94

Modifications in public employees' retirement system before a member's right to payment of pension accrues must be reasonable, and what constitutes a permissible

change is for courts to determine on facts of each case.

7. Officers ☞94

Alterations of public employees' pension rights, to be sustained as reasonable, must bear some material relation to theory of pension system and its successful operation, and changes in pension plan, which result in disadvantage to employees, should be accompanied by comparable new advantages to them.

8. Municipal Corporations ☞187(7)

The 1951 Long Beach city charter provision that pension granted each retired disabled police department employee thereafter shall be based on applicable percentage of his average monthly salary during five years immediately preceding his retirement, thus substituting pension of fixed amount for fluctuating type guaranteed by previous repealed provision for payment of yearly pension of half of amount of salary attached to rank held by pensioner at time of retirement, cannot be validly applied to retired disabled police patrolman, who entered police department in 1941, while repealed provision was in effect, and retired in 1952, but he is entitled to fluctuating pension based on salaries paid active employees of same rank. St.1925, p. 1335, § 187(3); St.1951, p. 4635, § 187.2(b).

Kenneth Sperry, Long Beach, for appellant.

Walhfred Jacobson, City Atty., Clifford E. Hayes, Deputy City Atty., Long Beach, for respondents.

ASHBURN, Justice.

The question in this case is whether petitioner, a retired patrolman of the Long Beach Police Department, must accept a pension of a fixed amount or is entitled to a pension which fluctuates from month to month and year to year in proportion to the salary of a patrolman then on active duty.

Petitioner having been permanently injured on March 15, 1952, while in the performance of duty as a member of the Police Department of the City of Long Beach, was forced to retire from active duty on the

following day, March 16. After appropriate proceedings therefor, the City Council granted petitioner a disability pension dating from March 16, 1953 instead of March 16, 1952, and refused to order any payments for the intervening period of one year. Petitioner filed the instant proceeding in mandate to compel respondent City to grant a pension from March 16, 1952, in an amount equal to one-half of the salary attached to his rank of patrolman in said Police Department; petitioner specifically relied upon § 187, subdivision 3 of the City Charter, alleging that he was "entitled to be retired from active service and to receive a disability pension in an amount equal to one-half of the salary attached to the rank or position held by him at the time of his inability to continue in such service, to wit, March 15, 1952." The court granted the application, directed respondents to make an order granting petitioner a disability pension dating from March 23, 1952, and "payable monthly in an amount equal to 50% of the average monthly salary earned by petitioner during the five years immediately preceding March 23, 1952, which said average monthly salary shall be determined by dividing the total salary earned by petitioner during said five-year period by the actual number of months or portion thereof during which he earned such salary." Petitioner appeals from "that portion of the judgment which limits the disability pension payable to petitioner to an amount equal to fifty per cent (50%) of the average monthly salary earned by petitioner during the five years immediately preceding March 23, 1952, and which fails to order the respondents to grant him a disability pension equal to fifty per cent (50%) of the salary currently attached to the rank formerly held by petitioner, to wit, that of Patrolman in the Long Beach Police Department, as said salary varies from time to time in accordance with the provisions of Section 187, subdivision (3) of the Long Beach City Charter."

[1-3] Petitioner entered the service on November 1, 1941, suffered permanent injury on March 15, 1952, and was compelled to retire on March 16, 1952. When he entered the department, subdivision 3 of sec-

tion 187 of the Charter was in effect. It was enacted in 1925 and provided that "such person so retired shall, during his lifetime, be paid from said pension fund a yearly pension equal to one-half (½) of the amount of the salary attached to the rank or position held by him in such department at the date of such retirement order." Stats.1925, p. 1335. This language has been construed to provide a fluctuating pension, one which increases or decreases as salaries paid to active employees increase or decrease. *Casserly v. City of Oakland*, 6 Cal.2d 64, 56 P.2d 237; *Terry v. City of Berkeley*, 41 Cal.2d 698, 700, 263 P.2d 833. The basic concept is that "pension payments are deferred compensation", *Wallace v. City of Fresno*, 42 Cal.2d 180, 184, 265 P.2d 884, 885; and the statutes are to be liberally construed to effectuate their beneficent purpose. *Terry v. City of Berkeley*, supra, 41 Cal.2d 698, 702, 263 P.2d 833.

As appears from *Allen v. City of Long Beach*, 45 Cal.2d 128, 287 P.2d 765, 766: "On March 29, 1945, the City of Long Beach undertook to withdraw substantially all pension rights granted by section 187 of its charter to employees of the police and fire departments, and we held that the action of the city was invalid as to persons employed before that date. *Kern v. City of Long Beach*, 29 Cal.2d 848, 179 P.2d 799. Those who thereafter entered the police and fire departments were offered no pension benefits until 1950 when the city entered into a contract with the state, pursuant to section 20450 et seq. of the Government Code, for the purpose of making such persons members of the state employees' retirement system. In 1951 section 187.2 of the charter was enacted altering the pension rights of policemen and firemen employed prior to March 29, 1945."

Said section 187.2, adopted on June 5, 1951, provides: "(b) The amount to be paid as a pension to each person who shall be granted a pension subsequent to the effective date of this amendment pursuant to the rights thereto vested by reason of the provisions of Section 187 of this Charter prior to the repeal thereof by the adoption of Section 187.1 hereof, shall be based in each instance upon the applicable percent-

age of the average monthly salary earned during the five (5) years immediately preceding the retirement or death of the person whose service formed the basis for such right to a pension. Such average monthly salary shall be determined by dividing the total salary earned by such person during said five-year period by the number of months during which such person earned such salary." Stats.1951, p. 4635. The effect of this enactment is to substitute a pension of a fixed amount for the fluctuating type previously guaranteed by subdivision 3 of § 187.

This court held in *Rustad v. City of Long Beach*, 122 Cal.App.2d 106, 264 P.2d 955, that § 187.2 is valid in its application to members of the department whose employment began before March 29, 1945. The controlling facts were exactly parallel with those at bar. Rustad had joined the fire department in July, 1941, was injured in September, 1950 (before § 187.2 was enacted), but his disability and right to pension were not determined until December 3, 1951. The court concluded that § 187.2 governed his pension right, and at page 108 of 122 Cal.App.2d, at page 956 of 264 P.2d emphasized the fact that § 187 subdivision 3, was repealed and § 187.2 enacted "before he became disabled and entitled to be paid his pension". Relying on *Terry v. City of Berkeley*, supra, 41 Cal.2d 698, 263 P.2d 833, and similar cases, the court determined that § 187.2 was a reasonable change which could be made without impairment of any vested right if the change was effected before the right to payment of a pension had accrued. Petitioner Cochran was employed in 1941, was injured in March, 1952, and became entitled to payments beginning in March, 1952. Section 187, subdivision 3, was repealed and § 187.2 was enacted "before he became disabled and entitled to be paid his pension" as in the Rustad case.

[4, 5] The Terry case was decided on November 25, 1953; Rustad on December 17, 1953 and hearing denied February 10, 1954; *Wallace v. City of Fresno*, supra, 42 Cal.2d 180, 265 P.2d 884, was decided on January 29, 1954. The court in the Wallace case reiterated the rule applied by this court in Rustad, saying at page 183 of 42 Cal.2d,

at page 886 of 265 P.2d: "A public employee who serves under pension provisions similar to those contained in the 1923 ordinance acquires a vested contractual right to a substantial pension. This right arises before the happening of the contingency which makes the pension payable, and it cannot be constitutionally abolished by subsequent changes in the law. *Kern v. City of Long Beach*, 29 Cal.2d 848, 852 et seq., 179 P.2d 799. In discussing the nature of an employee's rights we recognized in the Kern case that a public pension system is subject to the implied qualification that the governing body may make reasonable modifications and changes before the pension becomes payable and that until that time the employee does not have a right to any fixed or definite benefits but only to a substantial or reasonable pension." And at page 184 of 42 Cal.2d, at page 886 of 265 P.2d: "A number of decisions applying the principles announced in the Kern case have upheld, as reasonable, amendments which were enacted after the employees involved had earned some pension rights but before their pensions became payable." *Packer v. Board of Retirement*, 35 Cal.2d 212 at page 218, 217 P.2d 660, at page 664, (April 25, 1950) says: "It appears, therefore, that both the cases and the policy underlying pensions for public employees indicate that any one or more of the various benefits offered, including interests created for third persons, may be wholly eliminated prior to the time they become payable, provided, of course, the employee retains the right to a substantial pension."

[6-8] The Supreme Court in *Allen v. City of Long Beach*, supra, 45 Cal.2d 128, 287 P.2d 765, has established a new criterion for determining the reasonableness of changes made in a retirement system before the right of a member to payment of pension has accrued. At page 131 of 45 Cal.2d, at page 767 of 287 P.2d the court says: "Such modifications must be reasonable, and it is for the courts to determine upon the facts of each case what constitutes a permissible change. To be sustained as reasonable, alterations of employees' pension rights must bear some material relation to the theory of a pension system and

its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages. Wallace v. City of Fresno, 42 Cal.2d 180, 185, 265 P.2d 884; see Packer v. Board of Retirement, 35 Cal.2d 212, 214, 218-219, 217 P.2d 660." (Emphasis added.) We are unable to deduce from the cited Wallace and Packer opinions a rule requiring compensating new advantages as the price of changes which result in disadvantage to the employees. But it is enough to know that the Allen case is the latest pronouncement of the Supreme Court. In effect it holds that § 187.2 of the Charter cannot be applied validly to one in petitioner Cochran's status, and that Rustad no longer reflects the law of this state. The fact that the opinion does not mention the Rustad case does not impair this conclusion. Bohn v. Bohn, 164 Cal. 532, 129 P. 981; People v. Bateman, 57 Cal. App.2d 585, 135 P.2d 192; Kenney v. Antioch L. O. School Dist., 18 Cal.App.2d 226, 63 P.2d 1143.

In the Allen and the companion Alger case, 45 Cal.2d 128, 287 P.2d 765, members of the police and fire departments whose service began before March 29, 1945, and who were still on active duty, brought action for declaratory relief as to their rights under the Charter as amended by § 187.2. Among the 1951 changes involved was: "The method of computing the pension benefits payable to employees retiring after 25 years of service was altered to provide for payment of a fixed rather than a fluctuating amount". 45 Cal.2d at page 131, 287 P.2d at page 767. The trial judge upheld application of the formula of § 187.2 to the plaintiffs, and was reversed in that respect. At page 131 of 45 Cal.2d, at page 767 of 287 P.2d, after using language above quoted, the court continued: "In the present case it appears that section 187.2 substantially decreases plaintiffs' pension rights without offering any commensurate advantages, and there is no evidence or claim that the changes enacted bear any material relation to the integrity or successful operation of the pension system established by section 187 of the charter." At page 131 of 45 Cal.2d, at page 767 of 287

P.2d: "The method of computing benefits was revised, under section 187.2, by substituting a fixed pension for the fluctuating pension previously provided for, and the sum to be paid as a pension is based on one-half the average monthly salary earned by the employee during the five years preceding his retirement or death. Prior to enactment of this section a retired employee was to receive a benefit equal to one-half the salary currently attached to the position which he had held one year prior to his retirement, and under the plan then in operation the amount of his benefit would fluctuate from time to time after retirement to reflect changes in the salary schedule attached to his old position. Payment of a fixed amount freezes the benefit at a figure which is based on salary scales preceding retirement, thus the longer an employee is retired on a fixed pension the more likely it is that the amount of his pension will not accurately reflect existing economic conditions, whereas a retired employee receiving a fluctuating pension based on the salaries that active employees are currently receiving can maintain a fairly constant standard of living despite changes in our economy. * * * It is, of course, impossible to predict with certainty whether, at the time of retirement of each of the employees here involved, the amount paid him under a provision for a fixed benefit would be greater or less than that paid him under a fluctuating benefit system, but that very uncertainty indicates the advantage of a plan for fluctuating benefits which attempts, however roughly, to reflect the actual purchasing power of the dollar. Under all the circumstances, it appears that plaintiffs' rights would be adversely affected by the change to the fixed benefit plan."

There are no controlling factual differences between the Allen case and the one at bar. Moreover, the fact of a detrimental effect upon petitioner of application of § 187.2 to his pension clearly appears. At page 10 of the opening brief appellant makes this statement, which is based upon a stipulation found in the record and which is not denied by respondent: "Based upon the formula provided by Section 187.2, subdivision (b), the fixed pension granted ap-

pellant pursuant to the judgment of the trial court herein amounts to \$151.05 per month. Under the fluctuating pension provided for by Section 187, subdivision (3), appellant's monthly benefits as of the date of the trial would have amounted to \$208.50 and to considerably more at the present time."

The Allen case commands a reversal of the instant judgment.

The judgment is reversed with directions to enter judgment in conformity with this opinion.

MOORE, P. J., and FOX, J., concur.



139 Cal.App.2d 543

William OLDENBURG and Etta Oldenburg,
Plaintiffs, Cross-Defendants and
Respondents,

v.

Louis BRODY, Theora E. Brody and Burrow
Escrow Company, a California Corpora-
tion, Defendants, Cross-Complainants and
Appellants,

Morris Levin and L. Ruth Levin et al.,
Defendants and Cross-Complain-
ants.

Civ. 5098.

District Court of Appeal, Fourth District,
California.

Feb. 28, 1956.

Rehearing Denied March 27, 1956.

Hearing Denied April 25, 1956.

Action for damages arising out of exchange of property. The Superior Court, Orange County, Franklin G. West, J., rendered judgment for plaintiff against defendant-conveyors and against escrow company, and defendants appealed. The District Court of Appeal, Griffin, J., held that evidence as to whether plaintiffs had or should have had knowledge that defendants had earlier relinquished abutter's rights to state was insufficient to support finding

that defendants had been guilty of fraudulently concealing this fact.

Judgment reversed.

1. Fraud ☞49

Where complaint in action for damages arising from exchange of properties alleged that defendants had represented that reconstruction of highway along their property would increase business potential and rental value, plaintiff's contention that defendant had fraudulently concealed facts that defendants had conveyed abutter's rights of access to state and that access could be limited accordingly was within issues.

2. Judgment ☞251(1)

Pleading ☞1

When a case is fairly tried upon merits, and under circumstances which indicate that nothing in pleadings misled unsuccessful litigant to his injury, matter of pleading becomes unimportant, and where an answer in an action has been filed, court may grant plaintiff any relief consistent with case made by the complaint and embraced within issues. West's Ann.Code Civ.Proc. §§ 475, 580.

3. Vendor and Purchaser ☞231(16)

Duly recorded deed relinquishing abutter's rights to state is constructive notice of its contents. West's Ann.Civ.Code, §§ 19, 1213-1215.

4. Brokers ☞105

Where it did not appear that plaintiffs' broker had been authorized or instructed to ascertain state of title of property which was involved in exchange of property, or to ascertain whether defendants had relinquished abutter's rights, information obtained by broker was not necessarily imputable to plaintiffs. West's Ann.Civ.Code, § 2332.

5. Escrow ☞8(1)

A holder of an escrow is agent for all parties up to time that escrow is closed.

6. Fraud ☞58(1)

In action by plaintiffs for damages arising out of exchange of their orange grove for defendants' business property

along highway, evidence as to whether plaintiffs had or should have had knowledge that defendants had earlier relinquished abutter's rights to state was insufficient to support finding that defendants had been guilty of fraudulently concealing this fact. West's Ann.Civ.Code, §§ 1213, 1572, subd. 3, 3343; West's Ann.Code Civ. Proc. § 1880, subd. 3.

7. Fraud Ⓒ59(2)

In action for damages arising out of exchange of plaintiffs' property for defendants' property, based on contention that defendants had fraudulently concealed fact that they had relinquished abutter's rights to state in addition to deeding part of property to state, wherein it appeared that plaintiffs knew that the property had been deeded, measure of damages was difference in value of property with and without abutter's rights, without the land deeded in each case. West's Ann.Civ.Code, § 3343.

8. Fraud Ⓒ59(3)

One defrauded in purchase of property is entitled to recover difference between actual value of that with which defrauded person parted and actual value of that which he received. West's Ann.Civ. Code, § 3343.

9. Evidence Ⓒ498½

Question of qualification of witness to testify to cost of removing building, in action for damages for fraud in connection with exchange of property, was for trial court to determine.

10. Fraud Ⓒ57

In action for damages for fraud arising out of exchange of both real and personal property, wherein it appeared that defendants' personalty to be exchanged was more extensive than plaintiffs', trial court erred in eliminating evidence concerning value of personal property in fixing damage. West's Ann.Civ.Code, § 3343.

11. Exchange of Properties Ⓒ6

Where agreement for exchange of property provided that property would be exchanged subject to rights of way for existing roads, ditches, pipe lines and flumes, easements, reservations and restrictions,

that defendants and escrow agent conveyed defendants' property subject to prior relinquishment of abutter's rights to state was not a breach of agreement.

Rimel & Johnston, Santa Ana, for appellants Brody.

James E. Walker, Santa Ana, for appellant Burrow Escrow Co.

Harry Ashton, Newport News, and Donald D. Harwood, Corona Del Mar, for respondents.

GRIFFIN, Justice.

This is an action for claimed damages in the exchange of properties. In September, 1948, plaintiffs, cross-defendants and respondents William Oldenburg and Etta Oldenburg, his wife, and defendants, cross-complainants and appellants Louis Brody and Theora E. Brody, his wife, made an exchange of property through defendant, appellant and cross-complainant Burrow Escrow Company, a corporation. Two years later plaintiffs filed an action against defendants, and by their complaint alleged as a first cause of action that plaintiffs were the owners of an orange grove near Olive, and defendants Brody were the owners of a motel, cafe and gas station on the main highway in Santa Ana Canyon; that on September 22, 1948, they signed a written agreement of exchange (Exhibit A attached to the complaint); that defendant escrow company drew up this agreement at the request of the respective parties and that it constituted the escrow instructions in reference to the transaction; that by its terms defendants Brody agreed to convey to plaintiffs their property and to furnish a policy of title insurance showing title to be free and clear of liens, incumbrances or other matters, except as therein specified; and plaintiffs agreed to convey their property and furnish a similar policy of title insurance. Plaintiffs therein agreed to pay into escrow \$3,685.04 for the benefit of defendants Brody. Defendants Morris Levin and his wife, L. Ruth Levin, and Lee Staton, a copartnership, acted as real estate agents for both parties. Plaintiffs agreed to execute a promissory note to L. Ruth

Levin in the sum of \$1,000, as a part of the commission. It is alleged that plaintiffs performed their part of the agreement but defendants Brody did not comply with the terms of their agreement in that they failed to convey to plaintiffs their property "free and clear of liens, or incumbrances or other matters."

It appears from the evidence that the Brodys had theretofore, on February 25, 1948, deeded to the State of California for highway purposes, a small triangular strip of their property fronting on the old highway, which deed also contained the additional provision that the Brodys released and relinquished to the State all abutter's rights of access to and from the public highway adjoining said land, for freeway purposes and waived any right to damages by reason of a central dividing strip, or any damages to grantor's remaining property. This deed and a deed containing the description of the entire Brody property, together with the description of the Oldenburg property, were presented to the escrow officer in the presence of the real estate agent and Mrs. Brody. Apparently, in preparing the written agreement of exchange, the escrow officer's agent overlooked the excepted portion deeded to the State by the Brodys and described the whole property as indicated by Brodys' deed, and the parties signed the agreement of exchange as thus written. There is no question about all parties knowing that the portion of the property deeded to the State was not to be included in the description of Brodys' property, and it was so found at the trial. The written agreement contained a provision that the Brody property was to be conveyed subject to the "following incumbrances", among others: "Any rights of way for existing roads, ditches, pipe lines and flumes, easements, reservations and restrictions characteristic of other lands in the same locality." The main contention is that plaintiffs had no knowledge that the Brodys had also "relinquished and released" to the State all abutter's rights as indicated in the deed, and that plaintiffs were defrauded in this respect, because the State subsequently and after the exchange was effected, construct-

ed a drainage ditch, fenced the freeway in front of the Brody property, limited the access thereto by a 30-foot opening about 100 feet east of the gas station and a 30-foot opening about 310 feet west of the other opening, and changed the grade of the highway to a considerable extent.

Plaintiffs allege in their complaint as a first cause of action that the Brodys and the defendant escrow company did not comply with the written agreement, in that they failed to deed all of the Brody property described in the exchange agreement; that they excepted the strip previously deeded to the State, and that the escrow company, in violation of its duties under the agreement and without plaintiffs' knowledge or consent, caused the deed, with the exception, to be recorded and delivered to plaintiffs on October 15, 1948; that these defendants did not procure for plaintiffs a policy of title insurance as provided by the written agreement; that they did not secure a policy of title insurance until October 22, 1948, several days after the deeds were recorded; and that said policy did not insure title to the land as described in the written agreement of exchange, but showed it was subject to a prior conveyance to the State of all abutter's rights of access to and from the public highway adjoining said land. Damages in the sum of \$19,685.04 were claimed against defendants by reason of their claimed failure to perform the written agreement of exchange in accordance with its terms.

As a second cause of action plaintiffs allege that defendants Brody and Levin, between September 7 and September 22, 1948, falsely and fraudulently induced plaintiffs to exchange their property for the Brody property by representing to them that the right of access to said highway was not and would not be limited, and that no fences or other obstruction would limit or restrict ingress or egress thereto, when in truth and in fact, as defendants well knew, the Brodys had released and conveyed to the State said abutter's rights of unlimited access, and that the State Highway Department plan proposed to erect a fence along the common boundary line of Brodys' remaining property and to excavate a 6-

foot drainage ditch along said line so access would be limited accordingly.

During the trial plaintiffs moved to amend their complaint to show fraud by reason of concealment of fact, charging that the Brodys, knowing that the State was going to fence the highway and create a limited access to the Brody property, concealed that fact from plaintiffs. The trial judge denied the motion but found, in this respect, that defendants Brody "did not state, declare or represent to plaintiffs that the right of access to and from the highway in front of the Brody property would or would not be limited or restricted in any manner"; that on September 22, 1948, defendants Brody knew that the State Highway adjoining the Brody property might be fenced; that neither defendants Brody nor defendant Levin nor anyone else then knew that in the future a ditch would be constructed in front of the Brody property.

The complaint also contains further allegations that these defendants specifically and generally misrepresented the rental income from and incumbrance payments on the property. Since the trial court found against these last-mentioned allegations we will not give them further consideration.

Then follows a claim that plaintiffs would not have otherwise paid the Levins \$1,250 in addition to the promissory note of \$1,000. The prayer is that the note be canceled.

It is further alleged that the Burrow Escrow Company, in furtherance of the fraud, violated the escrow instructions as set forth in the first cause of action. A nonsuit was granted this particular defendant as to the second cause of action because no fraud on the part of that defendant was established.

It is then alleged that the property conveyed to defendants Brody by plaintiffs was of the value of \$45,000, and that the property conveyed by Brodys to plaintiffs was less than \$30,000; that \$3,685.04 had been paid by plaintiffs into escrow for the benefit of defendants and accordingly plaintiffs were damaged in said sum by reason of such fraud and deceit.

It is then alleged that Morris Levin died and his wife was appointed administratrix

of his estate; that a claim was presented against it for the amount set forth and that the claim was rejected.

Defendant Brody's answer denied generally the allegations of the complaint, alleged that their property was of the value of \$45,000, that plaintiffs' property was of the value of less than \$30,000, and as separate defenses alleged that when the escrow was opened a written agreement was entered into between the parties; that contemporaneously with its execution it was orally understood and agreed between them that the description of the Brody property furnished by them was that portion owned by them before the deeding of the strip to the state; that the deed giving the description of the excepted portion was also furnished at that time and that only the remainder was to be conveyed; and that plaintiffs received all the land which they were supposed to receive in exchange for their property. The trial court properly found that all parties knew that the highway strip was to be excluded from the deed.

It is then contended that by plaintiffs accepting, without objection, the deed from the Brodys, which contained the exception and the provision that title was "subject also to covenants, conditions, reservations, restrictions, easements and rights of way of record, if any", plaintiffs waived the right to insist upon a conveyance strictly in accordance with the terms of the written agreement. By way of cross-complaint the Levins set up the promissory note for \$1,000 and asked for judgment thereon, plus attorneys' fees, etc.

The Burrow Escrow Company, by cross-complaint, claimed that the written exchange agreement was modified at the time by the agreement of the parties that the deed of the Brody property to plaintiffs should show the excepted portion deeded to the State, and claimed mutual mistake in reference to the written agreement. It asked that it be reformed accordingly. The request for reformation was denied and the court properly held that plaintiffs were not deceived in this respect. It then found, however, in respect to the first cause of action, that the defendant escrow company

prepared the written exchange agreement; that the failure to note the relinquishment of abutter's rights therein was not the result of mutual mistake; that plaintiffs "have received by conveyance from defendants Brody all of the land which plaintiffs in fact agreed to purchase but have not received all of the *real property* which plaintiffs in fact agreed to purchase and defendants Brody agreed to convey in that the right of access had been conveyed to the State of California" (*italics ours*); that the land conveyed was not free and clear of liens or incumbrances or other matters; that the agreement between the parties provided that the conveyance from defendants Brody to plaintiffs was to be subject to certain incumbrances, among which were "Any rights of way for existing roads, ditches, pipe lines and flumes, easements, reservations and restrictions characteristic of other lands in the same locality"; and that it is true that defendant Burrow Escrow Company, in direct violation of its duties and obligations owing to plaintiffs, and without the knowledge or consent of the plaintiffs, caused said deed to plaintiffs to be recorded.

Defendants Brody, by a cross-complaint, alleged that plaintiffs and cross-defendants represented that their property was subject to a trust deed in the sum of \$25,000 when in truth and fact there was \$525 accumulated interest due thereon and unpaid and an unpaid irrigation district assessment in the sum of \$358, and sought judgment for said sums. The trial court allowed judgment for \$10,500 against both the Brodys and Burrow Escrow Company on the first cause of action based upon these findings, and allowed judgment only against the Brodys on the second cause of action. Certain facts relating to the leasing of the Brody property after plaintiffs took possession were considered by this court in *Daniels v. Oldenburg*, 100 Cal.App.2d 724, 224 P.2d 472.

As to the second cause of action the court further found that defendant Levin made no false representations to plaintiffs; that defendants Brody did not state, declare or represent to plaintiffs that the right of access to and from the highway in front

of the Brody property would or would not be limited or restricted in any manner; that on September 22, 1948, defendants Brody knew that the state highway adjoining the Brody property might be fenced; that neither defendants Brody nor defendant Levin nor anyone else knew that in the future a ditch would be constructed in front of the Brody property; that the transaction between plaintiffs and defendants Brody was completed before a change in plans of the state highway department resulted in the construction of a ditch on the said right-of-way in front of the Brody property; that defendants Brody represented to plaintiffs that the road in front of the property would be closer to the buildings thereon and that traffic would be closer to the property after the State of California had constructed the freeway; that such representation was true in that the freeway, as then projected and subsequently constructed was closer to the buildings on said property, but was untrue in that the access of traffic to the property from the west was limited as described; that the representations made by defendants Brody were made for the purpose of inducing plaintiffs to exchange the real property described. It then specifically found that plaintiffs employed two brokers, one Fuller and Levin, as their agents and that each agent knew that Brodys had conveyed abutter's rights of access to the State but that this knowledge was obtained outside of the scope of their authority and therefore was not imputable to plaintiffs; that on August 30, 1948, plaintiff William Oldenburg executed and delivered to one Fuller, a duly licensed real estate broker, a written listing to sell or trade their property; that on September 3rd Fuller went to the Brody property with the view of possibly arranging a trade for plaintiffs' property; that he examined it and part of the right-of-way map of the State of California showing lines of the right of access; that Fuller learned that abutter's rights of access had been conveyed to the State and that the line between the proposed freeway and the Brody property would probably be fenced area; that access to the freeway would be limited to points near the easter-

ly and westerly boundaries thereof; that the information so obtained by Fuller with reference to abutter's rights of access and the fencing of the Brody property was not obtained by him within the scope of his employment or authority; that Fuller did not inform plaintiffs of the information so obtained by him, nor did he tell them anything relative thereto which he might otherwise have learned; that before the execution by plaintiffs and defendants of the written agreement of exchange, Mr. Levin learned that abutter's rights of access had been conveyed to the State and that the line between the proposed freeway and the Brody property would probably be fenced so that access to the freeway would be limited to points near the easterly and westerly boundaries thereof; that from September 7th until the close of the escrow Levin was acting as agent for plaintiffs and for defendants Brody in bringing about the exchange of the properties described, and that he was at all times a duly licensed real estate broker but had no written contract of employment; that the knowledge obtained by Levin with reference to abutter's rights of access and the fencing of the property was not obtained by him within the scope of his employment or authority and that Levin did not inform plaintiffs of the information so obtained by him, nor did he tell them anything relative thereto which he might otherwise have learned.

It then found that, except for plaintiffs' belief in and reliance upon the representations of the defendants Brody, the plaintiffs would not have paid into said escrow the sums mentioned, and would not have authorized the payment of \$1,250 to the Levins and would not have executed and delivered a promissory note for \$1,000 and would not have conveyed the property to the Brodys. It then concluded that plaintiffs were entitled to \$10,500 on the second cause of action and that L. Ruth Levin should have judgment on her cross-complaint against the Oldenburgs for \$1,000 principal and attorneys' fees on the note. Judgment was entered accordingly.

At the close of the trial, defendants moved that plaintiffs be required to elect as to

whether they were submitting their case on the first or second cause of action. The motion was properly denied.

Defendants have lodged in this court a written opinion of the trial judge which they contend conclusively shows that the trial court adopted the wrong measure of damages, ignoring the value of the personal property in the transaction; and that he had forgotten some of the testimony and erroneously construed the agreement of the parties.

Defendants contend on appeal that the trial court erred when it considered evidence of concealment not pleaded in the complaint and when it found fraud based on that evidence, i. e., when defendants made the claimed statement that the road in front of the property would be closer to the buildings thereon and that traffic would be closer to this property after the State had constructed the highway, although true, defendants concealed the known fact that a fence was to be erected between the highway and this property and ingress and egress would only be available at the points above mentioned, citing such authority as *Borneman v. Salinas Title Guarantee Co.*, 66 Cal.App.2d 500, 504, 152 P.2d 649; *Frace v. Long Beach City High School Dist.*, 58 Cal.App.2d 566, 137 P.2d 60; and *Mayer v. Beondo*, 83 Cal.App.2d 665, 189 P.2d 327, 190 P.2d 23.

[1,2] The complaint alleges generally that at various times defendants fraudulently represented that the reconstruction of the highway would increase the business potential of said property and the rental value thereof, when in fact defendants had conveyed the abutter's rights of access to the State, and access would or could be limited accordingly. The pleadings of plaintiffs and defendants sufficiently embrace the issue of fraud by concealment, as found by the court. *Alonso v. Hills*, 95 Cal.App.2d 778, 782, 214 P.2d 50. The matter of pleading becomes unimportant when a case is fairly tried upon the merits and under circumstances which indicate that nothing in the pleadings misleads the unsuccessful litigant to his injury, and where an answer in an action has been filed

the court may grant plaintiff any relief consistent with the case made by the complaint and embraced within the issues. Secs. 475 and 580, Code Civ.Proc.; *Buxbom v. Smith*, 23 Cal.2d 535, 542, 145 P.2d 305.

The real question presented in this connection and the most serious one is whether, under the facts presented, plaintiffs also had, or should have had, knowledge of the fact that the access rights had been relinquished by the Brodys to the State at the time, and that the State Highway Department could or would construct a freeway in front of the Brody property with the limited access indicated.

[3] The Oldenburgs testified they knew that the strip had been deeded to the State for highway purposes but disclaimed any knowledge on their part that the Brodys had relinquished the access rights to it and believed, from defendants' representations, that the road and traffic thereon would be closer to their place of business, unimpaired by a fence or drainage ditch. It is clear that none of the parties knew of the contemplated construction of the ditch at the time of the exchange, but by the relinquishment of the rights indicated in the deed to the State by the Brodys, at least the Brodys must have known, at the time, of the right of the State to subsequently erect the fence and construct the drainage ditch. This deed and relinquishment had been duly recorded prior to this time and was constructive notice of its contents. Secs. 1213-1215, Civ.Code. Section 19 of the Civil Code provides that every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact. See also *Furst v. Scharer*, 119 Cal.App.2d 605, 607, 260 P.2d 198.

There is testimony that when the Brodys and Mrs. Oldenburg entered into the escrow agreement, the deed to the State containing the relinquishment, etc. was given to the escrow agent and was "passed between the parties". Mrs. Oldenburg denied this

and claimed she never saw it and had no knowledge of its presence in the escrow files. It is defendants' contention that since the escrow company was the agent for both parties, knowledge of the escrow agent of the agreement and the documents on file therein, was knowledge of the parties to the transaction, citing *Thompson v. Stoakes*, 46 Cal.App.2d 285, 115 P.2d 830; and *Ryder v. Young*, 9 Cal.App.2d 545, 50 P.2d 495.

[4] There is evidence that on August 30, 1948, Fuller originally was an authorized agent of plaintiffs to effect a sale or trade of their property, and did, on September 3, 1948, make an investigation and found that the State was authorized and did intend to erect a fence in front of the property, but plaintiffs claim that he did not communicate that information to them. Apparently, the agent Levin, on September 7, 1948, became agent for both parties and Fuller was not thereafter consulted as to the transaction although Levin was later compelled to pay a portion of the commission to Fuller. Levin, on September 5, 1948, made some previous investigation as to these rights and the intentions of the State Highway Department in respect to these claimed rights of the State and there was sufficient evidence to show that he knew that the State had these rights and intended to exercise them at some time in the future. There is no showing that he actually communicated this information to the Brodys or to the plaintiffs prior to the exchange although it may well have been inferred that the Brodys had obtained such knowledge. In this connection defendants contend that the court's finding that this knowledge of the agents was not obtained by them within the scope of their employment and authority is contrary to the facts and the law, citing Sec. 2332, Civ.Code; 2 *Mechem on Agency*, 2nd Ed., p. 1387, sec. 1804; *Warren v. Dixon*, 74 N.H. 355, 68 A. 193; *Donald v. Beals*, 57 Cal. 399; and *Sullivan v. Helbing*, 66 Cal.App. 478, 226 P. 803. The evidence might support such a finding as to the agent Fuller. It is problematical whether it would support such a finding as to the agent Levin. It was found that he became the duly authorized

agent of plaintiffs two days after he obtained such information. It appears to us that during these negotiations he was duty bound to disclose these facts to his principal and his failure to do so would constitute fraud on his part. However, on account of the time element there is some support for the finding of the court that he was not acting within the scope of his authority at the time he made the investigation. Since the evidence does not affirmatively show that Levin was authorized or instructed on behalf of the plaintiffs to ascertain the state of the title, or whether the abutter's rights had been completely relinquished and a fence was to be erected, information obtained by him is not necessarily imputable to the principal. *Gordon v. Beck*, 196 Cal. 768, 239 P. 309; *Primm v. Joyce*, 87 Cal.App.2d 288, 291, 196 P.2d 829; *Pomona Mutual Building & Loan Ass'n v. Smith*, 18 Cal.App.2d 509, 515, 64 P.2d 444.

The court thereafter did make a finding that the agent Levin "made no false representations". This finding is opposed to the finding that defendants Brody did make false representations. The representations relied upon by plaintiffs to establish the claimed fraud were made first by Levin to plaintiffs respecting the highway being closer to the place of business, and later by the Brodys in the presence of Levin. Since the court found that Levin knew the truth of these facts at the time and did not disclose them to his principal, the Oldenburgs, the finding of fraud, only on the part of the Brodys, is incongruous. It should be here noted that the trial judge, in his original findings, did find that both Levin and the Brodys were guilty of making the false representations charged to the Brodys. Then, in substituted findings, for some unknown reason, it was found that Levin was not guilty of any fraudulent representations.

Whether the agent Levin was guilty or not guilty of fraud in the transaction becomes important, for under the evidence and findings, if Levin was not guilty of making fraudulent representations, then the Brodys were not guilty either.

Since the court found that defendants Brody did not state, declare or represent to plaintiffs that the right of access to and from the highway in front of the Brody property would or would not be limited or restricted in any manner, the actual fraud of the Brodys, if any, must be predicated on the fact, found by the court, that they knew that the State right of way adjoining the Brody property might be fenced. Defendant Levin also knew of this fact. Had the trial court found that both the agent and the defendants were guilty of fraudulent representations the finding might be supported. Under section 1572 of the Civil Code actual fraud consists of " * * * 3. The suppression of that which is true, by one having knowledge or belief of the fact; * * *." Deceit may be negative as well as affirmative. It may consist in suppression of that which it is one's duty to declare, as well as in the declaration of that which is false. *Barder v. McClung*, 93 Cal.App.2d 692, 697, 209 P.2d 808.

Plaintiffs claim that the finding that Levin made no false representations was due to the fact that testimony on this point was excluded against the estate of Levin, under section 1880, subd. 3, of the Code of Civil Procedure. The findings are not so limited. This finding is inconsistent with and would not support the conclusion that false representations or fraud of Levin was imputed to the Brodys as principals whereby plaintiffs were induced to part with their property.

It was testified, in the instant case, that the deed to the State was presented to the escrow agent and was passed around among the parties at the time of the signing of the exchange agreement. Plaintiffs testified otherwise and the court found that a "true copy" of the deed was deposited with the escrow agent "on the ——— day of September, 1948, and during the course of the escrow", and that all parties knew that the Brodys had conveyed the land to the State, but plaintiffs did not know that the deed contained a relinquishment of any and all abutter's rights of access appurtenant to the remaining property. It then specifically found that the failure to note

the other exception in reference to the relinquishment of abutter's rights in the written agreement was not the result of mutual mistake, and accordingly plaintiffs did not receive *all the real property* which the Brodys agreed to convey. It therefore became important to know when the deed to the State was placed with the escrow agent. The trial judge failed to insert the date and specific time when that was presented. If it was presented at the time and in the same escrow, then plaintiffs might well be chargeable with knowledge of its terms, since there was no finding of fraud as to the escrow agent or the Brodys in this respect.

[5] It is well-settled law in California that the holder of an escrow is agent for all parties up to the time that the escrow is closed. *Early v. Owens*, 109 Cal.App. 489, 494, 293 P. 136. However, it was said in *Vigli v. Davis*, 79 Cal.App.2d 237, at page 256, 179 P.2d 586, at page 598:

"While that is the general rule, there are exceptions to it", and that "the general rule would not be applied where there were two escrows, 'to documents deposited in the escrow to which the party sought to be charged with notice was not a participant.'" It then quotes from *Thompson v. Stoakes*, 46 Cal.App.2d 285, 292, 115 P.2d 830, as follows: "'As a matter of substantive law, where a positive fraud has been perpetrated by one agent, appellants herein, such fraud does not become non-actionable because of the knowledge of another agent, the escrow holder, of facts not communicated to the common principal. As between two innocent parties, notice to the agent of one is notice to the principal, but, as between the principal and the fraudulent agent, notice of another agent should not be imputed to the principal.'"

[6] Section 1213 of the Civil Code must be considered in conjunction with this transaction. It provides that "Every conveyance of real property acknowledged or proved and certified and recorded as prescribed by law from the time it is filed with

the recorder for record is constructive notice of the contents thereof to subsequent purchasers and mortgagees * * *." For exceptions thereto see *Seeger v. Odell*, 18 Cal.2d 409, 414, 115 P.2d 977, 136 A.L.R. 1291; 12 Cal.Jur. p. 764, sec. 38; *Highland Park Investment Co. v. List*, 42 Cal.App. 752, 757, 184 P. 48; *Ward v. Packard*, 18 Cal. 391, 393. It does not appear from the evidence nor the findings that plaintiffs have brought themselves within the exceptions noted therein.

[7] It is next argued that the trial court failed to fix the measure of damages as required by section 3343 of the Civil Code, designated in *Bagdasarian v. Gragnon*, 31 Cal.2d 744, 192 P.2d 935, and referred to as the "out-of-pocket loss" rule which was substituted for the "loss-of-bargain" rule. The trial court did receive evidence as to the actual value of the respective properties, both real and personal, and the difference in such values was such as would support the judgment rendered. However, in fixing the claimed value of the Brody property, plaintiffs' expert witness Goode testified that in his opinion, on September 22, 1948, the Brody property was worth \$38,000, with the triangular parcel of land and access rights, but only \$27,500 without the triangle and without access rights, and that in his opinion the orange grove property was worth \$40,000, a difference of \$12,500. He testified that he fixed the damage at \$10,500, being the difference in value before the taking by the State and the value of it afterwards. In fixing this damage Goode included in his appraisal of such damage not only the whole triangular strip that had been deeded to the state, but also unsegregated and noncompensable factors. He testified that in determining the amount of the damage he did not base it solely upon the loss of access, as distinguished from other factors. One factor was increased speed of traffic, but he stated that there was no way he could convert that into dollars and cents; and that he also considered the change of grade in making his appraisal. It is apparent from the testimony of the witness that he was erroneously placing the valuation upon the entire property as it existed before the deed

of the triangular strip to the state. The plaintiffs in this action knew of the building of the highway and knew that the triangular strip had been deeded to the State at the time they entered into the transaction. Accordingly, the true test would not be the value of the property in its entirety, including the triangular section, but as it existed at the time of the transaction.

[8,9] Under section 3343 of the Civil Code, one defrauded in the purchase of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received. The market value may be considered in determining actual value. In determining this damage Goode also said he included the cost of moving the service station, garage and cafe, and fixed a set value of such cost. He admitted he did not consider the valuation of the personal property on the Brody holdings in fixing its value. A motion to strike his entire testimony was made, citing the dissenting opinion in *Rose v. State of California*, 19 Cal.2d 713, 715, 123 P.2d 505, and *Holman v. State of California*, 97 Cal. App.2d 237, 241, 217 P.2d 448, in support of their claim. The motion was denied. It is true that defendants' witnesses gave a different estimate of the valuation of the respective properties. The trial court viewed the premises and heard independent evidence as to the value of the personal property involved, and fixed the damages at \$10,500, the amount fixed by plaintiffs' witness Goode. The question of the qualifications of the witness Goode to testify in respect to the cost of removing the buildings, etc. was for the trial court to determine. 10 Cal.Jur. p. 963, sec. 220. Had it not been for the written opinion of the trial judge filed herewith, the amount of damage might be sustained under the holding of the majority opinion in *Rose v. State of California*, supra, and *Joint Highway Dist. No. 9 v. Ocean Shore R. Co.*, 128 Cal.App. 743, 765, 18 P.2d 413. He said:

"* * * my conclusion as to reasonableness is not based upon the fact that the highway was to be divided, but

upon the construction of the fence and ditch, which actually caused the destruction of abutter's right of access

* * * I am ignoring the voluminous evidence hearing on leases and income from the business. * * * In discussing the measure of damages, I feel that the personal property involved on either side of the transaction should be ignored. The escrow instructions and all of the arrangements between the parties seem to have ignored such personal property, and while evidence was received on the same, I feel that no allowance by the court should be made. As to the damages, I am adopting the testimony of Mr. Goode. It is true that his evidence was strenuously attacked in that he took into consideration as one of the factors to be considered in determining the value of loss of access, the element of the divided highway; nevertheless, that was merely an incident which does not militate against his basic opinion as to loss of access and the value thereof. I am therefore finding that plaintiffs have been damaged in the sum of \$10,500.00."

[10] From this statement it clearly appears that the trial judge eliminated all evidence concerning the value of personal property and to a great extent relied upon Goode's testimony in fixing the damage. Goode also eliminated the value of the personal property and considered the erection of the drainage ditch as a part of the damage. Apparently the trial judge did not fix the ultimate damage in accordance with section 3343 of the Civil Code. The personal property included within the Brody property consisted of the furnishings of many cottages, gas tanks, garage supplies, etc., totaling several hundreds of dollars. In comparison, the personal property involved in the plaintiffs' property was of much less value. It was definitely stated in the *Bagdasarian* case, supra, that the failure of the trial court to determine the value of the personal property and include it in computing the value of the property received constituted prejudicial error.

Since the second cause of action must be reversed as to the Brodys, we will next consider the first cause of action against them and the Burrow Escrow Company. The findings are that the escrow company prepared the written agreement of exchange which constituted the escrow instructions; that the parties signed it and that it erroneously and by mistake failed to include the excepted strip and relinquishment of abutter's rights in the description of the Brody property; that the parties understood the Brodys had conveyed the strip to the State and could not convey it to plaintiffs, but did not know that such conveyance included a relinquishment of any and all abutter's rights of access appurtenant to the remaining property, and such failure to note the other exception in reference to the relinquishment of abutter's rights in the written agreement of exchange constituted a negligent act for which these defendants were liable. The theory upon which this liability is bottomed is reflected in the trial judge's written opinion, where it is said:

"The deed prepared by the defendant Burrow Escrow Company, signed by Brody and recorded by Burrow Escrow Company, correctly excepted the strip of land conveyed to the State, but did not except the abutter's right of access which had been earlier relinquished to the State of California. It was, in my opinion, obligatory upon the defendants Brody and Burrow Escrow Company to give a deed correctly describing all that the plaintiffs were to receive, whereas, in truth and in fact, it purported to and did convey to plaintiffs certain property which was not truly available. Stated more clearly, the deed failed to except the abutter's right of access, which, in this case, was of the greatest importance to the grantees and the loss of which has resulted in substantial damage."

[11] By the agreement of exchange, as construed by the trial court, Brody and the

parties hereto agreed to exchange his property subject "to the following incumbrances", among other things: "Any rights of way for existing roads, ditches, pipe lines and flumes, easements, reservations and restrictions characteristic of other lands in the same locality". It is apparent that at the time of this exchange there was a recorded right of way for the freeway that was then being built, including the right to dig ditches and build a fence along said easements, and that these restrictions were characteristic of other lands in the same locality. It is apparent that the agreement of exchange made a general reference to the restrictions involving this property. The deed of conveyance to plaintiffs likewise conveyed the Brody property in its entirety, less the triangular strip previously deeded to the State, and sufficiently recited that such property was being conveyed to plaintiffs subject to "covenants, conditions, reservations, restrictions, easements and rights of way of record, if any". It is apparent from the recorded deed to the State that the covenants, conditions, reservations, restrictions, easements, and rights of way were set forth therein. A certificate of title which was received by plaintiffs sometime later, recites that the liens and incumbrances to which said title is subject include "Any and all abutter's rights of access, appurtenant to said land as released and relinquished to the State of California by deed recorded February 25th, 1948 in book 1621, page 447, Official Records". It appears to us that the reasons set forth in the written opinion of the judge, when construed in connection with the evidence and findings would not adequately support a judgment against the escrow company or the Brodys on the first cause of action.

Judgment against appellants reversed.

BARNARD, P. J., and MUSSELL, J., concur.

Hearing denied; CARTER, J., dissenting.

139 Cal.App.2d 474

Joseph BARBARIA, Plaintiff and Appellant,
v.

INDEPENDENT ELEVATOR COMPANY,
Inc., a corporation, Atwell, Vogel & Sterl-
ing, Inc., a corporation, B. C. Van Emon
Elevators, Inc., a corporation, and Pat M.
Keane, Defendants and Respondents.
Civ. 16659.

District Court of Appeal, First District,
Division 2, California.
Feb. 27, 1956.

Rehearing Denied March 28, 1956.

Hearing Denied April 25, 1956.

Action against elevator inspection com-
pany, elevator inspector and elevator com-
panies for injuries sustained by warehouse
employee when elevator therein fell. The
Superior Court, City and County of San
Francisco, Herman A. van der Zee, J., di-
rected verdict for defendants, and plaintiff
appealed. The District Court of Appeal,
Kaufman, J., held, inter alia, that evidence
was insufficient to take to jury question
whether inspector had been negligent in
failing to detect an alleged defect.

Judgment affirmed.

1. Motions ⇨62

Where the rights and interests of de-
fendants are distinct and judgment is
severable, a motion by one and resulting
order will not affect judgment against the
others.

2. Appeal and Error ⇨335

In respect to action for injuries sus-
tained when elevator fell, elevator inspec-
tion company and inspector and elevator
companies had distinct and severable in-
terests, and where trial court, by unappealed
order at first trial, granted new trial to in-
spection company and inspector but denied
plaintiff's motion for new trial as against
elevator companies, and plaintiff's appeal
from denial of motion for default against
elevator companies was dismissed, and
plaintiff's notice of appeal from final judg-
ment in second trial, and his opposition for
motion for directed verdict, referred only
to inspection companies and inspector,
elevator companies were not parties to ap-
peal.

3. Evidence ⇨153(27)

Insurance policies are best evidence of
insurance contracts.

4. Negligence ⇨136(23)

In action against inspection company,
which was engaged by warehouse's insurer,
and against inspector, for injuries sustained
by warehouse employee when elevator fell,
evidence was insufficient to take to jury
question whether inspector had been negli-
gent in failing to detect an alleged defect.

5. Negligence ⇨1

"Negligence" is conduct which falls be-
low the standard established by law for
protection of others against unreasonable
risk of harm.

See publication Words and Phrases,
for other judicial constructions and defi-
nitions of "Negligence".

6. Appeal and Error ⇨854(5)

On appeal from judgment on directed
verdict, reviewing court was not restricted
to consideration of ground stated by trial
court, where there was no substantial evi-
dence to support a verdict for losing party.

7. Negligence ⇨136(23)

In action against elevator inspection
company and its inspectors, who were en-
gaged by warehouse's insurer, for damages
for injuries sustained by warehouse em-
ployee when elevator fell, evidence was in-
sufficient to take to jury question whether
there was any contract of employment be-
tween inspection company and warehouse,
such as would raise a duty on part of in-
spection company to warehouse and its em-
ployees. West's Ann.Rules on Appeal, rule
23(b).

8. Negligence ⇨45

Where an elevator inspection company
undertakes with owner of building to keep
elevator therein safe, owner's employee may
recover for damages flowing from com-
pany's negligence.

9. Inspection ⇨4

Person who was employee of elevator
inspection company and who was certified
by state as an elevator inspector was, while
inspecting elevator, a "public officer", al-
though employed and paid by private em-

ployer. West's Ann.Gov.Code, § 1981; West's Ann.Labor Code, § 7311.

See publication Words and Phrases, for other judicial constructions and definitions of "Public Officer".

10. Inspection ◊4

Where elevator inspector was acting as a public officer at time of inspection of elevator, and the person who was injured when elevator fell did not file a verified written claim or serve complaint on inspector within 90 days after accident, inspector could not thereafter be charged with liability for acts in his capacity as public officer. West's Ann.Gov.Code, § 1981.

11. Negligence ◊45

Where an elevator inspection company owes duty to owner of building to advise owner of any dangerous condition of elevator, it can be held liable for failure to relay such information even if information is derived from a state officer.

Chauncey McKeever, San Francisco, for appellant.

Dana, Bledsoe & Smith, San Francisco, Joseph W. Rogers, Jr., San Francisco, of counsel, for respondents Atwell, Vogel & Sterling, Inc., and Pat M. Keane.

Barfield & Barfield, San Francisco, for respondent Independent Elevator Co.

Daniel J. O'Brien, San Francisco, for respondent B. C. Van Emon Elevators.

KAUFMAN, Justice.

Plaintiff appealed from a judgment entered on September 8, 1954, in favor of defendants Atwell, Vogel and Sterling, Inc., and Pat Keane and from an order denying plaintiff's motion for entry of default against defendants Independent Elevator Co. and B. C. Van Emon Elevators, Inc., in an action for personal injuries caused by the fall of an elevator. A motion by respondents Independent Elevator Company and B. C. Van Emon Elevators, Inc. to dismiss the appeal from the order denying the motion for entry of default was granted by this court on June 15, 1955. *Barbaria v. Independent Elevator Co.*, 133 Cal.App. 2d 657, 285 P.2d 91.

The complaint alleged negligence of respondents B. C. Van Emon Elevators, Inc. in the repair, maintenance and adjustment of the elevator, rendering it unsafe for use, and negligence of Atwell, Vogel and Sterling, Inc. in making inspections of said elevator and reporting deviations from safety regulations of the State of California. It was alleged that Haslitt Warehouse Company, appellant's employer, had employed Atwell, Vogel and Sterling, Inc. to make these inspections and to inform said Warehouse Company of any condition that might impair the safety of the elevator. The accident herein occurred on February 6, 1953, and it was alleged that one of the inspections was made on May 15, 1952, that the elevator was then in a dangerous and defective condition which would have been discovered if a proper inspection had been made by Pat Keane, the inspector employed by Atwell, Vogel and Sterling, Inc., who is also a respondent herein.

The first trial of this action resulted in a jury verdict for plaintiff against defendants Atwell, Vogel and Sterling, Inc. and Pat Keane, and for defendants Independent Elevator Company and B. C. Van Emon Elevators, Inc., and against plaintiff. That judgment was entered on June 2, 1954. The losing defendants moved for a new trial, which was granted on July 1, 1954, on the grounds of excessive damages, insufficiency of the evidence to justify the verdict, that it was against law, and error in law occurring at the trial. No appeal was taken from that order.

Plaintiff moved for a new trial, addressing the notice to defendants Independent Elevator Company, Inc., B. C. Van Emon Elevators, Inc. and their attorneys, asking that the court set aside that part of the verdict rendered against plaintiff and in favor of the two above named defendants. The court, on July 26, 1954, denied the motion to vacate "and set aside that part of the verdict heretofore rendered in this action against plaintiff and in favor of defendants, Independent Elevator Company, Inc. and B. C. Van Emon Elevators, Inc., and the judgment entered thereon, and to grant a new trial."

[1] Respondents Independent Elevator Company, Inc. and B. C. Van Emon Elevators, Inc. have filed a brief, arguing that the dismissal of the appeal from the order denying plaintiff's motion to enter the default of these defendants removed all vestige of appeal against them. The rule is stated in 3 Witkin, California Procedure, 2081, sec. 833, that "where the rights and interests of the defendants are distinct and the judgment is severable, a motion by one and resulting order will not affect the judgment against the others." See, *Robson v. Superior Court*, 171 Cal. 588, 594, 154 P. 8; *Fowden v. Pacific Coast S. S. Co.*, 149 Cal. 151, 155, 86 P. 178; *Fearon v. Fodera*, 169 Cal. 370, 376, 148 P. 200. In *Hoffmann v. Lane*, 11 Cal.App.2d 655, 661, 54 P.2d 477, 479, it was said that "The granting of a new trial as to one of several independent tort-feasors, found jointly liable for negligence, does not vacate the judgment against the remainder." It is further stated that if "the rights and liabilities of the codefendants are interdependent or those of one are entirely dependent on the other" if the judgment is vacated as to one it is also vacated as to the other. Appellant's complaint herein alleged that he did not know whether some or all defendants were liable to him nor to what extent.

Undoubtedly, in this case the rights and interests of defendants were distinct and severable. It was clearly the intention of the trial court, as noted in *Barbaria v. Independent Elevator Co.*, supra, to grant a new trial as to the losing defendants and leave the verdict intact as to the winning defendants.

[2] The only appeal therefore, now pending before this court is that set forth in appellant's notice of appeal, "from the judgment * * * on September 8, 1954 in favor of defendants, Atwell, Vogel and Sterling, Inc. and Pat Keane." The judgment entered on the directed verdict includes no other defendants, and there was, of course, no evidence offered at the second trial touching the liability of these defendants and respondents. Appellant did not resist the motion for directed verdict on the ground that other issues or other parties were involved, and did not challenge the

verdict on the ground that it was incomplete. Consequently, he must be held to have waived any objection thereto. *Brown v. Regan*, 10 Cal.2d 519, 523, 75 P.2d 1063; *Joerger v. Pacific Gas & Electric Co.*, 207 Cal. 8, 21, 276 P. 1017; *Kirby v. Adcock*, 116 Cal.App.2d 570, 571, 253 P.2d 700.

Appellant Barbaria, an employee of Haslitt Warehouse Company in San Francisco, claims to have suffered an inguinal hernia when the freight elevator he was operating went out of his control and crashed at the bottom of the elevator shaft. His employer, Haslitt, was insured for workmen's compensation and public liability by the California Casualty Indemnity Exchange. The latter company employed Atwell, Vogel and Sterling, Inc. to inspect Haslitt's elevators at yearly intervals. Pat Keane, an employee of Atwell, inspected the elevators in May of 1950, 1951 and 1952. His reports were sent by Atwell to California Casualty, but none were ever sent to Haslitt. Don Haslitt, vice-president and secretary of the warehouse company, said that he knew his elevators were inspected by the State and by California Casualty, and that he expected to be notified if anything dangerous was discovered. On cross-examination he stated that in the years gone by, California Casualty had billed them using itemized invoices and that elevator inspection was set forth as an item. He said that he had looked for these earlier records but could not find them, as they were periodically destroyed. Workmen's compensation policies, he thought, were kept only for three or four years back. He was not questioned about the current billing practice. Respondents concede that undoubtedly, California Casualty passed on to the insured elevator inspection costs as part of its overhead costs in issuing an insurance policy.

Permits for elevator operation are issued annually by the Division of Industrial Safety of the California Department of Industrial Relations. Permits are based on reports of state inspectors. These are a few full-time state elevator inspectors, but most of them are specially certified by the State and must be employed as elevator inspectors by an insurance company or an

organization of the type of Atwell herein which inspect elevators for insurance companies. Respondent Pat Keane, employed by Atwell, inspected the elevators on behalf of the State in November of 1950, 1951 and 1952, after which the annual permits were issued. In May of each of these years he performed the annual inspections required by California Casualty as noted above.

The complaint herein, it will be recalled, alleged that Haslitt Warehouse Company employed Atwell to make inspections, to report deviations from state safety regulations and to inform Haslitt of any condition that might impair the safety of the elevator; that in pursuance of said employment defendant would make regular inspections; that one such inspection was made on May 15, 1952, which was so negligently made that the dangerous condition which subsequently caused the accident, was not discovered or reported to the State or to Haslitt.

[3] The insurance policies were not produced in evidence by appellant. They would undoubtedly be the best evidence of the contract between appellant and California Casualty. Respondents do not have them in their possession and state that they are willing to stipulate that an application by appellant to produce them as additional evidence in accordance with Rule 23(b), Rules on Appeal, be granted. There was evidence of a contract between California Casualty and Atwell. There was no evidence of any contractual relation between appellant's employer Haslitt and respondents Atwell or Keane.

The freight elevator involved in the accident had a rated capacity of 4,000 pounds. The load on the elevator at the time of the accident was in excess of the rated capacity, having on board a fork lift weighing 3,970 pounds, two employees of Haslitt, appellant and a Mr. Oldano, and steel plates that had been built into the floor in 1949 or 1950, which weighed 600 to 640 pounds. The elevator operated at two speeds "half" or slow and "full" or fast. There is no evidence in feet per minute of travel as to either of these speeds. The "governor tripping speed"

was 210 feet per minute. The control lever had five positions, the center one for "neutral" or "stop", the two positions on both right and left, for half and full speed up and half and full speed down. On each floor in the hallway were constant pressure buttons by which the elevator could be brought from one floor to another. These buttons operated as switches. When these buttons were pressed the car operated at full speed. The pressure of such a button by a person in the hall took control from the operator and made the car switches ineffective. If the operator in the car was descending at half speed when a button was pressed on a floor below, the car would descend at full speed.

Appellant and Oldano put their load on the elevator at the fifth floor, intending to descend to the fourth. They had begun to proceed at half speed when the elevator accelerated. It descended until it crashed against the bottom of the shaft. Oldano said that it went "pretty fast", appellant testified that it was a "free fall." The safety switch and the "machine limit switch" ordinarily should have been effective to stop the elevator at its lower limit of travel before it hit the "bumpers" in the pit. There was no evidence that either of these switches was defective. Appellant testified that he reached for the safety switch but before he could pull it the elevator hit bottom. There was expert testimony that the fact that the machine limit switch failed to work would indicate that it was caused by the overload on the elevator.

The theory of both sides, as revealed by the testimony of their experts was that while the car was proceeding in slow speed a button was pushed on the first floor, causing the car to accelerate. The negligence which appellant contends proximately caused the accident, was failure of the inspector to detect and report a defect in the governor. It is claimed that the governor failed to function properly, thus the speed of the car was not checked in time. There was no breakage of the cables in this case. Such breakage would cause a "free fall" as testified by appellant's expert, Garrett. This expert stated

that if for any reason the car exceeds pre-set speeds, either by a runaway or breakage of the cables, the governor should operate to check the speed. The governor could not trip at a speed below 210 feet per minute, or $3\frac{1}{2}$ feet per second.

The governor consists of a wheel with a grooved rim, mounted on an axle attached to a heavy iron base in the "pent-house" at the top of the shaft. The governor cable rides in the groove and is attached at one end to the top of the elevator. The other end is attached to a point below the car where it is connected to two safety devices. The motion of the rope is caused by the ascent and descent of the car. On either side of the wheel or sheave of the governor are two "pawls". When the car descends the wheel rotates in a counter-clockwise direction and the pawls "fan out" their ends extending beyond the rim of the wheel. The faster the wheel rotates, the further the pawls extend beyond the rim of the wheel.

Prior to 1947 the governor was designed so that it tripped when one of the pawls struck a raised portion of the base of the governor known as the "casting" or "rib" upon the expansion of the pawl when the speed passed the limit set. It was found through experience that there were times when this device had failed. The State, therefore, ordered all such governors converted by the attachment of a grip device or yoke. The pawls were then supposed to engage the yoke instead of the rib as formerly. The elevator herein was so converted. The expert, Garrett, an assistant safety engineer for the Division of Industrial Safety, demonstrated with the governor which was introduced into evidence, that it was possible that it might fail to function properly, and might on occasion engage the rib instead of the yoke. Garrett admitted that when the accident was investigated the governor appeared to have functioned properly as the yoke was then engaged and the safety devices at the bottom of the car had been actuated, a mark on the guide rails showing that they had begun to dig in to stop the car.

Garrett stated that he was at first at a loss to explain how the accident happened. Therefore he conjectured that although the governor physically gave the appearance of having functioned, it may have engaged the rib instead of the yoke, and that the severe bounce then caused the rib to be disengaged and the yoke to become engaged. Although counsel tried to get him to state that this was probable, he would go no further than saying it was possible. Mr. Rodriguez, State Supervisor of the Elevator Section of the Division of Industrial Safety testified also that the theory propounded by Garrett was a possibility, that no other possible explanation could be found, and that was apparently what happened. At the time of the accident, he stated, the governor conformed to safety rules then in force.

The inspector, respondent Pat Keane, testified that the State had not ordered the ribs removed from this type of governor until after this accident, that it is still not considered a violation, but when they are found it is recommended that they come out. He demonstrated how he had tested the governor in making his inspection. Appellant states that Keane admitted that if he had noticed the obstruction (meaning the rib) he would have insisted that it be remedied. Keane, however, actually testified that if he had noticed *an* obstruction he would have insisted that it be remedied, and then made it clear that he did not consider the rib an obstruction, that this was "a legal governor."

It is suggested that Keane was negligent in not noting a change of rated capacity because of the steel plates being put in the floor of the car. However, all the testimony was that these were added at a time before Keane began inspecting this elevator, and that he therefore would not have been expected to have questioned this.

There was evidence that Haslitt had trouble with this elevator running past the first floor and into the pit in October 1952 and in January 1953. Each time an elevator repair company had been called in. There was no evidence that the inspector

or Atwell had ever been notified of these occurrences.

[4, 5] It seems abundantly clear from the above review of the expert testimony concerning the governor on this elevator, that the State Supervisor and the assistant safety engineer of the Elevator Section of the Division of Industrial Safety had no reason to suspect that this type of governor was rendered dangerous by failure to remove the rib or casting after its conversion to a yoke type governor. It was this very accident which caused them to theorize that this type of conversion could possibly prove dangerous. How then can it be said that the inspector was negligent in approving this mechanism for safety? It is clear from the expert testimony herein that what happened, or rather what may have happened, in this case was a result that could not have been reasonably anticipated by the safety engineers at the dates on which the inspections were made. The inspector had met the standards which were then in force by the Industrial Safety Division at the time he performed his inspection. Negligence, as defined in the Restatement of the Law of Torts, sec. 282, is conduct "which falls below the standard established by law for the protection of others against unreasonable risk of harm." The rules of the Division of Industrial Safety established standards for inspection which the court could adopt as the standard of care to be applied in determining negligence. The court could therefore, as it did in this case, declare as a matter of law, that there was not sufficient evidence to go to the jury, for there was no evidence of negligence directly contributing to the cause of the accident on the part of the inspectors under the state inspection standards then in force.

[6] Appellant in his reply brief does not attempt to answer respondents' analysis of the evidence, stating that only the trial judge's statement of his grounds for directing the verdict is the basis of the appeal. This, of course, is not true. If there is no substantial evidence in the records to support a verdict for the losing party, the directed verdict will stand, regardless of the trial judge's statement.

The trial court here stated that it had decided there was not sufficient evidence to go before the jury and then added in explanation that there was no duty owed by Atwell or Keane to the Haslitt company. On appeal this court is not restricted to a consideration of the ground stated by the trial court. *United Air Services v. Sampson*, 30 Cal.App.2d 135, 138, 86 P.2d 366. Respondents' motion herein was based also on the ground that there was no evidence of negligence.

Appellant relies upon section 311, Restatement of Torts, which states that when it is the business or profession of a person to give information upon which the bodily security of others depend, if false information is given, then such party is liable to the recipient of the information or to third parties to whom he should expect such information to be communicated or those put in peril by the action taken if reasonable care has not been used to ascertain the accuracy of the information. Under the evidence, however, it may be said as a matter of law, that reasonable care had been used by the inspector.

[7] The complaint herein based the cause of action against Atwell entirely on the duty arising under the contract of employment between Atwell and appellant's employer Haslitt. There was a complete failure of proof as to the existence of any contract between those parties. The only contract proved was that between Atwell and California Casualty in regard to the inspections. Appellant apparently could, but did not, introduce the insurance contract between Haslitt and California Casualty. In cases where a third person has been held liable to the insured or to a third person because of negligent inspection of equipment, there was evidence that the insurance company had agreed with the owner to inspect, thus assuming the owner's duty to keep the equipment safe. *Van Winkle v. American Steam-Boiler Insurance Co.*, 52 N.J.L. 240, 19 A. 472; *Hartford Steam Boiler Inspection & Ins. Co. v. Pabst Brewing Co.*, 7 Cir., 201 F. 617; *Bollin v. Elevator Construction & Repair Co.*, 361 Pa. 7, 63 A.2d 19, 6 A.L.R. 2d 277.

Although Haslitt, the employer, stated that he assumed he would be notified if anything was wrong, that is not evidence that the Atwell Company had agreed with him to take over his duty of keeping the elevator safe. In fact he regularly called in elevator repair companies when his employees reported anything wrong and there is no evidence that he communicated with Atwell or the inspector on any of these occasions.

Appellant cites *Lewis v. Terry*, 111 Cal. 39, 43 P. 398, 31 L.R.A. 220, as a case in point, wherein it was held that there was a duty apart from the contract where there were misrepresentations involving risk of bodily harm. That was a case reversing a decision sustaining a demurrer without leave to amend, where there were allegations that the folding bed sold by the retailer was *known* by him to be defective, and in such case it was held there would be a duty owed to a person injured in using it, even though such person was not the purchaser. In the present case there is no allegation that the inspector knew of a dangerous condition and represented it as safe, but rather that because of his negligence he did not discover it.

[8] There is language, it is true, in the case of *Dahms v. General Elevator Co.*, 214 Cal. 733, 7 P.2d 1013, 1017, which lends support to appellant's theory. An elevator repair company, an independent contractor, was held liable to the operator when he was injured by the car falling to the bottom of the shaft. There was evidence that accident was caused by either the repairs being negligently made, or by the failure on inspection to discover certain defects. The court declared that defendant *as a matter of law* was chargeable with knowledge "that in undertaking to repair an instrumentality such as an elevator, * * * any negligence on its part would cause injury to the operator of the car. * * * In such a case we think that defendant was under a duty to plaintiff to use ordinary and reasonable care in the repair and inspection of the elevator." In that case, of course, the independent contractor had assumed the employer's duty to make the elevator safe for the employee

or any passenger. If any substantial evidence had been offered in the present case of an undertaking on the part of Atwell of the employer's duty to keep the elevator safe, then, had negligence been shown, appellant would have been entitled to recover.

[9-11] In regard to the duties of the inspector Keane in his capacity as a State officer, it may be said that the complaint has charged him only as "an employee and servant" of defendant Atwell. It appears well settled that public officers of this type, though employed and paid by a private employer, are nevertheless classified as public officers when performing the functions of their office. See, *Patton v. Board of Health*, 127 Cal. 388, 59 P. 702; *St. John v. Reid*, 17 Cal.App.2d 5, 61 P.2d 363; *Maggi v. Pompa*, 105 Cal.App. 496, 287 P. 982. No attempt was made to comply with section 1981, Government Code, requiring the filing of a verified written claim within 90 days after the accident. Although the complaint was filed within 90 days of the accident it was never served on Keane. The failure to comply with this section makes futile any attempt to now charge Keane in his capacity as a public officer. *Ward v. Jones*, 39 Cal.2d 756, 249 P.2d 246; *Veriddo v. Renaud*, 35 Cal.2d 263, 217 P.2d 647; *Huffaker v. Decker*, 77 Cal.App.2d 383, 389, 175 P.2d 254. The November reports which Keane made in his capacity as State inspector were turned in to the employer Atwell who evidently took care of forwarding them to the State. It is certainly a fair inference that Atwell received the benefit of this information and would act on it if necessary. If a duty had been proved on the part of Atwell to advise appellant's employer, Haslitt, of any dangerous condition of the elevator which came to its attention through these reports, then Atwell could still be held, and the fact that it was a state officer through whom they received such information would not relieve said respondent of liability. However, there was no evidence that these reports contained such information. The claim is rather that they did not because the inspector negligently failed to find de-

fects. There is no evidence that respondent Atwell exercised any control over the inspector in the making of the State inspections, and his certificate entitling him to make such inspections could be revoked only at the instance of the state. Labor Code, § 7311.

In view of the lack of substantial evidence to support a contrary verdict, it must be held that no error was committed in directing a verdict for respondents

Judgment affirmed.

NOURSE, P. J., and DOOLING, J., concur.

Hearing denied; CARTER, J., dissenting.



139 Cal.App.2d 241

**Samuel L. BERNSTEIN, M.D., Petitioner
and Appellant,**

v.

**ALAMEDA-CONTRA COSTA MEDICAL
ASSOCIATION, an unincorporated asso-
ciation, Respondent.**

No. 16483.

District Court of Appeal, First District,
Division 1, California.

Feb. 16, 1956.

As Amended on Denial of Rehearing
March 16, 1956.

Hearing Denied April 11, 1956.

Mandamus proceeding. The Superior Court, County of Contra Costa, Norman A. Gregg, J., found the petitioner entitled to no relief, and he appealed. The District Court of Appeal, Fred B. Wood, J., held, *inter alia*, that medical association by-law, holding over each of members threat of expulsion if, in testimony before court or other judicial body, he should disparage, by comment or insinuation, another physician, would be unenforceable, as against public policy.

Reversed with directions.

1. Associations ⇨5

A practical and reasonable construction of constitution and by-laws of a vol-

untary organization by its governing board is binding on membership and will be recognized by courts, but an interpretation which is not reasonable is not binding on members and will not be recognized by courts.

2. Physicians and Surgeons ⇨9

Medical association by-law, holding over each of members threat of expulsion if, in testimony before court or other judicial body, he should disparage, by comment or insinuation, another physician, would be unenforceable, as against public policy.

3. Physicians and Surgeons ⇨9

Evidence would not sustain finding that physician had violated medical association's ethics code prohibition, against disparaging predecessor in charge of case, by furnishing, for use by a litigant in workmen's compensation case, a report containing several statements of criticism of a pathological report previously made by another physician. West's Ann.Civ.Code, § 47.

4. Mandamus ⇨168(4)

Physicians and Surgeons ⇨9

Association's canon, proscribing the giving of hints relative to nature and treatment of patient's disorder and the doing of anything to diminish trust reposed by patient in his own physician, was, in its application to circumstances of charge against member physician, predicated upon physician's conversation with nurse within hearing distance of another doctor's patient, neither unreasonable nor against public policy, and there was on evidence, no basis for reviewing court to disturb trial court's ruling, in mandamus case, that physician expelled from medical association had been guilty of violating such canon.

5. Appeal and Error ⇨882(8)

Parties stipulating to admission of statement in evidence could not, on appeal, successfully object to hearsay portions thereof.

6. Mandamus ⇨168(4)

There was no basis for reviewing court to disturb trial court's finding that evidence had been sufficient to sustain a finding that physician's conduct had constituted intentional violation of medical association's

canon proscribing a physician from doing anything to diminish trust reposed by patient in his own doctor.

7. Mandamus ☞187(10)

Where medical association had imposed a single penalty, that of expulsion, for all seven of violations of its ethics code of which member had been found guilty, but in ensuing mandamus proceedings the seven violations were reduced to two, redetermination by association of penalty to be assessed would be necessary.

8. Mandamus ☞125

Even if members of medical association had no severable interest in property of association, expulsion therefrom could be subject of judicial intervention; and mandamus was an appropriate remedy for member claiming to have been wrongfully expelled from association.

9. Associations ☞10

In any proper case involving expulsion of member from voluntary unincorporated association, only function which courts may perform is to determine whether association has acted within its powers, in good faith, and in accordance with its laws and the law of the land.

Tobriner, Lazarus, Brundage & Neyhart, San Francisco, for appellant.

Peart, Baraty & Hassard, Alan L. Bonnington, San Francisco, for respondent.

FRED B. WOOD, Justice.

Samuel L. Bernstein, M.D., was expelled from the Alameda-Contra Costa Medical Association upon a finding by the association's council that he was guilty of seven charges of violation of the Principles

of Medical Ethics of the American Medical Association.¹

Upon appeal to the council of the California Medical Association, he was absolved of one of the charges but the decision of the local council was affirmed in all other respects. Upon appeal to the Judicial Council of the American Medical Association the action of the state council was affirmed.

He then brought this action seeking a writ of mandate to restore him to membership and monetary damages for injuries allegedly sustained. The trial court found the evidence sufficient as to three of the remaining charges (insufficient as to the other three) and that Bernstein is entitled to no relief. He has appealed. The association has not.

We will consider the three remaining charges, designated by the parties as the Hill, the Muir, and the Enea cases.

The Hill Case.

[1-3] The charge was that Dr. Bernstein had violated section 4² of Article IV of Chapter III of the Principles of Medical Ethics in that on July 23, 1949, he "rendered a report concerning one George Hill, then deceased. Said report concerning George Hill was addressed 'To Whom It May Concern', and contained several statements of criticism by Dr. Bernstein of a pathological report previously made by Dr. J. M. Ellis. Specifically, Dr. Bernstein described Dr. Ellis as a pathologist 'who is not a certified pathologist, and who has rendered a very inexpert report' on the case. He again referred to Dr. Ellis as a 'rather inept and inexpert individual'. He further stated that 'a more experienced pathologist would have examined the heart a little more thoroughly'. Further on in

and on the same terms and in like manner as original applicants."

1. Section 14 of Chap. I of the local association's by-laws declares that a "member who * * * violates * * * any of the provisions of the Principles of Medical Ethics of the American Medical Association, shall be liable to censure, suspension or expulsion."

Section 14 also provides that "Members expelled from this association for any cause shall be eligible for membership after one year from date of expulsion,

2. Section 4 reads as follows: "When a physician does succeed another physician in charge of a case, he should not disparage by comment or insinuation, the one who preceded him. Such comment or insinuation tends to lower the confidence of the patient in the medical profession and so reacts against the patient, the profession and the critic."

the report he stated 'Here, again, I must comment about the inexpertness of the pathologist', referring again to Dr. Ellis."

It was stipulated that on October 5, 1948, Dr. Ellis performed an autopsy upon the body of George Hill and rendered to the coroner a pathological report to the effect that Hill probably died of natural causes, although recognizing the possibility of industrial injury as the cause, and later submitted the report to Hill's employer at the latter's request in regard to an industrial accident hearing concerning the death of Hill; and that on July 23, 1949, Dr. Bernstein, in response to a request by the attorney for Hill's widow, who was the applicant in the industrial accident proceeding, prepared a pathological report and delivered it to the widow's attorney, who thereupon turned it in to the Industrial Accident Commission. Both reports were introduced in evidence before the local medical council.

The Bernstein report was based upon a study of various papers, including "the copy of the inquest, the report of Dr. T. A. Miller, radiologist of St. Francis Hospital, the X-ray report issued by him, the report by Dr. Carl B. Eichorn, St. Francis Hospital, and report of the nurse on duty at the Columbia Steel Mill Hospital who first attended George Hill." Dr. Bernstein expressed the opinion that "George Hill's death was caused directly by the injury." He set forth in considerable detail the several factors which led him to that conclusion, in the course of which he analyzed the autopsy report, indicating various features thereof which he deemed inadequate or erroneous. In the course of this analysis Dr. Bernstein made the remarks concerning Dr. Ellis and his report which are quoted in the charge.

Counsel for the accusers (1) stipulated that Dr. Ellis was not a certified pathologist, (2) stated that Ellis was amply qualified in fact as a licensed physician who had specialized in pathology for some years,

and (3) contended that the question whether Ellis was a good or bad pathologist was not an issue, the question being whether Dr. Bernstein's conduct was ethical. The referee stated that "the qualifications of Dr. Ellis or the competency of the particular report that Dr. Ellis rendered is entirely immaterial in so far as the charge herein made is concerned." Apparently the council concurred in that view.

It further appears that Dr. Bernstein's report was given to the attorney for the widow of Hill for use as evidence in support of her claim for benefits under the workmen's compensation law,³ and was used for that purpose. It was brought to Dr. Ellis' attention by the attorney for the employer in the industrial accident proceeding, whereupon Dr. Ellis wrote the employer's attorney, at the latter's request, an analysis of Dr. Bernstein's report, apparently for the use of the employer in that proceeding. There is evidence that the Industrial Accident Commission made an award in the widow's favor.

It was Dr. Ellis who brought the Bernstein report to the attention of the medical association, nearly two years after its rendition.

It seems abundantly clear that Dr. Bernstein's report was requested by a litigant for use as evidence in a judicial proceeding; was prepared and delivered by the doctor, in response to that request, solely for that purpose; and was put to that very use by the litigant.

That makes it a "privileged publication," a publication (written or oral) " * * * made * * * [i]n any * * * judicial proceeding * * *." Civ.Code, § 47. In such a case, the privilege is absolute. *Moore v. United States Fidelity & Guaranty Co.*, 122 Cal.App. 205, 210-211, 9 P.2d 562, hearing by Supreme Court denied,—the filing, in a judicial proceeding, of a complaint containing a libelous statement. See also *Albertson v. Roboff*, Cal.2d,

3. Dr. Bernstein testified: "The attorney for the widow * * * called me and told me * * * that this particular individual had died and that Columbia Steel had denied its responsibility in the matter, and would I look over the docu-

ments which included the examination of the autopsy and medical opinions of several of the other doctors, and would I render an opinion on these clinical data which were submitted."

287 P.2d 145. The use of this report as evidence before the Industrial Accident Commission characterizes the author of it as a witness. The testimony of a witness in a judicial proceeding is uniformly accorded the same degree of privilege as is accorded the pleadings therein. (See cases collected in 12 A.L.R. 1247.) Thus, it is established in this state that statements made in an affidavit (testimony in written form) filed in a judicial proceeding enjoy this privilege. *Donnell v. Linforth*, 11 Cal.App.2d 25, 28-29, 52 P.2d 937, hearing by the Supreme Court denied. See also *Kelly v. Daro*, 47 Cal.App.2d 418, 118 P.2d 37, oral testimony in a legislative proceeding, which the statute puts in the same category as a judicial proceeding.

The policy of making such statements privileged is obvious. If parties and witnesses were subject to slander and libel actions for utterances made or filed in a judicial proceeding the administration of justice would be hampered and the judicial process throttled. The same policy should ban a medical association by-law which holds over each of the members the threat of expulsion if in his testimony (oral or written) before a court or other judicial body he "disparages, by comment or insinuation,"⁴ another physician. With such a threat ever facing him, he must weigh carefully and well his every utterance lest through some slip of the tongue he "insinuate" something about another physician which his county medical council may, per-

chance, deem "disparaging" and, as such, just cause for censure, suspension, or expulsion. It is inconceivable that the law could tolerate the holding of such a sword of Damocles over any medical witness in any judicial proceeding.⁵

We are loath to read into the Principles of Medical Ethics an intent upon the part of the American Medical Association to interfere with the judicial process. We find it unnecessary to do so. The canon here involved contains not a single word about the duty of one physician toward another when testifying as a witness in a judicial proceeding. It is a fair inference from such silence that the American Medical Association when it formulated its Principles of Medical Ethics harbored no intent to arrogate to itself the state's prerogative of defining the duties of witnesses in judicial proceedings and the prescribing of penalties for the violation of such duties.

Moreover, section 4 speaks of a physician who "succeeds" another physician "in charge of a case." He is not to disparage the physician who "preceded" him in charge of the case, for such conduct tends to lower the confidence of the "patient" in the medical profession and reacts against the "patient," the profession and the critic. This suggests a doctor-patient relationship and one doctor succeeding another in that relationship.⁶ It is difficult to fit the actors in the present drama into such a picture. It is hard to visualize the coroner or the widow or the body of the decedent as a

4. The words quoted are the very words of section 4, Art. IV, ch. III, Principles of Medical Ethics, American Medical Association; by no means limited to the proscribing of slanderous or libelous statements.

5. It has been held that an association's by-laws are not enforceable if against public policy. *Bennett v. Modern Woodmen of America*, 52 Cal.App. 581, 584-585, 199 P. 343, hearing by Supreme Court denied; cited with approval in *Ginsberg v. Butler*, 217 Cal. 467, 472, 19 P.2d 790, 92 A.L.R. 906; followed in *McCormick v. Woodmen of the World*, 57 Cal.App. 568, 207 P. 943, hearing by Supreme Court denied.

A by-law which provided for expulsion of a member upon his exercising his

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right to petition the legislature was held invalid in *Spayd v. Ringing Rock Lodge No. 665*, 270 Pa. 67, 113 A. 70, 14 A.L.R. 1443.

Concerning the right of an association to expel or otherwise discipline a member for exercising a right or performing a duty as a citizen, see cases collected in 14 A.L.R. 1446-1450.

It has been held incompetent for an association to expel a member for testifying in a legal proceeding to the disadvantage of the association. *St. Louis Southwestern Ry. Co. v. Thompson*, 102 Tex. 89, 113 S.W. 144, 147, on later appeal, see *Tex.Civ.App.*, 192 S.W. 1095.

6. Respondent suggests that this is too narrow a view, that it would render § 4 inapplicable to the specialist (such as a

patient in charge, first, of Dr. Ellis and, later, of Dr. Bernstein.

There is no escape from the conclusion that the evidence does not show a violation of section 4 in the Hill case.⁷

The Muir Case.

[4] The charge was that Dr. Bernstein violated section 1⁸ of Article IV of Chapter III of the Principles of Medical Ethics in that "on March 10, 1951, Mrs. Leo F. Muir was a patient of Dr. M. L. Lipton, and was in Pittsburg Community Hospital for delivery of her second child. It was decided that a Caesarean section was necessary and the patient was moved from the labor room to surgery. Just prior to this removal, Dr. Bernstein was scrubbing for a delivery and he engaged a nurse in conversation within hearing distance of Mr. and Mrs. Muir. Dr. Bernstein commented to the nurse, and the comment was heard by Mr. and Mrs. Muir, that this was the poorest excuse for a section that he had

ever seen and that 'if she (Mrs. Muir) pushed one through, she can push another through'."

The trial court found the evidence sufficient to sustain a finding that this charge constituted an intentional violation of said section 1. Our examination of the record convinces us that the court's finding is correct and cannot be disturbed.

Appellant claims that the remarks which he made to the nurse were not intended for the ears of Dr. Lipton's patient or her husband and that he was unaware that they did hear what he said. However, as stated orally by the trial court "the councilors could have made an implied finding that what the doctor said was intended to be overheard." There was evidence that the doctor was only 12 feet distant from the patient and her husband and that the door between them was open. Although the nurse testified that this conversation was carried on in a normal tone of voice and

pathologist, a roentgenologist, or a surgeon) who is called in for consultation or treatment.

We are not persuaded that any such consequences would follow. Besides, no such situation is involved here. It will be time enough to decide such questions when they arise.

7. The respondent association invokes § 1 of Chap. XIII, By-Laws of California Medical Association, which declares that "Interpretation of ethics about which any controversy may arise or exist shall be submitted to the Council of this Association, and its interpretation thereon shall be final."

That interpretation must be reasonable.

The provisions of the constitution and by-laws become the contract between an association and its members, limiting the power to regulate the conduct of the members.

"The *practical and reasonable* construction of the Constitution and by-laws of a voluntary organization by its governing board is binding on the membership and will be recognized by the courts." *DeMille v. American Federation of Radio Artists*, 31 Cal.2d 139, 147, 187 P.2d 769, 775, 175 A.L.R. 382; emphasis added.

An interpretation which is not reasonable is "not binding on the members * * * and will not be recognized by

the courts." *Mandraccio v. Bartenders Union*, Local 41, 41 Cal.2d 81, 85, 256 P.2d 927, 929, citing the *DeMille* case, and *Riviello v. Journeymen Barbers, etc.*, *Union*, 109 Cal.App.2d 123, 126-129, 240 P.2d 361.

In *Smetherham v. Laundry Workers' Union*, 44 Cal.App.2d 131, 136-138, 111 P.2d 948, the court entertained no hesitancy in undertaking an interpretation of the by-laws, guided in part by these considerations: "Where one construction would make the contract unusual or extraordinary, courts are to disregard such construction if the contract may reasonably be subject to a construction which is fair and just. Indeed it must be presumed that the parties intended the contract to be reasonably construed." 44 Cal.App.2d at page 138, 111 P.2d at page 952.

8. Section 1 reads as follows:

"A physician, in his relationship with a patient who is under the care of another physician, should not give hints relative to the nature and treatment of the patient's disorder; nor should a physician do anything to diminish the trust reposed by the patient in his own physician. In embarrassing situations, or whenever there seems to be a possibility of misunderstanding with a colleague, a physician should seek a personal interview with his fellow."

she did not know whether anybody else heard it, she also said she did know that they could have heard it if they had been listening and was afraid at the time that they had heard. Later, in a letter to the chairman of the Ethics Committee of the respondent association Dr. Bernstein exhibited considerable animus toward Dr. Lipton. Of this the trial court said "I think the petitioner's attitude toward the doctor [Lipton] as expressed in that letter strongly corroborates the intention here, and he may have intended by the remarks for the patient to hear and to disparage Dr. Lipton." Appellant claims his letter was admitted for a limited purpose which did not embrace the use made of it by the trial court. That is not correct. After its introduction and just prior to the conclusion of the accusers' case in chief, the referee, asked by appellant's counsel for clarification as to the parts admitted, ruled that the portion thereof which dealt with "a pharmacy fabrication" (not involved upon this appeal) would not be considered, but that "so far as the balance of the letter, as I heard it, I think it is all material. With that admonition to the Council, I think there is adequate safeguard for the admission of it."

The patient testified that she was terribly disturbed by Dr. Bernstein's remarks and momentarily lost confidence in her doctor and thought of consulting another doctor but after considering it regained her confidence in Dr. Lipton, who had already consulted two doctors before recommending a Caesarean.

It is clear that the charge and the evidence supporting it present facts which come well within the purview of the canon in question. This canon in its application to the circumstances of the Muir case is neither unreasonable nor against public policy and we find no basis for a reviewing court to disturb the trial court's ruling in respect to this charge.

The Enea Case.

[5, 6] The charge was that Dr. Bernstein violated section 1⁹ of Article IV of Chapter III of the Principles of Medical Ethics in that "in the latter part of March, or early April, 1950, Mrs. Sarah A. Enea was under the care of Dr. S. S. Steinbergh for treatment of a fractured hip. After surgery was scheduled for this condition, Dr. Bernstein stated to Mrs. Enea's brother that Mrs. Enea should not be operated upon for this condition. On May 12, 1950, Mrs. Enea was again operated upon for the fractured hip condition. At that time, Dr. Bernstein told Mrs. Enea's brother that they should call in a consultant and that they should have done this initially as he suggested."

The second incident is supported in part by the testimony of the patient, Mrs. Enea, in the form of a written statement by her.¹⁰ It is not too clear whether in making this statement she was referring to the first or the second incident of the charge. We were inclined to view it as a reference to the first incident, but appellant insists that she was speaking of the second incident and he has convinced us that such was the case, particularly in view of the words "who stated that I should not have been operated upon" which appear near the end of the first sentence of her statement. (That leaves the first incident of the charge unsupported by sufficient evidence but the proof concerning the second incident is sufficient, and that in turn is sufficient to affirm the trial court.) Dr. Bernstein now objects to the hearsay portion of this statement. He says that hearsay can not serve as the sole basis for a finding of fact.

It appears to us that he is not in a position to urge this objection in view of the circumstances under which Mrs. Enea's statement went into evidence. The referee had already ruled out as hearsay a question addressed to the witness Dr. Steinbergh asking him to tell what Mrs. Enea's husband told him that Dr. Bernstein said to Mrs. Enea's brother. The accusers were

9. The text of section 1 appears in a footnote on page 866 ante.

10. Her statement reads as follows:

"On March 27, 1950, I slipped in the backyard and broke my left hip. At that time I was due to deliver my first child within two weeks. Dr. C. L. Kerns was my obstetrician and he called Dr. S. S. Steinbergh in as consultant to treat the

fractured hip. After surgery was scheduled, my brother Frank (Aiello) was approached by Dr. S. L. Bernstein who stated that I should not have been operated upon, for this condition. My brother, in turn, passed this on to my husband and we discussed it the night before operation and both agreed that we wanted Dr. Steinbergh to proceed with surgery."

now offering this statement signed by Mrs. Enea, explaining that she refused to come to the hearing and testify. His counsel then suggested that he and opposing counsel "get together during some future recess and * * * eliminate the hearsay and opinion. I would be perfectly satisfied to have the balance of the statement read in the record. I don't think the record should be cluttered up with a lot of hearsay and opinion."

Such a conference was held. Counsel agreed upon elimination of the second paragraph of the statement and stipulated that the first paragraph go into evidence.¹¹ To stipulate it into evidence under the circumstances described would seem in effect a stipulation that this piece of hearsay be treated as fully competent for all purposes and thus would be eligible to serve as the sole proof of what Dr. Bernstein said upon that occasion. It would seem inequitable to permit him now to object that this bit of hearsay was not buttressed by more direct evidence.

In making this analysis of this evidence we are not holding that in a hearing of this nature hearsay might not furnish a sufficient basis for the finding of a material fact. The by-laws of the California Medical Association govern the conduct of such hearings and provide that they shall be conducted "in such manner as to ascertain all the facts fairly to the accuser and accused, eliminating all formal or technical rules and requirements which ordinarily pertain to judicial proceedings." Such a rule well may sanction the use of relevant hearsay to support a finding, see *Sada v. Industrial Acc. Comm.*, 11 Cal.2d 263, 268-269, 78 P.2d 1127, a question which we need not determine in view of the circumstances under which the presently questioned hearsay was put in evidence.

Dr. Bernstein testified that one of his own patients (Frank Aiello, a brother of

Mrs. Enea) came to him, told him the nail which had been inserted during the first operation had slipped and asked "What do you think about it?" and the doctor replied it would probably be a good idea to get another opinion. Asked whom he would suggest, he suggested getting a Dr. Fisher but to do so through Dr. Steinbergh. He argues that such a response, to one of his own patients, characterizes it as a communication which is not proscribed by the canon of ethics specified in the charge. He thereby overlooks Mrs. Enea's testimony that Dr. Bernstein said that she "should not have been operated upon, for this condition."

The trial court considered this point and rejected it. In doing so, the court referred to the bitter feeling toward Dr. Steinbergh which Dr. Bernstein displayed in emphatic terms in a letter which he later wrote to the Ethics Committee of the medical association in regard to this and other incidents. In this connection the court said: "* * * the language he used about Dr. Steinbergh in his letter to the Ethics Committee, very frankly I just don't think the Court can feel that he acted in good faith. I think the only sustainable finding is that Dr. Bernstein intended to injure and disparage Dr. Steinbergh." However we might have interpreted the canon involved, in its application to the facts of the Enea case, had we that interpretation to make in the first instance, it comes to us upon appeal after having been made pursuant to appellant's agreement to be bound by the interpretation made by his state council. That interpretation has in turn been confirmed by the trial court and we are unable to say that it is unreasonable or against public policy.

We conclude that there is no basis for a reviewing court to disturb the trial court's finding that "the evidence was sufficient to sustain a finding that Charge 5 [the Enea case] constituted an intentional violation

11. In this connection his counsel stated: "So the record will be * * * clear in the matter, we will stipulate of course if Mrs. Enea was personally present and testifying in this proceeding, that her testimony with respect to these matters that you have read [the referee had just read the first paragraph into the record and had refused introduction of the second paragraph] would have been exact-

ly as you read the statement," but that "we don't stipulate of course, as to the truth of those matters."

The referee confirmed, saying: "That is right, it is evidence on behalf of the Accuser's case. * * * That is evidence and may be considered by the Council as part of the record in the case on behalf of the Accusers."

of Section 1, Article 4, of Chapter III of the Principles of Medical Ethics."

Redetermination of Penalty.

[7] The determination of the penalty (censure, suspension, or expulsion) for violation of the Principles of Medical Ethics is vested in the trial council, subject to appropriate review, of course.

Here the trial council imposed a single penalty, that of expulsion, for all seven violations, not a separate penalty for any one of them, nor a separate penalty for any group of them less than seven.

The seven violations have now been reduced to two. We have no way of knowing whether the trial council would have meted out the same penalty if it had found these two violations only. When such a situation develops upon the review of a disciplinary order of a public administrative agency, the agency is directed to set aside the order and redetermine the penalty. *Bonham v. McConnell*, 45 Cal.2d 304, 288 P.2d 502, and cases cited. We deem that principle applicable here. See *Cason v. Glass Bottle Blowers Ass'n*, 37 Cal.2d 134, 147, 231 P.2d 613, 21 A.L.R.2d 1387, remanding the matter of reinstatement or retrial "to the union for further proceedings in accordance with the rules which we have discussed."

In view of this conclusion it is unnecessary to consider appellant's claim that the penalty of expulsion was excessive, arbitrary, in abuse of discretion and based in part upon charges which the trial council found were not sustained.

Is This a Justiciable Controversy?

[8, 9] The respondent association advances the argument that "membership in a professional nonprofit association such as respondent in which the members have no severable interest in the property of the association, is not the subject of judicial intervention as there is no property right involved." That is an inadequate and inaccurate statement of the applicable principles which have been succinctly expressed by the Supreme Court in these words: "In any proper case involving the expulsion of a member from a voluntary unincorporated association, the only function which the

courts may perform is to determine whether the association has acted within its powers in good faith, in accordance with its laws and the law of the land." *Smith v. Kern County Medical Ass'n*, 19 Cal.2d 263, 265, 120 P.2d 874, 875. In making that statement the Supreme Court cited *Levy v. Magnolia Lodge*, No. 29, I.O.O.F., 110 Cal. 297, 42 P. 887, and *Smetherham v. Laundry Workers' Union*, 44 Cal.App.2d 131, 111 P.2d 948. The very act of citing these two cases carries an implied suggestion that in relation to this subject there is no fundamental distinction between a medical association, a labor union and a fraternal or beneficial association. In each type of organization the relationship between the members and the group is determined by contract, the terms of which find expression in the constitution and by-laws. "Any matter of policy involved in the adoption of the by-laws, the code of ethics, and the resolution in conformity therewith, is a question for the membership itself and is not debatable here so long as it is not shown that such policy is in violation of law." At pages 270-271 of 19 Cal.2d at page 878 of 120 P.2d.

Other forms of expressing this same principle will be found in *Swital v. Real Estate Commissioner*, 116 Cal.App.2d 677, 679, 254 P.2d 587, concerning membership upon a realty board, and in *Miller v. International Union, etc., Engineers*, 118 Cal. App.2d 66, 68, 257 P.2d 85, relating to membership in a labor union.

We entertain no doubt that the issues discussed herein are justiciable and that mandamus affords an appropriate proceeding for their judicial consideration and determination.

Somewhat inconsistently with its contention that this is not a justiciable controversy respondent upon this appeal asks that in the case in which the state council overruled the trial council and in two of the cases in which the trial court annulled the findings of the trial council, the findings of the latter should be revived, restored and given legal effect. The respondent is in no position to make any such claim. It did not appeal from the state council's decision nor did it petition the trial court nor has it appealed from the trial court's decision.

The judgment is reversed with directions to the trial court to revise the findings of fact and conclusions of law and render judgment, all in accordance with the views herein expressed, the judgment to include a direction to the trial council to set aside its order of expulsion and to determine the penalty to be imposed in the light of the revised findings herein.

PETERS, P. J., and BRAY, J., concur.



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OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA, a corporation,
Plaintiff and Respondent,

v.

STATE BOARD OF EQUALIZATION of the State of California and Jerrold L. Seawell, William G. Bonelli, George R. Reilly, James H. Quinn and Thomas H. Kuchel, members thereof, Defendants and Appellants.

Civ. 16656.

District Court of Appeal, First District,
Division 2, California.

Feb. 27, 1956.

Rehearing Denied March 28, 1956.

Hearing Denied April 25, 1956.

Action by insurance company, which was incorporated under laws of and had its principal place of business in California, to recover amount paid under protest for tax based on premiums received at company's Nevada office from policyholders residing in states in which company was not authorized to do business. The Superior Court, City and County of San Francisco, Edward Molkenbuhr, J., rendered judgment for insurance company, and taxation officials appealed. The District Court of Appeal, Dooling, J., held that where domestic insurance company, which derived its privilege of doing business from its incorporation in California, conducted all other ac-

tivities with relation to such policies at its California home office, insurance company was subject to privilege tax on such premiums under constitutional provision imposing tax based on premiums received upon business done in California.

Judgment reversed.

1. Insurance ⇨5

While obligation of policies of residents of state in which insurer is not licensed continues, that alone does not constitute transaction of business, and without license, insurer is forbidden to transact business in the state.

2. Taxation ⇨543(7)

In action by insurance company, which was incorporated under laws of and had its principal place of business in California, to recover amount paid under protest for taxes based on premiums received at company's office from policyholders residing in states in which company was not authorized to do business, which tax was imposed under constitutional provision basing tax on premiums received from business done in California, evidence showed that all service rendered to policyholders by company, other than collection of premiums, was rendered by home office in California. West's Ann.Const. art. 13, § 14½(c).

3. Taxation ⇨37.4

There is no constitutional objection to tax on domestic insurance company based on premiums received from policyholders residing in states in which insurer is not licensed to do business, even though the premiums are received by it in another state.

4. Taxation ⇨140

Where domestic insurance company, which derived its privilege of doing business from its incorporation in California, collected premiums from policyholders in states in which it was not authorized to do business at its Nevada office, but conducted all other activities with relation to such policies at its California home office, insurance company was subject to privilege tax on such premiums under constitutional provi-

sion imposing tax based on premiums received upon business done in California. West's Ann.Const. art. 13, § 14½(c).

Edmund G. Brown, Atty. Gen., Harold B. Haas, Deputy Atty. Gen., for appellants.

Knight, Boland & Riordan, John H. Riordan, San Francisco, for respondent.

DOOLING, Justice.

In an action to recover taxes paid under protest in the amount of \$13,739.45 the trial court gave judgment for the plaintiff from which the defendants appeal. The plaintiff, hereafter called Occidental, is a life insurance company incorporated under the laws of California with its principal place of business in the city of Los Angeles. The taxes involved in this case were based upon premiums received by Occidental during the year 1950 from policyholders residing in states in which Occidental was not licensed to do business.

The facts are not disputed. The premiums in question were all renewal premiums paid by the holders of policies issued by Occidental in previous years. All of the records of such policies are kept by Occidental in its Los Angeles office and all bookkeeping entries in connection with such policies are made there. From these records notices to these policyholders, showing the amount of renewal premium and its due date, with the name and address of the policyholder typed thereon, were made up in the Los Angeles office. They were then sent in bulk to the Nevada office of Occidental. In the Nevada office each notice of premium due was placed in a "window" envelope so that the name and address of the policyholder already typed on the notice showed through the transparent "window" and thereby served as the name and address of the addressee. Also typed on the premium notice as the address to which the premiums should be mailed was the Nevada address of Occidental and a self-addressed envelope directed to that office was enclosed with each premium notice. When the remittances from these policyholders were received by mail in the Nevada office they were deposited in a spe-

cial bank account in Nevada, withdrawals from which could only be made by authorized officials in Occidental's home office in Los Angeles. A special form of deposit slip was used, having a column for the notation of the number of the policy on which the premium was paid opposite the amount of the deposit. A duplicate of the deposit slip was then mailed to the Los Angeles office and a bookkeeping entry of the fact and date of payment of the premium was entered from this deposit slip in the permanent records of the policyholder maintained in that office. These duplicate deposit slips are also filed in the Los Angeles office. It is also in evidence that all claims with respect to such policies are paid out of Occidental's main bank account at Los Angeles. The policies, representative specimens of which were introduced, contain provisions for change of beneficiary, assignment of policy, proof of death, loans upon the value of the policy and for special settlement agreements, some of which by express provision of the policy only become effective upon filing the appropriate document in the home office and the rest of which contemplate action by the officers of the company which we are entitled to assume would be performed at the home office.

Occidental is licensed to do business in the State of Nevada and has paid the taxes exacted by that state, but such taxes do not include any tax based upon these premiums.

Our Constitution, Article XIII, § 14½, imposes a tax on life insurance companies doing business in this state, and in this respect provides: "the 'basis of the annual tax' is * * * the amount of gross premiums, less return premiums, received in such year by such insurer upon its business done in this State * * *." Cal.Const. Art. XIII, § 14½, subd. (c).

It is Occidental's position that these renewal premiums received by it in the State of Nevada are not "premiums * * * received * * * upon its business done in this State" within the meaning of this constitutional provision and hence the taxes based thereon are unauthorized. In this respect Occidental argues that the only business done in connection with these out-

standing policies is their renewal for the premium term which, under the terms of the policies themselves, becomes effective upon the receipt of the premiums by it at its office in the State of Nevada, and that this business is done in the State of Nevada and is not and can not be "business done in the State of California."

This argument has a deceptive simplicity. However the grammatical construction of the constitutional provision in question, in and of itself, demonstrates that the "business done" upon which the "premiums" are "received" is not the receipt of the premiums. The premiums may be received inside or outside of the State of California and they are still made "the basis of the annual tax" if the "business" upon which they are based was "business done in the State of California." To equate the receipt of the premiums with the "business done" upon which they are received would result in paraphrasing the constitutional provision to read: "premiums * * * received upon its business (of receiving premiums) done in this State." Such a construction is both tautological and unreasonable.

That the receipt of renewal premiums on life insurance, and the consequent extension of the full benefits of the policy for the new premium term, is not the business done upon which these premiums are received is demonstrated by the leading Pennsylvania case of *Commonwealth v. Equitable Life Assur. Soc.*, 239 Pa. 288, 86 A. 787. In that case the insurance company was licensed to do business in Pennsylvania. The company received renewal premiums from policyholders residing in Pennsylvania at its office outside that state. The Pennsylvania statute imposed a tax measured by "'premiums * * * received from business done within this commonwealth.'" 72 P.S. § 2261. The company claimed that since the premiums were received outside the State of Pennsylvania, they were not "from business done within" the state. The Supreme Court of that state ruled otherwise. It said at page 788 of 86 A.: "The court below seems to have unduly narrowed its inquiry, and contented itself with asking whether the mere receipt of premiums at an outside office was doing business within

this commonwealth. Certainly not, if that was all there was to it. But the answer to that question is not at all decisive of the real inquiry here. The defendant society does not exist merely for the collection of premiums; that is a mere incident to the great and beneficent purpose for which it exists. When it comes within our borders to do business, it renders a service; it furnishes protection and indemnity to its beneficiaries, residents of the state of Pennsylvania. That is the business which it does in Pennsylvania, and that is the purpose for which it seeks and is granted permission to enter. Furnishing that service, that insurance against loss, it makes a proper charge to cover the cost of the service which it renders, and that charge is the premium. It is simply payment for the valuable service it renders. Whether that service be paid for on the spot where the service is rendered, or whether the amount be remitted to the home office, does not change the character of the business done, and for which recompense or payment is made. * * * If the society was merely engaged in collecting premiums, without regard to the business or service for which those premiums were paid, there would be force in the suggestion that premiums collected outside the state do not constitute doing business within the state. But, when we reflect that the tax is placed upon the amount of the premium merely as a measure of the volume of insurance business done within the state, it is apparent that determining the place where the premium is received is not the proper test to apply in order to ascertain what that business was, or in what it consisted."

The constitutionality of the tax so imposed was affirmed by the Supreme Court of the United States in *Equitable Life Assur. Soc. of United States v. Commonwealth of Pennsylvania*, 238 U.S. 143, 35 S.Ct. 829, 59 L.Ed. 1239. For a similar holding see also *Pittsburgh Life & Trust Co. v. Young*, 172 N.C. 470, 90 S.E. 568.

These cases make clear that the "business done" "from" or "upon" which the premium is received is something other than the receipt of the premium and as a consequence that the receipt of the premium

outside of the state is not determinative that the "business" upon which the premium was received was "business done" outside of the state.

[1, 2] The Pennsylvania court equated the "business done" in Pennsylvania with the sum total of the services furnished by the insurance company to its citizens under the policies held by them and so concluded that the business from which the premiums were received was "business done" in Pennsylvania. In our case the only acts performed in Nevada by Occidental were the stuffing and mailing of envelopes containing premium notices, and the receipt and deposit of the premiums. All other services to these policyholders, since they were not done in Nevada, must have been done elsewhere. They could not be performed in the states of the policyholders' residence since Occidental was not licensed to do business in those states. While the obligation of the policies of residents of a state in which the insurer is not licensed continues that alone does not constitute the transaction of business, *Western Travelers Acc. Ass'n v. Johnson*, 14 Cal.App.2d 306, 309, 58 P.2d 206 and without a license the insurer is forbidden to transact business in the state. Cf. *Provident Sav. Life Assur. Soc. v. Commonwealth of Kentucky*, 239 U.S. 103, 36 S.Ct. 34, 60 L.Ed. 167. The business cannot be conducted in a vacuum and in fact the recital of the evidence which we have set out above shows that all of the services to these policyholders rendered by Occidental, other than the collection of the premiums, is rendered to them at its home office in Los Angeles.

[3] There is no constitutional objection to a tax on a *domestic* insurance company based on premiums received from policyholders residing in states in which the insurer is not licensed to do business, even though the premiums are received by it in

another state. *Guardian Life Ins. Co. of America v. Chapman*, 302 N.Y. 226, 97 N.E.2d 877, 883-884; cf. *Commissioner of Corporations & Taxation v. Boston Ins. Co.*, 328 Mass. 641, 105 N.E.2d 382.

[4] Cases are cited by respondent defining the meaning of "doing business" for tax purposes. They are all cases concerned with interstate commerce or with *foreign* corporations. The Pennsylvania court pointed out in *Commonwealth v. Equitable Life Assur. Society*, supra, 86 A. at page 788, that cases construing the meaning of "doing business" in other situations are of little aid in determining the precise question here presented. Occidental is a *domestic* not a *foreign* corporation. It derives its privilege of doing business from its incorporation in this state. The New York court said in *Guardian Life Ins. Co. of America v. Chapman*, supra, 97 N.E.2d at page 884: "The tax is upon the domestic insurance company and is measured by the premiums traceable to the privilege of its existence conferred by the State of New York." The tax in our case is equally a privilege tax, *Carpenter v. Peoples Mut. Life Ins. Co.*, 10 Cal.2d 299, 302, 74 P.2d 508, and Occidental by virtue of the privilege of its existence conferred by the State of California is conducting all of its activities with relation to the policies held by these policyholders, who reside in states in which it is not licensed, at its Los Angeles office in this state, except the collection of premiums alone. The premiums though collected in Nevada are traceable to these activities and may fairly be held to be "premiums * * * received * * * upon its business done in this State" within the meaning of the constitutional provision.

Judgment reversed.

NOURSE, P. J., and Kaufman, J., concur.

Hearing denied; CARTER, J., not participating.

ARGONAUT INSURANCE EXCHANGE,
an inter-insurance exchange,
Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION
of the State of California, and Glen
Maxwell Smith, Respondents.*
Civ. 21430.

District Court of Appeal, Second District,
Division 3, California.

Feb. 28, 1956.

Hearing Granted April 25, 1956.

Workmen's Compensation case. The Industrial Accident Commission made an award, and employer's insurer petitioned for review. The District Court of Appeal, Shinn, P. J., held that evidence did not support finding of Commission that claimant, who had been engaged by moving picture studio as a technical advisor on scientific matters and as a fabricator of strange devices, and who was injured while in his home working on a rocket to be used in moving picture, was an employee, rather than an independent contractor.

Award annulled.

1. Workmen's Compensation ☞235

A general authority over workers is not sufficient to create an employer-employee relationship if instructions are given as to a desired result without the right to exercise complete and authoritative control of the means to be employed in performance of the work. West's Ann.Labor Code, § 3353.

2. Workmen's Compensation ☞305

No special test of fact or circumstance is a conclusive answer to question whether one is an employee or an independent contractor, within workmen's compensation law, and each case must turn upon its own peculiar facts and circumstances.

3. Workmen's Compensation ☞1939

The Industrial Accident Commission's finding on issue whether employer-employee relationship exists will not be disturbed where it is supported by substantial evidence unless only a single inference and

one conclusion may be drawn, in which case the question is one of law.

4. Workmen's Compensation ☞1452

In workmen's compensation case, evidence did not support finding of Industrial Accident Commission that claimant, who had been engaged by moving picture studio as a technical advisor on scientific matters and as a fabricator of strange devices, and who was injured while in his home working on a rocket to be used in moving picture, was an employee, rather than an independent contractor. West's Ann.Labor Code, § 3353.

Herlihy & Herlihy, Los Angeles, for petitioner.

Everett A. Corten and Edward A. Sarkisian, San Francisco, for respondent Industrial Accident Commission.

SHINN, Presiding Justice.

Petitioner Argonaut Insurance Exchange was the insurer of Ivan Tors Productions, Inc., with respect to workmen's compensation liability and petitions the court for annulment of an award in favor of Glen Maxwell Smith based upon injuries he received while at work. The ground upon which annulment of the award is sought is that it had no support in the evidence for the reason that Smith was an independent contractor and not an employee of Tors at the time he sustained his injuries. This contention in our opinion must be sustained and the award annulled.

Tors Productions, hereinafter called Tors, was making a motion picture entitled "Riders to the Stars" and contemplated the production of another one called "Space Station U.S.A." Smith was a highly skilled technical adviser in the production of motion pictures and this had been his profession for more than 20 years. He was possessed of scientific equipment which he was accustomed to rent to the producers of pictures in connection with services he rendered as a technical adviser. He conceived an idea for a story which he sold to the corporation Tors and was employed by the latter as technical adviser and associate

* Appeal Dismissed by Stipulation of the Parties Nov. 14, 1956.

producer for the production of the first picture entitled "Riders to the Stars" and in the contract of employment he agreed to furnish equipment for use in the production. On June 8, 1953, by letter addressed to and accepted by Smith, the terms and conditions under which Smith's services were to be rendered were set forth in extenso. This contract, which was in such detail as to render unlikely any situation in which either of the parties would have to trust the other, comprises 19 pages of closely printed matter and has been filed as a supplement to the petition for writ of review. We shall recite here only sufficient of its provisions to show the nature of the relationship which it created. Smith agreed to render his services "as technical adviser and story consultant in connection with the photoplays and to render all services usually and customarily rendered by persons engaged in such capacities in connection with the production of feature-length motion picture photoplays"; he agreed to furnish and make available "various and sundry technical and electronic equipment," was to commence work May 1, 1953 and continue thereafter until completion of the photoplays. He was to be paid for each picture \$7,500 of which \$5,000 was to be in cash from production funds and the balance of \$2,500 only from gross receipts of the pictures; also 2 per cent of the net profits of the two pictures. The contract did not provide for any deductions for unemployment insurance, Social Security benefits or withholding tax and none was made. Smith warranted that all material prepared or composed by him would be original and protectible as such; he assigned to Tors any rights he might have in the pictures "whether such results and proceeds consist of literary, dramatic, musical, motion picture, mechanical, material or any other form or works, themes, ideas, creations, products or compositions"; and was to certify that whatever he might author during his employment should belong to Tors. The latter was not required to utilize the services of Smith or to produce or market either picture but nevertheless was required to pay him the stipulated cash compensation. Smith, on the other hand, was obligated to

render his services and furnish his equipment as long as they were required in the production of the pictures. Smith was to receive screen credit as "associate producer in charge of scientific research, or words to such effect." Tors was given the right to assign the agreement or license all or any part of its rights thereunder and the agreement was to inure to the benefit of its successors and assigns. Paragraph 4 of the contract reads as follows: "During the term hereof you will render your services to us on a non-exclusive basis and as, when and wherever we may require. Your services shall be rendered in a diligent and conscientious manner and to the best of your ability and subject to such instructions, directions, requests, rules and regulations made or issued by us. Your services shall be rendered under the supervision, direction and control of and in collaboration with such person or persons as we may from time to time designate. *Notwithstanding the foregoing provisions, it is understood that your services hereunder shall be rendered in the capacity of an independent contractor.*" (Emphasis added.) Attached to the agreement was an exhibit, bearing the signatures of the parties which set forth in minute detail the manner in which the pictures would be exhibited and the net profits computed.

The first picture had to do with rockets, one of which was called a "V-2 Type." Such a rocket, which had been constructed by Smith and delivered to the lot, had been damaged and was in need of repairs. Smith testified that Ivan Tors, president of the corporation, instructed him to take it home and repair it in the evening; he undertook to do this but while seated on the floor in his home he picked up a small acetylene gas tank which exploded when he endeavored to move it, thereby inflicting multiple permanent injuries.

There was evidence that the picture consisted of 397 separate scenes, all of which required discussion among Smith, Ivan Tors, Carlson, who was the director, Siodmak, the writer, Redmond, the head special effects man. Ivan Tors testified that he suggested what was to be done "because finances are involved, and I have to be

careful that it should not be expensive. A certain shot can cost \$15,000 or a thousand dollars; so this again has to be discussed with the Producer and all his employees. That is a special situation." He also testified that Smith as a scientific expert is "one of the top men in his field"; that there were only two or three qualified men in that field. He gave instructions to Smith as to what he wanted and "it would be up to him to do it." * * * "No one in the IASTE Union has a specialty like he has; but anything that an IASTE man can do, I let be done by a Union member, to comply with my contract with the IASTE." He also testified that while he signed the agreement with Smith he never read it. His attorney prepared it. He had "about three hundred contracts like that" coming from his attorney and he testified "And I think it was his conclusion at that time, from my memo. that Mr. Smith is an independent contractor."

Respondent commission relies entirely upon paragraph 4 of the contract and upon evidence that Ivan Tors, president of the corporation, had and exercised authority to direct how the picture should be made. Respondent says that the evidence of the parties "as to their business relations, their situation at the time the written contract was executed and the subsequent acts of the parties in operating under the written contract, showed clearly that the employee did not have that freedom to do his work without close and constant supervision, direction and control of the employer."

[1] It cannot be questioned that Tors had general authority over every one who was working on the production; he knew the results which he desired to achieve and was diligent in imparting that knowledge to others through innumerable daily conferences over a period of months. Among them were Mr. Carlson, the director, and Mr. Redmond, the special effects man. But such general authority is not sufficient to create an employer-employee relationship if it gives instructions as to a desired result without the right to exercise complete and authoritative control of the means and methods to be employed in performance of

the work. Labor Code, § 3353; *Western Indemnity Co. v. Pillsbury*, 172 Cal. 807, 159 P. 721; *Winther v. Industrial Acc. Comm.*, 16 Cal.App.2d 131, 60 P.2d 342; *Mountain Meadow Creameries v. Industrial Acc. Comm.*, 25 Cal.App.2d 123, 76 P.2d 724. Smith was employed to give technical advice and the benefit of his scientific skill as a fabricator of strange devices to the end that his work would contribute to a desired result. One does not enter into an employer-employee relationship by giving general directions to a plumber, *Bennett v. Truebody*, 66 Cal. 509, 6 P. 329; or a lather, *Perguica v. Industrial Acc. Comm.*, 29 Cal. 2d 857, 179 P.2d 812; or a picker of his olives, *Winther v. Industrial Acc. Comm.*, supra, 16 Cal.App.2d 131, 60 P.2d 342; or a hauler of milk, *Mountain Meadow Creameries v. Industrial Acc. Comm.*, supra, 25 Cal.App.2d 123, 76 P.2d 724; or water, *Briggs v. California Emp. Comm.*, 28 Cal.2d 50, 168 P.2d 696; or hay, *Flickenger v. Industrial Acc. Comm.*, 181 Cal. 425, 184 P. 851, 19 A.L.R. 1150; or for the pumping of sand from a well, *Pryor v. Industrial Acc. Comm.*, 186 Cal. 169, 198 P. 1045; or the grading of land, *Western Indemnity Co. v. Pillsbury*, supra, 172 Cal. 807, 159 P. 721; or the painting of a building. *Los Flores S. Dist. v. Industrial Acc. Comm.*, 13 Cal.App.2d 180, 56 P.2d 581.

Smith's task was to manufacture rockets about 3 feet long which would resemble a V-2 rocket, thus permitting the use of film that had been made of a real V-2 rocket. He was to devise and construct the mechanism that would make the rocket function as desired. According to Tors, Smith was one of two or three men who were capable of constructing and installing such a rocket. He was an inventor and had been in the business of manufacturing intricate electronic and other technical instruments. Tors had no technical training or knowledge in that field nor had any one else in his organization. Smith constructed the rockets in a laboratory at his home and did much of his other work there. The record is devoid of evidence that Tors or any one else gave Smith any directions with respect to the construction of the rocket or the manner in which it would

be made to function, or with respect to any feature of his work that involved special knowledge or skill. Upon the contrary, it was shown that no one in the organization was competent to direct the technical features of his work.

How can it be said that in rendering his services such an exceptionally qualified technician as Smith was subservient to the directions and control of Ivan Tors or any one else who was without any training, knowledge or experience, and wholly incompetent to give advice? Where one possessed of surpassing scientific or artistic accomplishments is engaged to furnish his talent in the service of another, who is wholly devoid of knowledge or experience in the matter, it would seem incongruous to consider that his genius was to be subordinated to the ignorant direction and control of his employer. There was nothing in the relations of Smith and Tors when the former's services were engaged, nor anything in the contract or the manner of its performance which points to an employer-employee relationship.

[2] No special test or fact or circumstance has been found to give a conclusive answer to the question whether one is an employe or an independent contractor and each case must turn upon its own peculiar facts and circumstances. *Schaller v. Industrial Acc. Comm.*, 11 Cal.2d 46, 62, 77 P.2d 836.

It seems clear to us that Smith was far removed from the status of a mere employe. He was practicing a unique and highly technical profession; in addition to the mechanical apparatus he was to construct, it was contemplated that he would furnish ideas, picture material and advice, and give rather than receive directions; he contracted to render an entire service for an entire price; his services could not be dispensed with without payment of his full compensation; the contract specifically pro-

vided that he was employed as an independent contractor, which was his expressed intention and also the understanding of Tors' attorney, who prepared the contract according to Tors' directions, and the contract made no provision for deductions for unemployment insurance, Social Security or withholding tax and none was made. These were all important matters having a direct bearing on the nature of the relationship. *Empire Star Mines Co. v. California Emp. Comm.*, 28 Cal.2d 33, 43, 168 P.2d 686. They all point unerringly to the status of Smith as that of an independent contractor, and there are numerous other provisions that have the same tendency.

[3,4] The respondent says "It was a question of fact 'to be determined by the commission from the evidence adduced, whether the essential employer-employee relationship exists, and the commission's finding on that issue will not be disturbed where it is supported by substantial evidence' unless only 'a single inference and one conclusion may be drawn' in which case the question is one of law." Citing *Esquer v. Teresi*, 105 Cal.App.2d 89, 94, 232 P.2d 895. This, of course, is an elementary rule in proceedings for review of workmen's compensation awards but it cannot be invoked to foreclose the independent judgment of a court when the character of the relationship of the parties is to be determined from a construction of their contract and undisputed evidence of their strict compliance with their respective undertakings. Not only the contract but the manner in which performance was rendered permit of the single conclusion that Smith was an independent contractor and we are obliged to hold that the finding of the commission to the contrary is without support in the evidence.

The award is annulled.

PARKER WOOD and VALLÉE, JJ., concur.

139 Cal.App.2d 368

**PEOPLE of the State of California,
Plaintiff and Respondent,**

v.

**Alfred JALIFI, Defendant and Appellant.
Cr. 3130.**

**District Court of Appeal, First District,
Division 2, California.**

Feb. 21, 1956.

Prosecution for violation of narcotics law after alleged prior felony conviction for same offense. The Superior Court, Santa Clara County, Murray Draper, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Kaufman, J., held that record failed to show that defendant was convicted on unsupported testimony of perjurer.

Affirmed.

1. Criminal Law ⇨1130(5)

Where defendant's brief contained no citation of authority in support of contentions, the District Court of Appeal could refuse to consider the brief. West's Ann. Rules on Appeal, rule 15(a).

2. Poisons ⇨9

In prosecution for violation of narcotics law, record failed to show that defendant was convicted on unsupported testimony of perjurer. West's Ann. Health and Safety Code, § 11500.

3. Criminal Law ⇨1159(4)

The statements of a witness believed by jury cannot be attacked on appeal unless it is a physical impossibility that statements be true or unless their falsity be apparent without resorting to inferences or deductions.

4. Poisons ⇨9

In determining whether defendant was convicted of violation of narcotics law on witness' testimony which was false and unworthy of belief, the fact that witness, an operative employed by State Bureau of Narcotic Enforcement, had known of defendant by the wrong name was immaterial,

where operative positively identified defendant as the person referred to by the wrong name. West's Ann. Health and Safety Code, § 11500.

5. Criminal Law ⇨1120(10), 1130(2)

Defendant's contention that prosecution witnesses who were operatives employed by State Bureau of Narcotic Enforcement both had long arrest records, could not be raised on appeal were there was no such testimony in the record and defendant's brief did not claim such impeaching evidence was improperly excluded.

6. Criminal Law ⇨1028

In prosecution for violation of narcotics law, where defendant relied entirely on alibi that he was in another city when crime was committed and did not raise defense of entrapment in trial court, defendant could not raise such defense for first time on appeal by reference to operatives employed by State Bureau of Narcotic Enforcement as paid informers hired for purpose of entrapment. West's Ann. Health and Safety Code, § 11500.

7. Criminal Law ⇨37

The fact that a defendant committed a crime when solicited by a decoy raises no inference of unlawful entrapment.

Alfred Jalifi, Jr., San Quentin, in pro. per.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., John S. McInerny, Deputy Atty. Gen., N. J. Menard, Dist. Atty. of Santa Clara County, J. W. Feeley, Deputy Dist. Atty., San Jose, for respondent.

KAUFMAN, Justice.

Appellant, Alfred Jalifi, appeals from a judgment of conviction after jury trial on a charge of violation of section 11500 of the Health and Safety Code. The information also alleged a prior felony conviction for violation of the aforesaid section. When arraigned on January 14, 1955, appellant pleaded "not guilty" to the charge and admitted the prior conviction.

John Santiago was an operative employed by the State Bureau of Narcotic Enforcement for the purpose of making narcotic purchases from suspected peddlers in the San Jose area. On the evening of December 7, 1954, Santiago contacted appellant, Jalifi, whom he knew of by the name of Califfa on a street corner in San Jose, in an attempt to purchase narcotics. This was the first time Santiago had met appellant. Santiago offered \$25 for six capsules of heroin. At this point they were approached by Charles Rodriguez. Appellant, having seen Rodriguez approach, told Santiago that he would not sell him the heroin, and Rodriguez and appellant went into a nearby bar. Rodriguez soon returned and offered to make the heroin purchase for Santiago.

Appellant returned while Rodriguez and appellant were talking, and told Santiago that he would not sell to him because he didn't know him, and that he would have to give the money to Rodriguez. Appellant would then give the narcotics to Rodriguez to deliver to Santiago. Santiago handed the money over to Rodriguez, whereupon both Rodriguez and appellant went back into the bar. In a short while Rodriguez came out and followed Santiago to a nearby parking lot. On the way, Rodriguez said that he could get only four capsules from appellant instead of six, but could get the other two later. At the parking lot Rodriguez was arrested by Officer Bishop, who had prearranged to have Santiago lead the suspect to that location. Rodriguez was brought into the police station.

Santiago returned to the site of the original meeting about 15 to 30 minutes later, where he again met appellant who gave him the remaining two capsules. As he delivered it, appellant asked if Rodriguez had sent Santiago for the heroin, and Santiago told him he had. Santiago gave these capsules to officer Bishop, who turned them over to Inspector Savage of the State Bureau of Narcotics. Narcotics chemist Inspector Bergmans of that department testified that the capsules contained two grains of heroin.

Ramon Villa, another operator for the Bureau of Narcotics corroborated Santiago's testimony, stating that he knew appellant by the name of "Califfa"; that he had met him on Post Street in San Jose where they discussed a possible narcotics purchase. Appellant told Villa that he was afraid that Santiago might be an undercover narcotics agent, but Villa reassured him. Villa testified that he was working with Santiago, and that he had told Santiago that appellant was a possible source for a narcotics purchase. Villa saw appellant in Los Angeles some three weeks later and had him arrested.

Appellant took the stand in his own defense, testifying that he had been in Los Angeles from November until his arrest on December 20, 1954, and had not been in San Jose on the night of December 7, 1954. He was unable to identify his employer in Los Angeles other than as "Johnny", nor could he state the employer's trade name or place of business. He said that it was work concerned with cutting lawns and fixing flowers. Rodriguez testified on behalf of appellant, saying that he had made the narcotics purchase on the night of December 7, 1954, for Santiago from a man named Califfa who was not the same person as appellant. He admitted a previous conviction of a felony.

The witness Martinez testified for appellant. He stated that Santiago had arrested him, taken him in, and told the officers, "Here's Califfa for you." He admitted to being under arrest at the time of trial for sale and possession of narcotics, and that he had previously been convicted of the felonies of rape and assault with a deadly weapon.

[1] Appellant, appearing in propria persona on this appeal, contends that Santiago is a perjurer and that his testimony is unworthy of belief. Appellant's brief is without citation of authority in support of his contentions, and for this reason alone the appeal could be dismissed. *People v. MacArthur*, 125 Cal.App.2d 212, 217, 270 P.2d 37; *People v. Gidney*, 10 Cal.2d 138,

142, 73 P.2d 1186; Rule 15(a), Rules on Appeal.

[2-4] There is no merit in appellant's contention that he was convicted on the unsupported testimony of a perjurer. The jury chose to believe Santiago's testimony rather than that of appellant and his witnesses. The statements of a witness believed by a jury cannot be attacked on appeal unless it is "a physical impossibility that they be true or their falsity be apparent without resorting to inferences or deductions." *People v. Klinkenberg*, 90 Cal. App.2d 608, 627, 204 P.2d 47, 58. The falsity, in order to render such testimony unbelievable on appeal, must be "apparent without resort to inferences or deductions." *People v. Pettis*, 95 Cal.App.2d 790, 794, 213 P.2d 731, 734. Much is made of the fact that Santiago had known of appellant by the name of "Califfa" instead of Jalifi. This is immaterial since Santiago positively identified appellant Jalifi as the person referred to by the name of "Califfa."

[5] Appellant states that the operatives Santiago and Villa both had long arrest records. There is no such testimony in the record, and appellant's brief does not claim that such impeaching evidence was improperly excluded. This matter cannot therefore be raised on appeal. *People v. Van Skander*, 20 Cal.App.2d 248, 256, 66 P.2d 1228.

[6,7] Although appellant does not argue that he was the victim of entrapment, he refers to the operatives, Santiago and Villa, as paid informers hired by the Narcotics Bureau for the purpose of entrapment. If he intends this reference as an argument on the defense of entrapment, it is sufficient to say that he raised no such defense in the trial court, but relied entirely on his alibi that he was in Los Angeles when the crime was committed. The defense of entrapment may not be raised for the first time on appeal. *People v. Branch*, 119 Cal.App.2d 490, 495, 260 P.2d 27. It is also well settled that the fact that a defendant committed a crime when solicited by a decoy, raises no inference of unlawful entrapment. *People v. Roberts*, 40 Cal.2d 483, 489, 254 P.2d 501; *People v.*

Branch, supra; *People v. Finn*, 136 Cal. App.2d 152, 288 P.2d 281.

No error appearing in the record before us the judgment must be affirmed.

NOURSE, P. J., and DOOLING, J., concur.



139 Cal.App.2d 485

**The PEOPLE of the State of California,
Plaintiff and Respondent,**

v.

**George W. REDSTON, Defendant and
Appellant.**

Cr. 5436.

**District Court of Appeal, Second District,
Division 1, California,**

Feb. 27, 1956.

Defendant was convicted of manslaughter upon information charging murder of one and assault with deadly weapon upon another, with prior murder conviction. The Superior Court of Los Angeles County, Aubrey N. Irwin, J., imposed sentence, and defendant appealed from judgment and order denying his motion for new trial. The District Court of Appeal, Fournier, J., held, in part, that in absence of showing of thorough, painstaking and systematic effort to locate missing witnesses, state did not make sufficient showing that it had exercised due diligence to find such missing witnesses to justify trial court in permitting the testimony which such witnesses had given on direct examination at preliminary examination to be read to jury at trial.

Judgment reversed and cause remanded for new trial.

1. Criminal Law 438

Where inevitable effect of introduction of photograph is to arouse sympathy or prejudice of jury, and fact in proof of which it is offered is not denied, or where its introduction serves no purpose other

than to inflame jurors' emotions, the photograph is not admissible in evidence.

2. Criminal Law ⚖️438

In prosecution of bartender for murder of patron during altercation following attempt to eject another, in absence of issue concerning identity of deceased or his death, trial court erroneously admitted photographs of deceased taken during course of autopsy, showing surgical incisions upon the shaved, severed skull. West's Ann.Pen. Code, §§ 187, 245.

3. Criminal Law ⚖️1144(12)

Where defendant, in murder prosecution, did not make objection to trial court's admission of testimony which missing witnesses had given on direct examination at preliminary examination, on specific ground that state had not preliminarily shown that testimony had been transcribed by reporter, certified and filed with county clerk, in absence of clear showing of error in record, District Court of Appeal would not indulge presumption that error had been committed. West's Ann.Pen. Code, §§ 187, 245.

4. Criminal Law ⚖️543(2)

Testimony that witness has not been found is not equivalent to swearing that he cannot, with due diligence, be found within the state, within Penal Code provision declaring that testimony taken at preliminary examination may be read into evidence at trial, upon its being satisfactorily shown that witness cannot with due diligence be found within the state. West's Ann.Pen. Code, § 686.

5. Criminal Law ⚖️543(1)

The word "diligence" connotes persevering application, untiring efforts in good earnest; there must be evidence of substantial character to support conclusion of "due diligence" within Penal Code provision declaring that testimony taken at preliminary examination may be read into evidence at trial, upon satisfactory showing that witness cannot with due diligence be found within the state. West's Ann.Pen. Code, § 686.

See publication Words and Phrases, for other judicial constructions and definitions of "Diligence".

6. Criminal Law ⚖️543(2)

In prosecution of bartender for murder of patron during altercation following attempt to eject another, in absence of showing of thorough, painstaking and systematic effort to locate missing witnesses, state did not make sufficient showing that it had exercised due diligence to find missing witnesses to justify trial court in permitting the testimony which such witnesses had given on direct examination at preliminary examination to be read to jury at trial. West's Ann.Pen. Code, § 686.

7. Criminal Law ⚖️539(1)

Before prosecution may avail itself of evidence taken at preliminary hearing, the truth of such testimony must be subjected to such tests as experience has shown necessary to render reliance thereon safe; where this has been prevented without fault of defendant, such evidence should be excluded at trial. West's Ann.Pen. Code, § 686.

8. Criminal Law ⚖️543(1)

Where deputy district attorney had improperly prevented defendant from exercising his right to cross-examine witnesses while they were testifying at his preliminary examination, upon failure of state to produce such witnesses at subsequent murder trial of defendant, state could not introduce their testimony. West's Ann. Pen. Code, §§ 187, 245, 686.

9. Witnesses ⚖️380(3)

In prosecution of bartender for murder of patron during altercation following attempt to eject another, trial court erred in refusing to admit testimony of witness that other witness, who was missing at trial but who had testified on direct examination at preliminary examination, had admitted that he had not seen anything of what happened. West's Ann.Pen.Code, §§ 187, 245, 686.

10. Criminal Law ⚖️1169(1)

In prosecution of bartender for murder of patron during altercation following attempt to eject another, cumulative effect of all errors committed by trial court in relation to admission of gruesome photographs taken during autopsy, of testimony

which missing witnesses had given at preliminary examination, and lack of due diligence of state to find such missing witnesses, was prejudicial and compelled reversal of judgment of conviction. West's Ann.Pen.Code, §§ 187, 245, 686.

Aaron Sapiro, Sam Bubrick, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

FOURT, Justice.

Defendant was charged in an information with the commission of two felonies: count I, a violation of section 187 of the Penal Code, in that on December 25, 1954, he murdered Louis Carl Roeckle, and count II, a violation of section 245 of the Penal Code, in that on December 25, 1954, he committed an assault with a deadly weapon upon Victor J. Dignazio. Defendant was further charged with a prior conviction of a felony, namely murder in the state of Texas on September 25, 1936.

Defendant admitted the prior conviction and plead not guilty, and not guilty by reason of insanity, to each of the counts.

Trial was by jury and the defendant was found guilty of manslaughter as to count I. The jury disagreed as to count II, and that count was thereafter dismissed upon motion of the district attorney. The defendant withdrew his plea of not guilty by reason of insanity, made a motion for probation and for a new trial, each of such motions was denied and he was thereupon sentenced to the state prison. The defendant has appealed from the judgment and from the order denying his motion for a new trial.

On December 24, 1954, and for several years prior thereto, the defendant was acting as a bartender in the Pecon Club on South La Brea Avenue in the city of Los Angeles. Victor Dignazio was a steel worker who, with some fellow employees, had done a great deal of drinking just before going to the defendant's place of business about 3:00 p.m., December 24, 1954. Dignazio was a frequenter of the bar in question. He was in the bar substantially

all of the time after his arrival until about 1:30 o'clock a. m., December 25, 1954, and during most of this time he was ordering and consuming drinks.

At about 6:00 p.m., Dignazio was talking with one Larry Sampson at the bar, and apparently the defendant ordered Sampson to leave the establishment because of his bad conduct and intoxication. Dignazio and the defendant thereupon had some discussion with reference to that episode, wherein Dignazio indicated that it was unfair to Sampson to order him to leave. Dignazio continued to consume drinks to the point where he was finally refused any further drinks.

Later in the evening, John Wise, Richard Sayer and Louis Roeckle were in the bar. Sayer had a drink with Dignazio. The defendant told Sayer that Dignazio and Roeckle had been agitating him and he further told Dignazio to leave the establishment. Dignazio stated that he had been having an argument with the defendant about communism. The defendant maintained a large sign, among others over the bar, reading "Fight Communism", and Dignazio had expressed disapproval of the idea. The defendant again told Dignazio to leave the place of business and came around the end of the bar for the purpose of turning out the lights, to the end that everyone would go home. Upon the defendant's coming from behind the bar, Dignazio grabbed him by the head in a headlock. Sayer pulled Dignazio off of the defendant, whereupon the defendant ran back behind the bar with Dignazio pursuing him. Defendant was afraid of Dignazio and fearful that he would be badly injured by him. Dignazio had frequently talked of his great strength, had threatened the defendant during the evening, had told him that he would smash him like a grape and that he would break his arm like a match.

Upon Dignazio's continuing to come behind the bar, defendant grabbed a bat which was used as an ice tamper and struck Dignazio on the top of the head, cutting his scalp. There was blood behind the bar at a point about three feet from the open end. The testimony is conflicting as to how Roeckle got hit. Some evidence is to the

effect that while the defendant was fighting off Dignazio, that Roeckle, who was on the front side of the bar, reached across the bar, grabbed the defendant and that thereupon, the defendant, from behind the bar, struck Roeckle with the bat; that Roeckle had a large ashtray in one of his hands at the time; that it was thought that the defendant hit Roeckle only once, but that after the defendant came from behind the bar Roeckle was trying to come at the defendant, and that defendant may have hit him the second time. Other testimony is to the effect that after felling Dignazio behind the bar, defendant came to the front of the bar and struck Roeckle on the head several times; that the defendant then went behind the bar and hit Dignazio again, and thereafter returned to Roeckle and hit him again while he was lying on the bar room floor.

During the melee Wise and Sayer ran outside. Officers Brown and Ward of the Los Angeles Police Department met Wise and a Mr. Bowes, and after talking with them, entered the bar. Prior to the officers' arriving, Sayer had returned to the bar and lifted and carried Roeckle some 200 feet outside of the building. Sayer intended to take Roeckle to an emergency facility for medical attention. Dignazio had, in the meantime, gotten up, walked out of the establishment, and he later went to a doctor and hospital for treatment.

The defendant was excited and confused when questioned by the officers in the first instance, and at that time he told several untruths. Defendant denied any trouble at the bar. He stated that there had been some trouble earlier, but that the men had left; that there had been an argument between some men, but no real fight. When asked if he had hit anyone with a bat he replied that he had not, that there was no bat in the place. The bat was later located by one of the officers and inquiry was made about a red smear on it, and a smear on defendant's torn shirt. Defendant stated that the smears were red paint. Roeckle was located by one of the officers in an unconscious condition at the point where he had been taken by Sayer. Defendant, upon being confronted with this, thereupon ad-

mitted that there had been a fight, and that he had struck the two men who had attacked him.

Defendant was arrested and taken to the police station and questioned at about 2:30 o'clock a.m., December 25th, by officers Danforth and Jackson. Sayer was also arrested and taken to the same police station. Roeckle was taken to a hospital and died on December 27, 1954, after an operation on his skull.

At the police station, at about 2:30 a.m., December 25th, a statement was taken from the defendant which was tape recorded without his knowledge. Later, following the death of Roeckle, another statement was taken from the defendant, which was also tape recorded without his knowledge, and still later a third statement was taken, but not tape recorded.

An autopsy surgeon testified that the death of Roeckle was due to a fractured skull; that he was unable to say whether the deceased received one blow or multiple blows.

[1] The defendant contends that the trial court erred in receiving into evidence as People's Exhibit 1, a picture of Roeckle apparently taken during the course of the autopsy. The picture is of the deceased with the hair shaved off and showing certain incisions on the head, neck and chest, apparently made during the autopsy. This picture was followed by two others. People's Exhibit No. 2 was a picture of the upper part of the skull, after the same had been removed with an electric saw. One piece of bone was missing which had apparently been lost in the course of the autopsy or thereafter. People's Exhibit No. 3 was a picture of the base of the skull after the top had been sawed off and removed. The pictures are ghastly and gruesome. There was never any question as to the identity of the deceased and there was no question as to the death. The general rule is that, "Where the inevitable effect of introducing a photograph is to arouse the sympathy or prejudice of the jury, and the fact in proof of which it is offered is not denied, or where its introduction serves no purpose other than to inflame the jurors'

emotions, it is not admissible." 18 Cal.Jur. 2d 710. In the case of *People v. Burns*, 109 Cal.App.2d 524, at pages 541-542, 241 P.2d 308, at page 319, 242 P.2d 9, the court said, with reference to some pictures of the deceased: "They were particularly horrible because the head was completely shaved. The head shows large incisions which had been made for the autopsy and were thereafter sewn together. * * * Bruises and abrasions appear on the face, neck and arms. * * * No one disputed that the deceased received them. * * * How looking at the pictures would help the jury understand what caused them or how they could cause death, it is difficult to understand. The completely bald head, the surgical cuts and sutures, the ugly punctures, the inverted lips with the instruments attached, make the body so grotesque and horrible that it is doubtful if the average juror could be persuaded to look at the pictures while the witness pointed out the bruises and abrasions. In view of the fact that no question was raised as to these bruises and abrasions, and the fact that a view of them was of no particular value to the jury, it is obvious that the only purpose of exhibiting them was to inflame the jury's emotions against defendant. * * * In California it has been held that photographs of this kind are admissible even though they show marks of the incisions for the autopsy, *People v. Gomez*, 209 Cal. 296, 286 P. 998, and even though they might inflame the minds of the jurors against the defendant. *People v. Burkhart*, 211 Cal. 726, 297 P. 11. However, in every case in which they were admitted, with the possible exception of the *Burkhart* case, *supra*, where the 'evidence points positively and unmistakably to the defendant as the perpetrator of the homicide', 211 Cal. at page 730, 297 P. [11] at page 13, there was some necessity for exhibiting the wound or wounds to the jury. In *People v. Elmore*, 167 Cal. 205, 212, 138 P. 989, the court pointed out that photographs should not be offered or admitted for any purpose other than to help the jury. The admission of photographs of this type is within the sound discretion of the trial court. Surely, there is a line between admitting

a photograph which is of some help to the jury in solving the facts of the case and one which is of no value other than to inflame the minds of the jurors. That line was crossed in this case. The error was not waived by the fact that after the court had admitted the photographs and the district attorney asked the doctor to point out on them the injuries shown thereon, defendant objected on the ground that the photographs speak for themselves. There was an abuse of discretion here."

[2] Under the circumstances in this case, it was error to admit the photograph of the deceased in his then condition.

John Wise and Richard Sayer, who had testified at the preliminary hearing on January 21, 1955, supposedly could not be found on March 18th, 1955, the date the trial was set, or on March 21st, the date upon which the trial actually started. The court permitted the testimony given by them upon the direct examinations at the preliminary hearing to be read to the jury. Permission was refused to introduce the testimony of Charles Arak and Charles Cane to impeach the statements made by Sayer and Wise at the preliminary hearing. Permission was also refused to introduce testimony with reference to the circumstances under which Sayer made his statement to Charles Arak. Further, the court refused the defendant the right to explain why he had told the untruths to the officers in the first instance.

Appellant contends that the trial court erred in receiving the testimony of Richard Sayer and John Wise as given at the preliminary hearing.

Wise testified at the preliminary hearing as to his residence and occupation, that he had no home address; that he lived at the Wilshire La Brea Bowl, 737 South La Brea, and that he was a janitor at the establishment.

Sayer testified at the preliminary hearing that he lived at 3501 West 8th Street, and that he worked at Tilfords Restaurant.

The district attorney, for the purpose of laying a foundation to show due diligence for the reading of the testimony at the preliminary hearing, called three witnesses

Anthony Coia, a process server for the district attorney, received a subpoena on February 17, 1955. Several persons were named in the subpoena, among them C. A. Bowes, Richard Sayer (whose address on the subpoena showed Tilford's Restaurant, Wilshire and La Brea—3501 W. 8th Street (5301 W. 8th)), and John Wise (whose address on the subpoena showed Wilshire-La Brea Bowl, 737 S. La Brea YO 5296 Janitor). Charles A. Bowes testified that he was in charge of the maintenance of the bowling alley two doors away from the Pecon Club; that he knew Sayer and Wise and that he saw them December 25th, 1954. He further testified that he did not know where they were now and that the last time he saw Sayer was the night of the episode, and that he didn't remember when he last saw Wise. Coia testified that he went to a bowling alley at 737 South La Brea where he talked to a C. A. Bowes who told him that Wise, two weeks previously, was on his way to Big Bear, en route to San Francisco. The witness then testified that he proceeded to an apartment house about one hundred feet from the bowling alley and talked to the manager. Coia said he inquired concerning Wise and Sayer and learned that they were no longer residing at the apartment house. He stated that he checked the county and city jails and learned that the persons being sought were not in either jail. He said the Registrar of Voters could not give him any information as to their whereabouts. He stated further that he called about six various bowling alleys, without saying where they were, in the hope that maybe the persons sought might be employed at another bowling alley, and found that they were not employed at any alley that he had called.

[3] A foreign subpoena was issued on March 15, 1955, three days before the case was set for trial. This subpoena set forth, in substance, that the address of Wise was Baldwin (or Windsor) Bowling Alley, 624 Mission Blvd., San Francisco, California. It further set forth, in substance, that Richard Sayer (a k a Richard Wm. McFadden) was at the same address as Wise. Officer E. V. Jackson of the Los Angeles Police Department testified that at the request of

the Deputy District Attorney, he made an effort to locate Wise and Sayer; that he directed an all-points bulletin over the teletype system statewide, regarding Sayer, requesting any information as to his whereabouts. As to Wise, he directed a teletype to the Chief of Police in San Francisco and requested that he conduct an investigation in the bowling alleys in the 700 block on Mission Street. A letter from the Chief of Police returning the subpoena unserved, set forth that there is no such address as 624 Mission Boulevard in San Francisco. The witness also testified that he inquired of the State C.I.I. of Sacramento (which we presume is the Bureau of Criminal Identification and Investigation) regarding Sayer and was advised that they had no information "on him". The deputy district attorney, with that showing, asked for and received permission, over the objection of the defendant, to read the testimony of Wise and Sayer taken at the preliminary hearing held on January 21, 1955. After the direct examination testimony of Wise and Sayer at the preliminary hearing had been read to the jury, the trial judge apparently, for the first time, looked at the transcript. There was no affirmative showing prior to the reading of the testimony that it had ever been transcribed by the reporter, certified by him or filed with the county clerk. In other words, there was no showing whatsoever of the authenticity of the transcript before it was read to the jury. However there was no specific objection on that ground and unless the record clearly shows error, no presumption will be indulged that error was committed.

[4-6] In the laying of the foundation for the introduction of the testimony of Wise and Sayer, neither the process server nor the policeman testified that he had checked for any forwarding addresses at the post office, or otherwise. There was no testimony that any check had been made at Big Bear for Wise, where he supposedly had gone. There was no testimony that any check for Sayer was made at the place where Sayer said he was employed. There was no testimony that the federal, state or private employment agencies or labor unions were checked. There was no testimony

of any check of any hospitals or similar institutions. There was no testimony of any check of the telephone, light, gas and water companies, or of the local directories. There was no testimony by officer Jackson that in issuing the teletype or in his inquiry of the State C.I.I., that he ever sought information concerning Richard McFadden, the name Richard Sayer was apparently "also known as". To say that a witness has not been found is not the same as swearing that he cannot, with due diligence, be found within the state. The word "diligence" connotes perservering application, untiring efforts in good earnest. There must be evidence of a substantial character to support the conclusion of due diligence. Here there was no showing that there was a thorough, painstaking and systematic effort to locate the witnesses. As was said in *People v. McDonald*, 66 Cal.App.2d 504, at page 509, 152 P.2d 448, at page 450, "The provisions of section 686 of the Penal Code, whereby the testimony taken at the preliminary examination may be read into evidence at the trial, upon its being satisfactorily shown that the witness cannot with due diligence be found within the state, contemplates something more than a desultory and indifferent search for a witness. The admission of complainant's testimony taken at the preliminary hearing, upon a foundation which shows only lack of diligence, constitutes an abuse of discretion on the part of the trial court, which under the circumstances must be held prejudicial. It is unnecessary to consider the other points raised." Due diligence is foundational and must be complied with before the testimony is admissible. It follows from what has been set forth herein that there was not "due diligence" as contemplated by section 686 of the Penal Code.

Defendant correctly contends that his right to cross-examine the witness at the time of the preliminary examination was erroneously restricted and curtailed. It was not a full and complete cross-examination.

At the preliminary examination, counsel for the defendant started to cross-examine Sayer with reference to a contradictory statement that he, Sayer, had made to Mr. Sapiro and Mr. Arak, the attorneys for the

defendant, when Sayer was in custody in jail on December 28, 1954. Questions were directed to the witness Sayer to ascertain if he would consent to the attorneys taking the witness stand and testifying as to what the witness had previously told them. There was an objection to that line of examination by the prosecution which was sustained by the court. The deputy district attorney thereupon advised the witness that he was not required to give any answers to any questions by counsel which might tend to incriminate him of any crime whatsoever, or tend to degrade him, and further, that he could decline to answer any questions *which he felt, in his own mind*, might tend to incriminate him of any crime.

It is doubtful that there could be a statement more stultifying than this to the laws of evidence. The privilege against self-incrimination is a highly technical subject. The deputy district attorney knew, or should have known, that the witness was not the judge of the tendency of an answer to incriminate. That was for the court to determine. It is not only a legal requirement, but an element of good citizenship, for an individual called before a court to testify to answer questions honestly and frankly. The witness stated that he was unwilling that the attorneys testify as to what was said between the witness and the defendant's attorneys at the time of their conversation. When further inquiry was attempted by counsel to ascertain why the witness was unwilling, the deputy district attorney immediately started to advise the witness of a further privilege. Counsel for the defendant stated, "May I object to counsel (the deputy district attorney) putting words in the mouth of the witness? I think the witness should testify for himself. I think it is a pretty rotten thing that the State should try to gag testimony and prevent proper testimony from coming before a court in a case as important as this where a crime of this nature is involved." The judge then stated that the deputy district attorney could proceed to advise his witness and the deputy thereupon informed the witness that the communications between attorney and client were privileged and that such could not be divulged without the

consent of the client. The question was then put to the witness as to whether he had ever retained an attorney while in the jail. The answer was "No".

It is apparent that in so far as the testimony of Sayer is concerned, the deputy district attorney prevented any semblance of a proper and thorough cross-examination of the witness. Mr. Justice Sutherland stated appropriately in *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314, the following: "The [District Attorney] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

[7,8] No injustice is done to the prosecution to rule that before it can avail itself of the evidence taken at a preliminary hearing, the truth of such testimony shall be subjected to such tests as experience has shown necessary to render reliance thereon at all safe. Where this has been prevented without fault of the defendant, the evidence should be excluded.

[9] At the conclusion of the prosecution's case, the defendant offered to establish, by a witness Cane, that on January 8, 1955, Cane saw Wise at the Pecon Club; that he asked Wise what he knew about the trouble the defendant was in; that Wise stated, in effect, that he had not seen anything; that he was playing the juke box and did not see any trouble. The defendant apparently knew nothing of this conversation between Cane and Wise until long after the preliminary examination. There was

an objection and the court sustained the same. In the case of *People v. Collup*, 27 Cal.2d 829, 836-838, 839, 167 P.2d 714, 718, it was said:

"The reading of the former testimony is expressly permitted by the code (Pen.Code, § 686; Code Civ.Proc. § 1870(8), and the goal of all judicial proceedings is to bring before the trier of fact all pertinent evidence. Hence the rule allowing the use of former testimony is a salutary expedient in the administration of justice. But it is equally clear that by reason of the same principle the impeaching evidence should be admitted for what it is worth. It is also evidence which throws additional light upon the case.

"The reason for the requirement that a foundation be laid is in furtherance of that policy. To prevent the surprise of the party offering the witness, that is, to give him data from which his witness may refute or explain the impeachment, and to present the complete picture of the credibility of the witness by preserving the opportunity to explain or refute, and the danger of false testimony by the impeacher are valid reasons for the rule. With reference to surprise, the prosecution should bear that burden when they take advantage of the unavailability of the witness as a basis for introducing the testimony at a former hearing. Insofar as the reasons for the rule consist of the endeavor to get all of the pertinent evidence before the court and to further test the credibility of the impeachment, the lack of the foundation cannot be said to impair the value of the impeaching testimony to the point where it should be rejected when it is impossible to lay the foundation.

"Closely analogous to the question here presented, is the rule declaring admissible, contradictory statements to impeach dying declarations. The only difference of consequence is that the offeror of the impeaching evidence had no opportunity to cross-examine the declarant. There is, however, the right of cross-examining the witness to

the declaration, and like in the case at bar, the declarant-witness is unavailable, making the laying of a foundation impossible. The same principles should be applicable in both cases. Dying declarations may be impeached by contradictory statements of the deceased without laying a foundation. *People v. Amaya*, 134 Cal. 531, 66 P. 794; *People v. Lawrence*, 21 Cal. 368; *People v. Attema*, 75 Cal.App. 642, 243 P. 461; *Carver v. United States*, 164 U.S. 694, 17 S.Ct. 228, 41 L.Ed. 602, 16 A.L.R. 419; III Wigmore on Evidence, 3d Ed., § 1033. It has been held that there is a distinction between impeaching dying declarations and testimony at a former trial because of the opportunity to cross-examine in the latter case (*Mattox v. United States*, 156 U.S. 237, 15 S.Ct. 337, 345, 39 L.Ed. 409), but as we have seen the issue is largely one of the value of the evidence, and that factor should not be decisive. The *Mattox* case was by a divided court, and Justice Shiras, dissenting, in discussing the question, stated: 'Undoubtedly the credit of witnesses testifying under oath should not be assailed by evidence of their statements made elsewhere, without affording them, if practicable, in justice to them and to the party calling them, an opportunity to deny, explain, or admit; but it must not be overlooked that the primary object of the trial is not to vindicate the truth or consistency of witnesses, but to determine the guilt or innocence of the accused. If the evidence tending to show that the testimony of an essential witness cannot be relied on because he has made contradictory statements elsewhere, and at other times, is valid and admissible, as the authorities all concede, why should the right to put in such evidence be destroyed by the incidental fact that the witness, by reason of death, cannot be produced to deny or to admit that he made such statements? Does not the necessity call for a relaxation of the rule in such a case?' In *Carver v. United States*,

supra, the court permitted the impeachment in the case of dying declarations and cited the *Mattox* case, but stated, at page 698 of 164 U.S., at page 230 of 17 S.Ct., 41 L.Ed. 602: 'We are not inclined to *extend* it to the case of a dying declaration * * *.' The opportunity to cross-examine is not of too great significance when we have a case where the contradictory statements were made after the former testimony or were not known to the impeacher at the time. In such case he never had an opportunity for cross-examination to test the witnesses' reliability on that ground.

"The modern tendency is to relax rigid rules of evidence—to escape from a slavish adherence to them with the accompanying hardship, injustice and prevention of a full disclosure of all pertinent circumstances to the trier of fact. Dean Hale, of the School of Law of the University of Southern California, aptly states: 'However, it doubtless is possible to follow this rule, calling for foundation, too slavishly. Cases arise in which the laying of the foundation is impossible or impracticable—for example, where a deposition is taken and the conflicting statements are made thereafter, or where the declarant of admissible hearsay has told conflicting stories.' (10 So.Cal.L. Rev. 136.) We conclude therefore that no predicate was necessary for the impeaching evidence in the instant case.

"* * * Insofar as those cases [*People v. Witty*, 138 Cal. 576, 72 P. 177; *People v. Compton*, 132 Cal. 484, 64 P. 849; *People v. Greenwell*, 20 Cal. App.2d 266, 66 P.2d 674; *People v. Seitz*, 100 Cal.App. 113, 279 P. 1070; *People v. Garnett*, 9 Cal.App. 194, 98 P. 247; *People v. Pembroke*, 6 Cal.App. 588, 92 P. 668] hold that the testimony of a witness given at a former trial, and read at the instant trial, because of the nonavailability of the witness cannot be impeached by contradictory statements made subsequent to the former trial, or by statements made prior

thereto but where the impeacher clearly shows that he had no knowledge of such contradictory statements, they are, and each of them is, overruled."

Appellant contends that the trial judge and the district attorney were guilty of misconduct. He further contends that there were many other errors all of which are set out in his brief. From what has heretofore been set forth, it is apparent that a reversal is proper in this case and therefore we find it unnecessary to consider appellant's other contentions.

[10] From the errors committed in this case, prejudice to the cause of the accused is so highly probable that we are not justified in assuming its non-existence. We believe that the cumulative effect of all the errors was prejudicial and compels a reversal.

The judgment and the order denying motion for new trial are, and each is, reversed and the cause remanded for a new trial.

WHITE, P. J., and DORAN, J., concur.



139 Cal.App.2d 453

Leonard LILIENTHAL, a minor, by Otto Lilienthal, his Guardian ad litem, and Otto Lilienthal, Plaintiffs and Appellants,

v.

The SAN LEANDRO UNIFIED SCHOOL DISTRICT OF ALAMEDA COUNTY,
Defendant and Respondent.

No. 16569.

District Court of Appeal, First District,
Division 1, California.

Feb. 27, 1956.

Action against school district for injuries sustained by plaintiff when knife, which his fellow students had been flipping into ground while sitting in a semi-circle at outdoor class, struck plaintiff's drawing board, and bounced into his eye. The Su-

perior Court, County of Alameda, Chris B. Fox, J., rendered judgment upon a directed verdict for defendant, and plaintiff appealed. The District Court of Appeal, Fred B. Wood, J., held that there was sufficient evidence to take to jury question as to whether teacher in charge of class had known, or should have known, of knife throwing.

Reversed.

1. Schools and School Districts ⇨122

In action against school district for injuries sustained by plaintiff when knife, which his fellow students had been flipping into ground while sitting in a semicircle at outdoor class, struck plaintiff's drawing board, and bounced into his eye, there was sufficient evidence to take to jury question as to whether teacher in charge of class had known, or should have known, of knife throwing. West's Ann.Education Code, § 1007.

2. Schools and School Districts ⇨89.2

In action against school district for injury sustained by student, question was whether school official had used same care as persons of ordinary prudence, charged with duty of carrying on public school system, would use under same circumstances, and it was not necessary that officers or employees of the district have had actual knowledge of danger.

3. Negligence ⇨4

What is ordinary care depends upon circumstances of each particular case and is to be determined as a fact with reference to situation and knowledge of parties.

4. Schools and School Districts ⇨89.2

Under statute making school districts responsible for injury of any pupil resulting from failure of their officers or employees to use ordinary care, a plaintiff may recover by proving either existence of danger known to authorities who neglected to guard pupil against it or that there was an unknown peril which by exercise of ordinary care under same circumstances a reasonably prudent person would have discovered. West's Ann.Education Code, § 1007.

5. Trial $\approx$ 139(1), 178

Judgment entered on directed verdict for defendant cannot stand unless there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff, giving to evidence in favor of plaintiff all value to which it is legally entitled and indulging in every legitimate inference which may be drawn from that evidence.

M. F. Hallmark, Oakland, Paul E. Deadrich, San Leandro, for appellants.

Bronson, Bronson & McKinnon, San Francisco, for respondent.

FRED B. WOOD, Justice.

Plaintiff, while attending a metalcraft class at the high school conducted by the defendant district, was injured by a sharp instrument¹ thrown by a fellow student. In this action for damages, verdict was directed for the defendant and plaintiffs have appealed.

He claims there was evidence sufficient to support a finding that the classroom teacher was negligent. He invokes section 1007 of the Education Code: "The governing board of any school district is liable * * * for any judgment against the district on account of injury to person or property arising because of the negligence of the district, or its officers, or employees * *."

The accident occurred during a class session on Friday during the first week of school. The class had spent that week on safety instruction. The students were instructed "how to handle equipment, the machinery and materials that they were to work with and proper regard for safety." They had been specifically instructed to be careful with the tools and not to throw anything.

On the day of the accident the class assembled in the shoproom, but because of noise from partition construction work, the teacher, after about ten minutes, took them outside on the lawn.

While in the shoproom Tom Accatino, one of the students, saw a "home made knife" in the sheet metal bin. The bin was for the purpose of storing short, small, odd pieces of metal, including pieces which had been used before but have a "certain salvage value." Tom picked up the knife and held it while he was in the shoproom. He did not think he took it outside. He thought he gave it to someone else while he was inside.

When the class reassembled outside on the lawn the students sat in a semicircle around the teacher. There were 28 boys in the class. The closest student was about ten feet from the teacher. The farthest were 20 to 25 feet away. Plaintiff sat at about the middle of the semicircle, about 15 to 20 feet from the teacher. The teacher was standing and the boys were either lying or sitting on the lawn facing him. He testified that he arranged the boys in a semicircle more or less in front of him, and that "they were facing me, some more or less from the side but all not, naturally, right directly in front of me, but *all plainly visible* * * *. It is possible that some of them had their sides turned to me because they were in various positions on the lawn." (Emphasis added.)

There was evidence that plaintiff was facing the teacher and that Chris Canazero, who threw the knife, was sitting between plaintiff and the teacher with his back to the teacher facing the plaintiff.

The class, engaged in reviewing a written examination on safety, had been in session on the lawn about half an hour when the accident happened. In the course of this review, the teacher would read a question and the correct answer and then look up from his paper to see if the students had any questions. He testified that at the time he heard plaintiff's outcry, it had been "a moment or two" since he had looked up. He stated in his deposition that he did not recall how long before the outcry he had last looked up at the class. He reconciled these two responses by saying in answer to

1. Made by a previous class and kept in a bin with other materials for class use, it was 6 or 7 inches long, of black tool steel, octagonal in cross-section, half

inch in thickness, hammered flat, curved and to a point at one end. It resembled a pencil. Some referred to it as a knife.

the question how long prior to the outcry he had looked up at the class: "I couldn't answer it precisely. I just answered your question, a moment or two meaning in general, about that, and assuming that one question would not take more than a moment or two, or a minute, probably, to cover, I would be naturally looking up so I couldn't say in terms of minutes or seconds, but in general, it wouldn't be very long, that is, by not very long, I mean a few moments." The class was orderly.

Before the accident happened, some of the boys had been flipping the instrument into the ground. Plaintiff testified that he had seen Tom Accatino flipping the knife four or five times. He saw no one else flipping the knife. Tom testified that he had seen three or four boys throwing the knife around. He named Chris Canazero as one of them. Student Jack Golden saw Chris Canazero throwing the knife into the grass two or three times before it hit plaintiff's drawing board and bounced into the latter's eye.

The teacher testified he did not see the knife before the accident and that his first knowledge that anything had happened was when he heard plaintiff's outcry. The knife, when it was being flipped on the lawn, made practically no noise.

[1-4] We think there was evidence for the jury on the question whether the teacher knew or should have known of the knife throwing. The evidence tending to prove that the knife throwing had been going on for some thirty minutes plus the teacher's own testimony that the students were facing him and were all plainly visible and that he looked up frequently and viewed them to give them a chance to ask questions, would, we think, warrant the jury to infer that he did observe these knife throwing activities (if the jury disbelieved his testimony that he did not see what was going on in front of him) or that he was inattentive and careless in failing to observe such an activity which was going on over such an extended period of time.

In such a case as this the "question is whether the school officials used the same care as persons of ordinary prudence, charged with the duty of carrying on the public school system, would use under the same circumstances. The legislature has made school districts responsible for the injury of any pupil resulting from the failure of their officers or employees to use ordinary care. What is ordinary care depends upon the circumstances of each particular case and is to be determined as a fact with reference to the situation and knowledge of the parties." *Bellman v. San Francisco High School Dist.*, 11 Cal.2d 576, 582, 81 P.2d 894, 897. It is not necessary that the officers or employees of the district have actual knowledge of the danger. A plaintiff may recover "by proving either the existence of a danger known to the authorities who neglected to guard the pupils against it or that there was an unknown peril which by the exercise of ordinary care under the same circumstances a reasonably prudent person would have discovered." 11 Cal.2d at page 584, 81 P.2d at page 898.

In the *Bellman* case the court affirmed a judgment² in favor of a pupil who was injured while performing a tumbling exercise in a physical education course. She performed the stunt imperfectly, failing to hold her hands out properly. The reviewing court found sufficient evidence to support an implied finding of negligence "either upon the theory that the 'roll over two' is not an exercise suitable for senior high school girls or that appellant's employees knew or should have known that because of the respondent's mental or physical condition she was not a proper subject for such instruction, or that the class teacher did not properly instruct and supervise her. It also justifies the implied finding of the jury that the respondent was not guilty of contributory negligence. While there was testimony from teachers of physical education that the 'roll over two' is not dangerous, the evidence also shows that injury could result if it was not performed in a particular way.

2. Contingent upon acceptance by the plaintiff of a reduction in the amount of the recovery.

That the respondent sustained some injury while attempting the exercise is certain. Under the circumstances shown in this case the issue of negligence was solely one for the determination of the jury.'” At page 583 of 11 Cal.2d, at page 898 of 81 P.2d.

In our case the jury could infer that the instructor saw the knife throwing by several of the pupils in succession. All the boys were “plainly visible” and he looked up frequently. If others saw it, he probably saw it going on. Drawing such an inference, the jury could disbelieve his testimony that he did not see it. This principle was applied in *Mastrangelo v. West Side Union High School Dist.*, 2 Cal.2d 540, 42 P.2d 634. A pupil was injured by an explosion caused by his selecting a wrong ingredient and mixing the ingredients in an improper manner in the chemical class laboratory. The plaintiff testified that the chemistry teacher was there; he walked behind plaintiff while the latter was mixing the ingredient and did not say anything to plaintiff. At the time of the explosion the teacher was 15 feet behind and looking towards plaintiff. “From the foregoing evidence a reasonable inference may be drawn that the chemistry instructor saw the grinding of the ingredients in the iron mortar with the pestle, yet he failed to warn the boys against the danger of that method of mixing them.” 2 Cal.2d at page 547, 42 P.2d at page 637.

It is not necessary, here, to hold as a matter of law that because the class members were plainly visible the “must have seen” rule requires us to draw the inference that the teacher did see the knife throwing activities while in progress.³ It is sufficient that the jury could reasonably have inferred that he did see the knife being thrown. As said in *Gillette v. City and County of San Francisco*, 58 Cal.App.2d 434, 442, 136 P.2d 611, 615: “notwithstanding there may be a total absence of any positive testimony that the defendant actually knew of plaintiff’s danger, and even though the defendant definitely denies seeing the plaintiff at

all, the doctrine of the last clear chance may be invoked and applied where the facts and circumstances are such as would justify the jury in finding that despite the defendant’s denial of knowledge or the absence of direct testimony on the subject, he was actually aware of plaintiff’s danger in time to avert the accident; in other words, that he ‘must have known’ of plaintiff’s danger.”

Even if the jury believed the teacher’s statement that he was unaware of any knife throwing until the occurrence of the accident and plaintiff’s outcry, they could have inferred that if he had used ordinary care in the use of his power of observation and his opportunity to observe he would have become aware of the knife throwing in ample time to put an end to it and thus could have avoided the accident. This was a point involved in *Charonnat v. San Francisco Unified School Dist.*, 56 Cal.App.2d 840, 133 P.2d 643. During a noon recess, on the school playground, plaintiff got into an altercation with a fellow student during the course of which the latter twisted and broke plaintiff’s leg. The teacher then in supervision of the playground professed unawareness of this altercation and testified she was 40 or 50 feet distant and that a great deal of noise was being made by the 150 students on the playground. But there was testimony that she was only 15 or 20 feet away during the five minute period this fight was going on. The “trial court found that the teacher in charge of the yard was in close proximity to the place where the argument started and the injuries were inflicted, and would and should have prevented the injuries if she had used ‘ordinary, or any, reasonable care or diligence to observe the conduct of said plaintiff, * * * and the children under her supervision’”. 56 Cal.App.2d at page 843, 133 P.2d at page 644. Of this the reviewing court said, “it would seem that * * * had the supervisor who was standing in close proximity to the plaintiff and Thomas [the pupil who injured plaintiff], been using due care, she would have seen or heard the

3. For an exposition of the “must have seen” rule in negligence cases involving the last clear chance doctrine, see *Darling v. Pacific Electric R. Co.*, 197 Cal.

702, 711, 242 P. 703; *Hoy v. Tornich*, 199 Cal. 545, 551, 250 P. 565, 568; *Har-erdtter v. Johnson*, 92 Cal.App.2d 547, 550-551, 207 P.2d 855.

fighting in time to have avoided serious injury." 56 Cal.App.2d at page 845, 133 P.2d at page 645. So, in our case, the jury could find that if the metalcraft teacher had been using due care, he would have observed the knife throwing in time to have avoided any injury to plaintiff.

The cases upon which the district relies do not proceed upon principles different from those which we have cited. Each was decided upon the basis of the facts presented by the evidence or the issues presented by the pleadings. Each is readily distinguishable from the facts of the instant case. One of them, *Hack v. Sacramento City Junior College Dist.*, 131 Cal.App. 444, 21 P.2d 477, our Supreme Court has already distinguished as one in which the injury "was caused by the negligent act of students in doing something not particularly directed by the teacher and while he was not present." *Bellman v. San Francisco High School Dist.*, supra, 11 Cal.2d 576, 584, 81 P.2d 894, 898.⁴

4. In *Weldy v. Oakland High School Dist.*, 19 Cal.App.2d 429, 65 P.2d 851, the trial and the reviewing courts found the allegations of the complaint, as tested by demurrer, inadequate to present an issue of negligence upon the part of the school authorities in the supervision of student spectators at a football game, to prevent rowdiness and the throwing of objects by such spectators.

In *Ford v. Riverside City School Dist.*, 121 Cal.App.2d 554, 263 P.2d 626, the plaintiff and a fellow student went surreptitiously to a known forbidden isolated area to obtain date "thorns" to play with and was injured while doing so. There were about 200 pupils on the playground at the time, supervised by two teachers who were assisted by a safety committee of fifth and sixth grade students. It was neither alleged nor proved that the teachers in charge of the playground failed to exercise the same care as that which a person of ordinary care charged with his duties would exercise under the same circumstances. The school authorities had no knowledge or notice of any dangerous practice engaged in by the students in connection with the palm trees. There was no evidence that any of the teachers could reasonably expect that plaintiff would surreptitiously visit the

[5] Where, as here, a verdict directed for the defendant is involved, the situation is like that which obtains in the case of a nonsuit or an order directing a verdict for the defendant notwithstanding a verdict for the plaintiff. In any such case the judgment may not stand unless there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff, giving to the evidence in favor of plaintiff all the value to which it is legally entitled and indulging in every legitimate inference which may be drawn from that evidence. In contrast, the granting or refusal of a new trial rests largely in the discretion of the trial judge, whose province and duty it is to scrutinize and weigh the evidence. See *Washington v. City and County of San Francisco*, 111 Cal.App.2d 368, 377, 244 P.2d 774; *Estate of Lekos*, 109 Cal.App.2d 42, 44 and 47, 240 P.2d 387; *Devens v. Goldberg*, 96 Cal.App.2d 539, 219 P.2d 935.

The judgment is reversed.

PETERS, P. J., and BRAY, J., concur.

shrub area during the recess period or that the yard supervisors had knowledge of his concealed presence at the palm tree.

In *Goodman v. Pasadena City High School Dist.*, 4 Cal.App.2d 65, 40 P.2d 854, a pupil in a school mechanics shop was injured by a flying fragment of aluminum while standing 12 feet distant from the spot where aluminum was being pounded. Plaintiff claimed the instructor was negligent in not requiring him to wear goggles but the reviewing court found no substantial evidence showing that the school authorities knew or ought to have known that plaintiff incurred any such risk in the situation described.

In *Pirkle v. Oakdale Union, etc., School Dist.*, 40 Cal.2d 207, 253 P.2d 1, a pupil was injured while playing touch football, a "free play" activity which was conducted under supervision and in accordance with the rules of the game and prevailing standards and practices in the schools. There was no claim that any player conducted himself improperly. The reviewing court found in such a situation insufficient evidence to support a finding of negligence in the instructors' supervision of the game.

139 Cal.App.2d 441

Beverly CANTOR, Plaintiff and Appellant,
v.

COUNTY OF SANTA CLARA, Robert B.
Chandler et al., Defendants and
Respondents.

No. 16526.

District Court of Appeal, First District,
Division 1, California.

Feb. 27, 1956.

Rehearing Denied March 28, 1956.

Hearing Denied April 25, 1956.

Motorist brought action against county and its road commission for injuries sustained when automobile fell into ravine from allegedly defective county road. The Superior Court, Santa Clara County, W. W. Jacka, J., entered an order granting nonsuit in favor of the commissioner, a judgment in favor of the county, and an order denying motion of motorist for a new trial, and the motorist appealed. The District Court of Appeal, Bray, J., held that evidence sustained finding that county was not negligent, and that where Superior Court erroneously granted a nonsuit in favor of the commissioner, and jury properly returned a verdict in favor of the county, exoneration of the county necessarily included the commissioner as the county's agent, and that therefore improper granting of motion for nonsuit in favor of commissioner was without prejudice.

Appeal from order denying motion for new trial dismissed, and order granting nonsuit and judgment affirmed.

1. Appeal and Error ⇨110

Order denying motion for new trial was not appealable and would be dismissed.

2. Automobiles ⇨306(5)

In action by motorist against county for injuries sustained when automobile fell into ravine from allegedly defective county road, evidence authorized determination by jury that though county had notice of condition of road, condition was not such as necessarily to put county on notice that condition was a dangerous one. West's Ann.Gov.Code, § 53051.

3. Automobiles ⇨308(4)

In action by motorist against county for injuries sustained when automobile fell into ravine from allegedly defective county road, evidence concerning county's alleged negligence was not such as to enable a court to hold that, as a matter of law, the county was negligent, but was such that a finding by jury either way would be supported. West's Ann.Gov.Code, § 53051.

4. Automobiles ⇨309(4)

In action by motorist against county for injuries sustained when automobile fell into ravine from allegedly defective county road, evidence justified giving of instructions on contributory negligence. West's Ann.Gov.Code, § 53051.

5. Automobiles ⇨309(1)

In action by motorist against county for injuries sustained when automobile fell into ravine from allegedly defective county road, proper instructions concerning statutory duty of county to post signs should have been given. West's Ann.Gov.Code, § 53051; Vehicle Code, § 465.

6. Automobiles ⇨204

Motorist has duty to see that which is clearly visible, and which would be seen by anyone exercising ordinary care.

7. Appeal and Error ⇨1067

In action by motorist against county for injuries sustained when automobile fell into ravine from allegedly defective county road, trial court's improper refusal to give proper instructions concerning county's statutory duty to post signs, was not reversible error, where allegedly defective condition of road was obvious to anyone driving on the road, and warning signs would not have added anything to motorist's knowledge, which he had obtained from his previous trips over the road, concerning the alleged defective condition. West's Ann.Gov.Code, § 53051; Vehicle Code, § 465.

8. Appeal and Error ⇨927(3)

Reviewing court, in determining question of nonsuit, must disregard conflicts and accept the evidence and reasonable in-

ferences therefrom most favorable to plaintiff.

9. Automobiles ⇐308(1, 6)

In action by motorist against county road commissioner for injuries sustained when automobile fell into ravine from allegedly defective county road, question whether commissioner should have used some portion of funds, which were available to him, to remedy the allegedly defective condition of the road or to give adequate warning of such condition, should have been left to jury, and nonsuit should not have been granted. West's Ann.Gov. Code, § 1953.

10. Officers ⇐119

Failure to file claim for injuries with public officer or employee, as required by the Government Code, bars recovery from the public officer or employee. West's Ann. Gov.Code, § 1981.

11. Estoppel ⇐62(2)

Compliance with requirement of the Government Code that claim against public officer or employee for injuries must be filed with public officer or employee cannot be waived by estoppel. West's Ann.Gov. Code, § 1981

12. Appeal and Error ⇐882(20)

Where apparently all parties in trial court, knowing that claim of motorist against county and county road commissioner for injuries had been filed with both commissioner and county assumed that matter of the claim was not in issue, the District Court of Appeal, could not support nonsuit in favor of commissioner on ground that claim had allegedly not been served on commissioner. West's Ann.Gov.Code, § 1981.

13. Release ⇐29(1)

Generally, the release of one joint tortfeasor releases the other.

14. Appeal and Error ⇐1061(3)

Where motorist brought action against county and county road commissioner for

injuries sustained when automobile fell into ravine from allegedly defective county road, and trial court erroneously granted a nonsuit in favor of the commissioner, and jury properly returned a verdict in favor of the county, exoneration of the county necessarily included the commissioner as the county's agent, and therefore improper granting of motion for nonsuit in favor of commissioner was without prejudice. West's Ann.Gov.Code, §§ 1953, 1956, 1981, 2001, 2002, 53051.

James W. Harvey, San Francisco, Dorothy E. Handy, San Francisco, of counsel, for appellant.

O. Vincent Bruno, San Jose, for respondents.

BRAY, Justice.

[1] Plaintiff appeals from an order granting nonsuit in favor of defendant Robert B. Chandler, and from the judgment in favor of defendant Santa Clara County.¹

Questions Presented.

Judgment for county—1. Was the county negligent as a matter of law? 2. Did the court err in (a) instructing on contributory negligence; (b) failing to instruct on duty to post signs?

Nonsuit—1. Was there any evidence that funds were available to defendant road commissioner? 2. Failure to prove presentation of claim. 3. Was the granting of the nonsuit error without prejudice?

Facts.

May 27, 1951, plaintiff, in the company of his lady friend (now his wife), her daughter, and his son, were enjoying a barbecue picnic at Stevens Creek Lodge picnic grounds in Santa Clara County. While there, they were invited by Arthur Natusch to visit him at his nearby cabin, situated on the Stevens Creek Canyon Road² about "two good city blocks" west of the lodge. Canyon Road is a county road 9.6 miles long. From the main highway to the lodge

1. Plaintiff also attempts to appeal from the order denying motion for new trial. As such order is not appealable it is hereby dismissed.

2. Hereafter referred to as Canyon Road.

is approximately 6 miles. The road is 2 lanes, macadamized. It continues from the lodge for approximately $3\frac{1}{2}$ miles where it dead ends in the canyon. Shortly after leaving the lodge, it becomes a narrow one-way twisting road with no lane markings. The surface had many imperfections, such as depressions, washouts and chuckholes. In the one-lane areas the width was 10-12 feet. The scene of the accident is about 200 feet beyond the lodge. There the road reaches a crest with a "very extreme left turn." At this point a motorist can see only the top of the car's hood, and not the road ahead. The road is only 9 feet wide, with a high cliff adjoining it on the left, and on the right a ravine with a creek 20 feet below. Plaintiff, driving with his now wife towards the Natusch cabin, approached the last mentioned point, his car about a foot and a half or two feet from the left edge of the road. As he was attempting to make the turn at the crest "The steering wheel was wrenched from my hand and the car fell away on the right side and over we went." The car dropped to the creek below, and plaintiff received severe injuries, for which he sought damages from the county and defendant Chandler, its road commissioner. Testimony of witnesses familiar with the road showed that the chuckholes and depressions in the road had existed for a considerable period of time, and that constant complaints thereof had been made to the county authorities for a period between two and three years. At the point in question there were two holes in the road, one being a large crescent-shaped depression or washout on the right side caused by the bank eroding. The other was a small hole ahead of it. Two cars had previously gone over the bank at the same location, one just a week before plaintiff's accident. There were no signs of warning anywhere on the road, although since the accident a "Narrow Road" sign had been erected. The day following plaintiff's accident the road was graded and a small embankment built up on the edge. Both in 1949 and 1950 one of the users of the road had complained to defendant Chandler about the condition of the road. Chandler

informed him there were no funds to repair it.

There was testimony that work was done yearly upon the road, including the filling of the depression at the turn above mentioned, but that children going to a swimming hole below would slide down the outside edge of the road, causing a new depression. There was some conflict as to the use of the road, plaintiff's witnesses testifying to considerable year-around use, defendants' to a use of it by about 27 cars daily, principally in the summertime.

County Judgment—(1) Negligence.

Plaintiff contends that the evidence shows that as a matter of law defendant county was negligent and plaintiff was not negligent.

Plaintiff's cause of action against the county is based upon section 53051, Government Code, which provides liability for injuries resulting from a dangerous or defective condition of public property if the legislative body, board or person authorized to remedy the condition (a) had knowledge or notice of such condition and (b) for a reasonable time thereafter failed to remedy the condition or to take action reasonably necessary to protect the public against the condition. As we hereafter point out in discussing the evidence as against defendant Chandler, there was evidence to support a finding that all the elements above mentioned existed. However, the evidence did not compel such finding. As to the dangerous condition of the road, there was evidence that this was a twisting, turning, narrow, typical mountain road, and that the crescent-shaped depression which plaintiff claimed caused his injury was at the very edge of the road and outside the traveled portion thereof, and that although there had been two accidents at this spot, a school bus daily, many passenger vehicles, trucks, bulldozers and trailers had used the road without mishap.

[2] On the question of notice the jury could have determined that while defendant county had notice of the condition of the road, that condition was not such as necessarily to put the county on notice that the

condition was a dangerous one. See *Howard v. City of Fresno*, 22 Cal.App.2d 41, 45, 70 P.2d 502.

[3] There was evidence (introduced after the granting of the nonsuit in favor of Chandler) that the maintenance of the road was extremely difficult when balancing the necessities of other county roads highly traveled against those of this road as to which there was evidence that it was traveled very little. Thus, the evidence concerning the county's alleged negligence was not such as to enable a court to hold that as a matter of law the county was negligent, but was such that a finding by the jury either way would be supported.

(2) Instructions—(a) Contributory negligence.

[4] Plaintiff contends that there was no evidence to support a finding of contributory negligence and hence the court should not have instructed on that subject. However, there was evidence from which the jury could have found plaintiff to be contributively negligent, although a finding the other way would likewise be supported. Leaving aside the question of whether the jury could not have disbelieved plaintiff's version of the accident, there was evidence that while plaintiff had only been over the road beyond the lodge twice before the accident, he was thoroughly familiar with the type of road it was and knew it contained many chuckholes and depressions; that he was traveling 15 miles per hour at the point where the road was narrowed to 9 feet with a sharp turn at the crest of an ascent and with a high cliff on one side and a steep declivity on the other, and where he could not see the road; that the depression which caused the accident was off the traveled portion of the highway. The foregoing evidence was such that the jury could have found (and undoubtedly did find) plaintiff contributively negligent. Therefore instructions on contributory negligence were properly given.

(b) Duty to post signs.

[5-7] Plaintiff offered and the court refused two instructions on this subject. The first quoted section 465, Vehicle Code: " * * * Local authorities in their re-

spective jurisdictions shall place and maintain or cause to be placed and maintained such traffic signs * * * upon streets and highways as may be necessary to indicate and to carry out the provisions of this Code or local traffic ordinances or to regulate, warn or guide traffic." The second instruction was to the effect that where a county has notice of a defective or dangerous condition of its streets, it is its duty, if it does not correct such condition, to post signs along said street to warn persons using it of the dangerous or defective condition existing thereon. This instruction is based on the requirement in section 53051, Government Code, "or to take action reasonably necessary to protect the public against the condition", on section 465, Vehicle Code, supra, and on *Rose v. County of Orange*, 94 Cal.App.2d 688, 691, 211 P.2d 45, holding that a county has a duty to warn if a dangerous condition exists in its streets. These were proper instructions and should have been given. Our problem is to determine whether the failure to give them was prejudicial. The court instructed practically in the language of section 53051 that after notice of a dangerous or defective condition of its road the county must remedy such condition or "take such action as was reasonably necessary to protect the public against such condition." It again referred to this requirement. Thus, the jury were twice informed that the county had a duty to either remedy the condition or protect the public from it. Obviously this would include the use of warning signs. A more important element on this question, however, is how the placing of signs would have changed plaintiff's situation. Immediately after the accident a sign "Narrow Road" was erected. Plaintiff knew and could see that it was a narrow road. Moreover, the condition as to chuckholes and depressions and the entire situation were admittedly completely obvious to anyone driving the road and to plaintiff. Warning signs would not have added anything to plaintiff's knowledge of the road from his previous two trips over it, and particularly to what was perfectly obvious to him. The situation here comes within the rule set forth in *Electrical Prod. Corp. v. County of*

Tulare, 116 Cal.App.2d 147, 153, 253 P.2d 111, 115: "Under some circumstances, it has been held that the physical conditions or jogs or offsets in a street may be equivalent to warning signs 'and as readily visible to the alert driver as a sign informing him of the condition; there being nothing to conceal the real condition or to deceive the operator of an approaching automobile while driving at a lawful rate of speed and with due caution'. *Waldorf v. City of Alhambra*, 6 Cal.App.2d 522, 45 P.2d 207, 209. A duty rests on a driver to see that which is clearly visible and which would be seen by anyone exercising ordinary care." It is unreasonable to assume that the jury did not know from the instructions that if it found the other elements of the public liability statutes present it did not know that included in the requirement that the county either remedy a dangerous condition or "take such action as was reasonably necessary to protect the public against such condition" was the duty of the county to place warning signs if a dangerous condition existed and if warning signs were needed. Undoubtedly plaintiff pointed out to the jury how little such signs would cost, and the jury must have had in mind plaintiff's contention that signs should have been erected. Nevertheless the jury by a unanimous verdict found against plaintiff's contention. It would be extremely unrealistic to consider that the giving of the proposed instructions would have caused any different verdict of the jury.

Nonsuit—1. Available funds.

[8] The record does not disclose upon what grounds the court granted the nonsuit, nor are the proceedings on the motion for nonsuit before us. It seems to be assumed by the parties that it was on the ground that there was no evidence that the commissioner had funds available to repair the road. Chandler's liability as road commissioner depends upon proof of the five elements required by section 1953, Government Code, to hold a county officer liable for the

defective or dangerous condition of county property: (1) The injury sustained must be the direct and proximate result of such dangerous or defective condition. The evidence meets this requirement. (2) The officer had notice of such condition. The evidence shows such notice. (3) He had authority and it was his duty to remedy such condition at the expense of the county and that funds for such purpose were immediately available to him. The evidence discloses such authority and duty. The funds situation will be discussed later. (4) Within a reasonable time after notice of the condition and being able to remedy it he failed to do so, or take reasonable steps to give adequate warning of such condition. Except as affected by the question of funds, the evidence met this requirement. (5) The plaintiff was using the public property carefully and with due care. The evidence met this requirement.³

[9] Upon this phase of the case the question is whether there was any evidence to show, as required by element (3) above, that funds were available to Chandler. There was no direct proof that Chandler had such funds. There was evidence from which a jury could have found that he had \$3,000 per year for the entire road. There was also evidence that the day following the accident about 50 or 60 loads of gravel were dumped into "this wash-out." The complaints about the particular depression which caused plaintiff's accident had been made over a period of 2 to 3 years. Thus a jury could have found that Chandler had had funds from which he could have remedied the condition before the accident, which was remedied the day after the accident. Moreover, section 1953 gives an officer two alternatives where he learns of the dangerous condition of public property under his care, (1) to remedy the condition, or (2) to give adequate warning of such condition. Thus it should have been left to the jury to determine whether Chandler should have used some portion of

3. In stating that the evidence met a particular requirement we are following the rule which requires us in determining the question of nonsuit to disregard con-

facts and to accept the evidence and the reasonable inferences therefrom most favorable to plaintiff.

that money for one of those alternatives. Of course, if the nonsuit had not been granted, Chandler would have had an opportunity to give any reasons he might have had why such money was not available for either alternative.

2. Claim.

[10-12] For the first time, defendants, on this appeal, contend that the nonsuit was properly granted because of the failure of plaintiff to allege and prove the service upon Chandler of the claim required by section 1981, Government Code. (Such claim was alleged as to all parties but only proved to have been served upon the county.) Plaintiff points out that defendants do not contend that such claim was not actually served upon Chandler. Plaintiff claims that had the point been raised at any time in the trial court he could easily have proved the service. While the failure to file such claim with the officer would bar recovery, see *Huffaker v. Decker*, 77 Cal. App.2d 383, 175 P.2d 254, and compliance with this section cannot be waived by estoppel, see *Johnson v. City of Glendale*, 12 Cal.App.2d 389, 55 P.2d 580, it would appear that under the circumstances of this case the failure to prove the filing of the claim with Chandler was not jurisdictional. Apparently all parties in the trial court, knowing that the claim had been filed with both the officer and the county, assumed that the matter of the claim was not an issue. It would be a horrible miscarriage of justice for us to support the nonsuit on a ground which was not presented to the trial court and which was groundless in fact.⁴

The motion for nonsuit was improperly granted.

3. Error without prejudice.

The most serious question is whether the error in granting the nonsuit is not error without prejudice due to the finding of the jury in favor of the county. The exact relationship of the county and an officer sued

in connection with the Public Liability Act, Gov.Code §§ 53051, 1953, 1956, 1981, 2001, 2002, has never been defined. They are joint tort-feasors in two respects: first, under the doctrine of respondeat superior the county is responsible for the torts of its officers in this regard occurring in the scope of their employment.⁵ See *Von Arx v. City of Burlingame*, 16 Cal.App.2d 29, 60 P.2d 305, holding that the liability of the sovereignty under the then section 1714 $\frac{1}{4}$, Civil Code (liability of owner of a public automobile) is that of a joint tort-feasor with the agent under the doctrine of respondeat superior. Secondly, the county had an independent duty through its other officers to take care of dangerous and defective conditions, even if one of its officers charged with the duty did not do so, so that it would have a liability jointly with that of the latter additional to that attributable to it under respondeat superior. A suit may be brought against both the county and the officer or separate suits against each. In a sense the liability of the county is broader than that of the officer for the reason that at least two requirements are necessary to make the officer liable that are not necessary to make the county liable. They are (1) proof that the officer had authority and it was his duty to remedy the condition; and (2) that funds were available to him. (To hold the county liable once notice of the condition is shown it is not necessary to prove that any particular officer had authority to repair the condition or the funds with which to do it.)

[13] In view of this broader liability of the county and of the other circumstances of the relationship, it must necessarily follow that the general rule that the release of one joint tort feasor releases the other, applies here. Especially is this so where plaintiff's entire case as to defendant Chandler was also his case as to defendant county. Here, primarily, the proof adduced by plaintiff to hold the county was

4. Our decision on this point is based upon the apparent acquiescence of defendants in plaintiff's statement that the claim was presented to Chandler. Moreover, in a brief filed after the first submission of this case was set aside, defendants in

discussing the subject again intimated that the claim had been presented.

5. There is no contention here that defendant Chandler was acting outside the scope of his employment and hence no common law liability for tort is claimed.

the alleged negligence of defendant Chandler. If the county was found not to be negligent, both independently and under the doctrine of respondeat superior, necessarily the agent whose very acts were in question is released from a charge of negligence. The relationship between the county and the road commissioner as defendants in this action, over and above the alleged liability of the county due to respondeat superior meets all of the elements to constitute the parties joint tortfeasors as defined in *Alexander v. Hammarberg*, 103 Cal.App. 2d 872, 230 P.2d 399.

In *Will v. Southern Pacific Co.*, 18 Cal. 2d 468, 116 P.2d 44, the reverse of the situation here occurred. There the railroad and its engineer and fireman were sued for negligence in driving its engine at a crossing. Additionally the railroad alone was charged with negligence in maintaining an embankment at the crossing which obstructed the view of an approaching train. The jury exonerated the employees, but rendered a judgment against the company. The Supreme Court held, 18 Cal.2d at pages 472-473, 116 P.2d at page 46: "The rule in this regard is that where liability is sought to be imposed under the doctrine of *respondeat superior* because of an act or omission not participated in or directed by the principal, a judgment in favor of the agent *ex propria vigore* relieves the principal of responsibility. [Citations.]

"The appellants seek to avoid this effect of the verdict because they are seeking a recovery against the railroad company not only under the doctrine of *respondeat superior* but also because of an alleged violation of an independent duty. * * * However, although a railroad is required to give proper warnings at crossings and to run its trains at safe speeds, a verdict which impliedly finds that a train was traveling at a proper speed upon warnings of its approach discharges the company from any liability based upon asserted negligence in allowing an embankment on its right of way which, to some extent, obstructed a

clear view of its tracks in one direction." See also *Bradley v. Rosenthal*, 154 Cal. 420, 97 P. 875, where it was charged that the employer and the employee were jointly negligent. The jury gave a verdict in favor of the employee and against the employer. The court held that a verdict exonerating the agent necessarily exonerates the employer. The converse of this rule must follow.

[14] The very close relationship between the county and its officer in connection with actions of the kind here is shown in the following language from *Huffaker v. Decker*, supra, 77 Cal.App.2d at pages 388-389, 175 P.2d at page 257: "Aside from the fact that the public is interested in saving its officers and employees from the harassment of vexatious litigation, it is directly and peculiarly concerned in any action against its employees in suits against them for damages occasioned through their negligence while acting as such employees and within the scope of their employment. This is so because section 2001 of the Government Code casts the duty upon the attorney for the municipality to act as counsel in defense of such action against the employee and the fees and expenses incurred therein are a lawful charge against the municipality. Furthermore, Section 1956 authorizes a municipality to insure its employees against the liability for such negligence and the premium for such insurance is therein declared to be a proper charge against the treasury of the municipality. It is thus seen that the city has a financial liability in any action brought against its employee under the above stated conditions, though perhaps the liability is not usually as great as it is where the city is sued." Thus an exoneration of the county must necessarily include its agent whose acts are necessarily vindicated and upon whose acts the alleged liability of the county rests.

The judgment and order are affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; CARTER, J., dissenting.

139 Cal.App.2d 515

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Clifford Coleman WOODS, Defendant and
Appellant.

Cr. 1031.

District Court of Appeal, Fourth District,
California.

Feb. 27, 1956.

Rehearing Denied March 8, 1956.

Hearing Denied March 28, 1956.

Defendant was convicted of unlawful possession of heroin and morphine. The Superior Court of San Diego County, Dean Sherry, J., rendered judgment, and from the judgment of conviction and an order denying a new trial, defendant appealed. The District Court of Appeal, Griffin, J., held that rectal examination by physician before defendant was placed in jail on charge of being under influence of a narcotic and removal of rubber finger stall containing heroin and morphine from defendant's rectum did not constitute unreasonable search and seizure and was not so brutal or shocking as to preclude use of evidence thus obtained in prosecution for unlawful possession of such narcotics.

Judgment and order affirmed.

1. Constitutional Law ⇨255

Forcible removal of finger stall containing heroin and morphine from defendant's rectum by physician by medically approved method against defendant's will was not so brutal or shocking as to preclude use of the evidence thus obtained in prosecution for unlawful possession of such narcotics on ground that defendant would be deprived of his liberty without due process of law in violation of Constitution. West's Ann.Health and Safety Code, § 11500; West's Ann.Const. art. 1, § 13; U.S.C.A.Const. Amends. 5, 14.

2. Arrest ⇨63(4)

In determining whether arrest without a warrant was authorized and search incident thereto therefore reasonable, court must determine whether officer's belief that felony was being committed at time of ar-

rest was based on reasonable cause. West's Ann.Pen.Code, § 836, subd. 3.

3. Arrest ⇨63(4)

Reasonable cause to believe that person arrested has committed a felony sufficient to justify arrest without a warrant may consist of information obtained from others and is not limited to evidence that would be admissible at trial on the issue of guilt. West's Ann.Pen.Code, § 836, subd. 3.

4. Arrest ⇨63(4)

"Reasonable cause" to believe person arrested has committed a felony sufficient to justify arrest without a warrant means such a state of facts as would lead a man of ordinary care and prudence to believe, or entertain an honest, strong suspicion, that the person in question is guilty of a crime. West's Ann.Pen.Code, § 836, subd. 3.

See publication Words and Phrases, for other judicial constructions and definitions of "Reasonable Cause".

5. Arrest ⇨63(4)

Sheriff's officer was justified in arresting without a warrant and placing in jail pending hearing on charge of a misdemeanor in violation of county ordinance one apparently under influence of a narcotic.

6. Arrest ⇨71

Where arresting officer after examination of one arrested for misdemeanor of being under the influence of a narcotic was justified in believing that he was about to commit felony offense of bringing with him into jail narcotics concealed in or on his person, officer was justified in making a reasonable search of such person before placing him in jail. West's Ann.Pen.Code, § 4573.

7. Searches and Seizures ⇨7(12)

Where arresting officer was justified in believing that one arrested for misdemeanor of being under influence of a narcotic was about to commit felony offense of bringing with him into jail narcotics concealed in or on his person and physical examination disclosed sufficient circumstances to indicate that such narcotics were concealed in defendant's rectum, rectal ex-

amination by physician and removal of heroin and morphine concealed in rubber finger stall in rectum did not constitute unreasonable search and seizure in violation of defendant's constitutional rights. West's Ann.Health and Safety Code, § 11500; West's Ann.Pen.Code, § 4573; West's Ann. Const. art. 1, § 13; U.S.C.A.Const. Amends. 5, 14.

8. Prisons ◊13

Persons about to enter jails or penal institutions may be examined by custodian for purpose of preventing the bringing of weapons and contraband into such institutions.

9. Searches and Seizures ◊7(12, 14)

Examination of persons about to enter jails or penal institutions for the purpose of preventing the bringing of weapons or contraband into such institutions does not violate any constitutional right of such persons, provided examination is reasonable and not conducted in a brutal or shocking manner. West's Ann.Const. art. 1, § 13; U.S.C.A.Const. Amends. 5, 14.

10. Arrest ◊71

Peace officers have the right to search persons lawfully arrested and to seize things connected with the crime. West's Ann.Pen.Code, § 836, subd. 3; West's Ann. Const. art. 1, § 13; U.S.C.A.Const. Amend. 14.

11. Criminal Law ◊394

Evidence obtained by unreasonable search and seizure is inadmissible. West's Ann.Const. art. 1, § 13; U.S.C.A.Const. Amend. 14.

12. Searches and Seizures ◊7(1)

The reasonableness of a search and seizure must be determined on the facts and circumstances of each case, since there is no established formula for determination of reasonableness. West's Ann.Const. art. 1, § 13; U.S.C.A.Const. Amend. 14.

13. Criminal Law ◊304(2)

Judicial cognizance may be taken of trafficking in narcotics in California, particularly in San Diego area near Mexican border.

14. Criminal Law ◊1114(1)

Contention that because defendant had been arrested in the first instances by United States government agents and released by them to county officers for action, federal court had exclusive jurisdiction over defendant and state court had no jurisdiction to try him on charge of unlawful possession of heroin and morphine, could not be considered on appeal from conviction, where true facts in such respect had not been presented to trial court and consequently were not reflected in the record. West's Ann.Health and Safety Code, § 11500.

Johnson & Johnson, by Charles M. Snell, San Diego, and Clifford Coleman Woods, in pro. per., for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant and appellant was charged in one count with possession of heroin and morphine on November 4, 1954, in violation of section 11500 of the Health and Safety Code; and in a second count with bringing a narcotic into a jail, in violation of Penal Code section 4573.

Three prior convictions of felony were charged and admitted, to wit, burglary, possession of narcotics, and smuggling opium, for which he served separate terms of imprisonment.

On a motion to set aside the information the court granted it as to the second count, and denied it as to the first. Defendant was represented by counsel. A trial by the court resulted in a conviction on the first count. A new trial was denied and defendant was committed to state's prison. In propria persona he filed an opening brief on appeal. He does not challenge the sufficiency of the evidence to show possession of a narcotic. However, he does challenge the judgment rendered on the ground that he was denied due process of law in that he claims evidence was obtained from his person in violation of his constitutional

guarantees and in violation of the exclusionary rule announced in *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905. In support of the argument he relies principally upon *Rochin v. People of California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183; and *People v. Martinez*, 130 Cal.App.2d 54, 278 P.2d 26.

The evidence shows that one of the sheriff's officers on the narcotics detail saw defendant at about 8:50 p. m. on November 4, 1954, when he was brought into the main sheriff's office in San Diego; that he examined him for the possibility that he was then under the influence of a narcotic, and informed defendant that he was going to summon a doctor to examine him to determine the matter. He testified that the defendant told him that he had previously that day gone to Tijuana with a Negro companion and while there he had purchased a narcotic and had snuffed it into his nostrils; that he then told defendant he had reason to believe he might have a narcotic secreted on his person, and asked him to remove his trousers and bend over for an examination; that he voluntarily did so; that by the aid of a flashlight he examined his rectum; that he saw a greasy substance around the anus and it had a rough, reddish appearance; that he then told defendant that should he have any narcotic secreted there it would be a felony to take it into jail, and that defendant stated he had none; that he then told defendant he was calling a doctor, which he did, to determine whether defendant was under the influence of a narcotic; that when the doctor arrived he examined defendant's eyes, arms and nostrils, and by the aid of a swab removed some substance from defendant's nose which he gave to the officer and stated in defendant's presence that in his opinion defendant was under the influence of a narcotic; that he again cautioned defendant, before taking him to jail, about taking any narcotic with him in any way and that defendant again stated he had none in his possession; that he took him to jail and into the jail clinic with the doctor; that he requested defendant again to remove his trousers and bend over, and that defendant stated: "I want you to

know that I am going to do this under protest", and that he told defendant: "All right, it will be done under protest"; that Woods removed his trousers and the doctor put a rubber glove on his hand; that defendant bent over and the doctor inserted a finger into defendant's rectum and said: "There is an object in his rectum"; that when defendant, at that time, reached around with his left hand, he told him there was no point in interfering with the doctor; that he and another officer then took hold of defendant's hands to prevent him from interfering with the doctor, and that the doctor removed a rubber finger stall with one gram of powdered substance containing morphine and heroin. It was offered in evidence and objection was made on the ground it was obtained from the person of defendant, in violation of his constitutional rights, under the Fifth and Fourteenth amendments to the United States Constitution, and Article I, section 13 of the California Constitution. The objection was overruled. The officer testified that thereafter, in the sheriff's office, he questioned defendant and told him he was going to charge him with the felony of smuggling the narcotic into jail, and that defendant then admitted he had purchased it in Tijuana that day and placed it there for the purpose of transporting it into the United States.

The doctor testified in more detail as to his examination of defendant and concluded he was under the influence of a narcotic before he was taken into the jail. His testimony as to the rectal examination was substantially the same as that related by the officer. He testified there was nothing unusual about this type of examination, and there was very little, if any, pain in connection with it.

After the people rested their case defendant's counsel moved to strike the evidence on the grounds stated in the objections to its admission. The motion was denied.

Defendant then testified that the officer first examined him, as he stated, to determine if he was under the influence of a narcotic, tested his eyes, and looked at his arms, but did not examine his rectum and

did not ask him to remove his trousers, but did call the doctor who there examined his eyes, arms, blood pressure, and heart, but made no examination of his rectum; that he was then taken into the jail dispensary and the officer asked him to remove his trousers; that he inquired as to the reason and was told it was for the purpose of making some form of examination upon his rectum; that he was told to eject the substance contained therein if he had it secreted there but he told them he had none and the officer said then he should have no objection to submitting to the probing activities of the doctor; that he told them: "I had no objections to it"; that "I was not afraid of anything being found that would criminally incriminate me"; that since the officer informed him that it would not be possible for him to go into the jail with something hidden upon his person and they were going to perform the examination anyway, he announced that they were proceeding under his protest; that they held his hands and that he felt considerable pain; that the doctor removed the object and it was the heroin there in evidence; and that he placed it in his rectum in Tijuana to transport it across the border.

The court, in summing up the evidence, remarked that the testimony of defendant, particularly as to any claimed harsh or brutal treatment, was not worthy of belief, as opposed to the testimony of the officer and the doctor. Defendant's motion for new trial was denied and judgment was imposed. Counsel for defendant also file an opening brief and presents about the same contentions made by defendant.

It is respondent's position that the heroin (the possession of which defendant admits) was not obtained in a manner which shocks the conscience or offends our concept of liberty; that this case is factually distinguishable from the Rochin case, *supra*, and that there was no evidence obtained as a result of an *unreasonable* search and seizure; that accordingly the Cahan case is not applicable; that the evidence was obtained by a medically approved method and in accordance with law; and that the resulting judgment of conviction should be affirmed.

The main question is whether the facts in the instant case bring it within the rule laid down in the cases relied upon by defendant. In the Rochin case, 1952, where deputy sheriffs having some information that accused was selling narcotics, entered the open door of a dwelling house, forced open a door to accused's bedroom, and forcibly attempted to extract capsules which accused swallowed, and at a hospital a physician, at deputy sheriff's direction, forced an emetic solution through a tube into the accused's stomach against his will and this "stomach pumping" produced vomiting, and in the vomited matter were found two capsules containing morphine. It was held under the facts of that case that the use of capsules to obtain the conviction of the defendant for illegal possession of morphine violated the due process clause of the Fourteenth Amendment; that a state's conviction cannot be brought about by methods which offend the sense of justice, and that involuntary verbal confessions are inadmissible in state criminal trials under the due process clause of the Fourteenth Amendment, even though statements contained in them may be independently established as true. Justice Douglas, in a concurring opinion, although conceding that evidence obtained from the accused's stomach would be admissible in the majority of states where the question has been raised, he was of the opinion that the evidence would not be admissible because of the provisions of the Fifth Amendment to the Constitution of the United States, and that a person is compelled to be a witness against himself when evidence is forcibly taken from him.

Since the trial of the instant case and since these decisions were rendered, our Supreme Court, in 1955, *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905, has invoked new rules in reference to the admissibility of evidence obtained in violation of the constitutional guarantee against unreasonable search and seizure.

In *People v. Martinez*, *supra*, 1954 (hearing denied with one dissent), it was held that a defendant in a narcotics case was deprived of due process of law where his conviction was obtained by use in evidence

of a package of heroin which he had put in his mouth and which was extracted therefrom after he was choked and wrestled to the ground by arresting officers. It was there said that the reasoning in the Rochin case was applicable to the facts of that case. However, in *People v. One 1941 Mercury Sedan*, 1946, 74 Cal.App.2d 199 at page 212, 168 P.2d 443, at page 451 (hearing denied with two dissents), where the stomach of the defendant was pumped and a narcotic was found, it was said:

"In line with the weight of authority it is our opinion that the privilege against self-incrimination does not preclude the introduction of physical disclosures the defendant is forced to make, or the results of tests to which he has involuntarily submitted. It is our view that the privilege only protects the individual from any forced disclosures made by him, whether oral or written. It is limited to the protection against testimonial compulsion."

In the *Cahan* decision, *supra*, 44 Cal.2d at page 446, 282 P.2d 905, the question of admissibility of coerced evidence is discussed and the Rochin case is cited for the statement that a defendant may not be convicted on the basis of evidence obtained by the rack or the screw, or other brutal means, no matter how reliable the evidence obtained may be. In *People v. Dawson*, 1954, 127 Cal.App.2d 375, 273 P.2d 938, where the officer, when he saw the defendant, placed his right hand to his mouth and put something in it, put his arm around defendant's neck and told him to spit it out, placed the hand-cuffs on him, and after a slight struggle, defendant did spit out three bindles of heroin, the court rejected the claim that the due process guaranteed by the Fourteenth Amendment to the Constitution was violated because no "brutal or shocking force" was shown, thereby distinguishing the facts from the facts in the Rochin case. See also *Ash v. State*, 139 Tex.Cr.R. 420, 141 S.W.2d 341.

In *People v. Haeussler*, 1953, 41 Cal.2d 252, at page 259, 260 P.2d 8, at page 12, certiorari denied by the U. S. Supreme Court, 1954, 347 U.S. 931, 74 S.Ct. 533, 98 L.Ed. 1082, the court said:

"* * * The Rochin opinion does not rest upon the premise that the taking of evidence from the person of a defendant or by entry into his body is the decisive factor. Instead, the entire course of conduct was examined and found to be brutal and shocking. The court disclaimed any intent to fix rigidly the confines of due process by asserting that they must remain 'indefinite and vague'. That blood tests and similar techniques may stand against constitutional objection is suggested by the statement: 'We therefore put to one side cases which have arisen in the State courts through use of modern methods and devices for discovering wrongdoers and bringing them to book. It does not fairly represent these decisions to suggest that they legalize force so brutal and so offensive to human dignity in securing evidence from a suspect as is revealed by this record.'"

It was then held that the taking of a blood test, when accomplished in a medically approved manner, does not smack of brutality. In that case the defendant was unconscious at the time the blood was withdrawn and the removal of four or five cubic centimeters was necessary to provide medical treatment. The only unauthorized action of the medical attendant was to remove one additional cubic centimeter of blood after the hypodermic needle already had been inserted. It was held that this conduct could not be characterized as shocking to the conscience and in violation of due process of law. To the same effect is *People v. Tucker*, 1948, 88 Cal.App.2d 333, 342, 198 P.2d 941, decided by this court (hearing in the Supreme Court denied).

[1] We are in accord with the announced judgment of the trial judge that the actions of the officers were not so brutal and shocking that they offended the due process clause. Accordingly, there is a fundamental difference between this case and the facts in the Rochin and Martinez cases.

The next question is whether the exclusionary rule announced in the *Cahan*

decision in reference to unreasonable search and seizure is applicable. It is argued by the attorney general that under the evidence there was reasonable or probable cause for the officers to believe that a felony was being committed and the search for and recovery of the narcotic was incident to the lawful arrest of a felon and that it was proper for the police officers, as an incident to the lawful arrest, to search and seize articles which they believed were being used in the commission of the crime.

In *In re Dixon*, 41 Cal.2d 756, 264 P.2d 513, according to the testimony, two police officers, who were looking for a Mr. Levitt, went to petitioner's apartment and rang the bell. They identified themselves as police officers when petitioner came to the door and invited them to enter. While one of them was talking to petitioner, the other, standing in the inner doorway and looking into another room, observed some of the equipment assertedly used by petitioner for counterfeiting, including a ten dollar bill taped to a printing frame before a camera. The officers then arrested and handcuffed petitioner, the premises were searched, and certain articles were seized. The police officers telephoned United States secret service agents, and additional evidence was discovered after the federal agents arrived, but the record shows that such evidence was voluntarily disclosed to the agents by petitioner in response to their questions. The officers and agents denied that petitioner was beaten or threatened, and there was testimony that his confession was given freely and voluntarily and that no force was used upon him except for a slight scuffle when he was handcuffed. The court concluded from the evidence that the police officers lawfully entered the apartment; that they thereafter had reasonable cause for believing petitioner had committed a felony; that hence they could arrest him without a warrant; and that it was proper for them, as an incident to a lawful arrest, to search the premises and seize articles which they believed were being used by petitioner in the commission of the crime for which he was arrested. See also *People v. Martin*, 45 Cal.2d 755, 290 P.2d 855, where the officers searched an office building with-

out a search warrant, after seeing book-making paraphernalia therein through the window. It was there held that the search of the premises was not illegal because the offense was being committed in their presence.

In *People v. Brown*, 45 Cal.2d 640, 290 P.2d 528, it was held that in the absence of anything apparent to the officers' senses, before an arrest and search, that defendant was committing or attempting to commit a public offense, the arrest cannot be justified on the ground that an offense was being committed or attempted in their presence.

[2, 3] In *People v. Boyles*, 45 Cal.2d 652, 290 P.2d 535, it was held that where officers waited and watched for someone to enter a hotel room, and one of them grabbed defendant's hands as she entered the room and found bindles of heroin in one hand, any trespass on their part was entirely unrelated to the securing of the evidence they obtained, and could not render that evidence inadmissible; that if an arrest under Penal Code section 836, subdivision 3 was lawful, the search incident thereto would not be unlawful merely because it preceded rather than followed the arrest; that under that subdivision, authorizing an officer to make an arrest when a felony has in fact been committed and he has reasonable cause for believing the person arrested has committed it, evidence other than that turned up in a search is present in any case in which the officer has reasonable cause to believe defendant guilty of a felony, and when his belief of defendant's guilt is based on reasonable cause and a felony has in fact been committed, not only are the requirements of subdivision 3 satisfied but a search incident to an arrest thereunder is reasonable. Since the court and not the arresting officer must make the determination whether the officer's belief that a felony was being committed at the time of the arrest was based on reasonable cause, the officer must testify to the facts or information known to him on which his belief is based. Reasonable cause to justify an arrest may consist of information obtained from others and is not limited to evidence that would be admissible at the trial on the issue of guilt.

In *People v. Simon*, 45 Cal.2d 645, 290 P.2d 531, a police officer observed two young men walking at night in a warehouse district, stopped them, searched them, and found a marijuana cigarette in defendant's pocket. The other man had a bottle of liquor. With respect to his reasons for the search and arrest, the officer testified he suspected them of committing a crime, i. e., possession of liquor by a minor. The court cited *People v. Brown*, supra, holding that it did not appear from the evidence that the officer had reasonable cause to believe that the defendant had committed a felony or committed a misdemeanor in the officer's presence.

In *People v. Coleman*, 134 Cal.App.2d 594, 286 P.2d 582, 586, it was held that the rule prohibiting use of evidence obtained through unlawful search and seizure does not apply to narcotics seized in a search made contemporaneously with a defendant's arrest without a warrant, by officers who had reasonable cause to believe he had committed a felony involving illegal sale or possession of narcotics; that "a search without a warrant is valid where it is incident to a lawful arrest, if it is reasonable and made in good faith"; and that a "seizure, during such a search, of evidence related to the crime is permissible". It stated that the *Cahan* decision, reversing the tenor of California law, held that evidence obtained by police officers in violation of Federal and State constitutional prohibitions against *unreasonable* search and seizure, is inadmissible, but it does not purport to inhibit the right of law enforcement officers to conduct a *reasonable* search and seizure incident to a valid arrest, citing authorities.

[4] Reasonable cause has been defined by our California Supreme Court as such a state of facts as would lead a man of ordinary care and prudence to believe, or entertain an honest, strong suspicion, that the person in question is guilty of a crime. *People v. Kilvington*, 104 Cal. 86, 37 P. 799. Probable cause has been defined as a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true. *People v. Brite*, 9 Cal.2d 666, 687, 72 P.2d 122;

Bompensiero v. Superior Court, 44 Cal.2d 173, 184, 281 P.2d 250; *United States v. Bell*, D.C., 48 F.Supp. 986; *Cook v. Singer Sewing Machine Co.*, 138 Cal.App. 418, 422, 32 P.2d 430; *Coverstone v. Davies*, 38 Cal. 2d 315, 239 P.2d 876.

The latest expression of opinion in reference to reasonable search and seizure is related in *People v. Blodgett*, 46 Cal.2d 114, 293 P.2d 57. There, defendant was charged with possession of marijuana. The officers searched the taxicab in which defendant was riding, after observing previous suspicious and unusual conduct of defendant and other passengers. Marijuana was found back of the rear seat. The contention was made that the cab was unlawfully searched and the evidence obtained was inadmissible. The court said the search, in view of the circumstances, was justified since the officers had reasonable grounds to believe that defendant was hiding contraband. To the same effect is *People v. Martin*, 46 Cal.2d 106, 293 P.2d 52, where the officers ordered the suspects out of the car and after searching them for weapons, reached into the car and took out a pack of marijuana. The court held that the facts related were themselves reasonable cause for police investigation and it was reasonable for the police officers to order the suspects to put their hands in front of them and get out of the automobile in order to search for weapons before questioning them, and that the officers were justified in taking the marijuana from the automobile.

In *Taylor v. Fine*, D.C., 115 F.Supp. 68, 70, it was held that incidental to a legal arrest, whether with or without a warrant, the officers may make a reasonable incidental search, citing cases. See also *Brinegar v. United States*, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879; *People v. Hupp*, 61 Cal.App. 2d 447, 143 P.2d 84; *United States v. Li Fat Tong*, 2 Cir., 152 F.2d 650; *United States v. Chin On*, D.C., 297 F. 531.

[5-12] In the instant case defendant was under arrest for being under the influence of a narcotic, a misdemeanor, violation of a county ordinance. The officer was justified in making the arrest of the defend-

ant on that ground and placing him in jail pending the hearing on the charge. The officer, at that time, after the examination he made of the defendant, who was about to be imprisoned, was justified in believing the defendant was about to bring with him into the jail narcotics concealed in or on his person, in violation of section 4573 of the Penal Code, a felony. He related to the defendant that "*he had reason to believe*" he did have possession of narcotics, and the physical examination revealed sufficient circumstances to indicate that such narcotics were concealed in the place where they were found. Under such circumstances a reasonable search of the defendant was authorized. It must be recognized that persons about to enter jails or penal institutions may be examined by the custodian of such institutions for the purpose of preventing the bringing in of weapons and contraband. When this examination is reasonable and not conducted in a brutal or shocking manner, there is no constitutional inhibition. The right of peace officers to search persons lawfully arrested and to seize things connected with the crime is well established. *Harris v. United States*, 331 U.S. 145, 151, 67 S.Ct. 1098, 91 L.Ed. 1399; *United States v. Rabinowitz*, 339 U.S. 56, 61, 70 S.Ct. 430, 94 L.Ed. 653; *Agnello v. United States*, 269 U.S. 20, 30, 46 S.Ct. 4, 70 L.Ed. 145; *McIntire v. United States*, 10 Cir., 217 F.2d 663, 665. The Cahan case, *supra*, stated only the rule of evidence, now adopted in California by judicial decree, that evidence obtained by unreasonable search and seizure is inadmissible. It was said in that case that in deciding to follow the exclusionary rule doctrine of the United States Supreme Court, California would not necessarily be bound by the decisions that have applied the federal rule, and to the extent that these decisions have developed needless refinements and distinctions, they would not be followed; that if the federal cases indicate needless limitations on the right to conduct reasonable search and seizures or to secure warrants, this court is free to reject them; and that the adoption of the exclusionary rule opens the door to the development of

workable rules governing searches and seizures, the issuance of warrants that will protect both the rights guaranteed by the constitutional provisions, and the interests of society in the suppression of crime. Apparently there is no established formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances. *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357, 51 S.Ct. 153, 158, 75 L.Ed. 374.

[13] The locus of the investigation was the area of San Diego near the Tijuana, Mexico, border line. Judicial cognizance may be taken of trafficking in narcotics in California, and particularly in the San Diego area, which is near the Mexican border. Intelligent and aware officers could not have failed to suspect that the defendant was under the influence of narcotics in view of his behavior and the circumstances which were apparent to them. They were familiar with the narcotics problem and its manifestations and the several methods employed in transporting narcotics across the border. In construing the application of the exclusionary rule in respect to unreasonable search and seizure, these facts should be considered. Here, according to the testimony of the doctor, the evidence was obtained in a medically approved manner. It was the usual rectal examination given to many patients of a doctor. It was a routine examination accompanied by very little pain, and the court found it was not "brutal and shocking", that it did not offend the due process clause, and that the search was not unreasonable under the circumstances.

[14] Defendant filed a closing brief, in *propria persona*, and again, as in his opening brief, made an effort to set forth certain claimed facts not before the trial court in the first instance which, he argues, entitles him to immediate release because the Superior Court had no jurisdiction to try him on the offense charged. In brief, he claims he was retained at the Mexican border by the United States Customs inspectors, who searched him and failed to find any narcotic, but believing him to be under the in-

fluence of a narcotic, released him to the sheriff for action. The argument is that since the officers of the United States Government arrested him in the first instance, the federal courts alone had jurisdiction to hear his case, and the State courts had no jurisdiction over him. Considerable authority is cited for this claim. Since the true facts in this respect were not presented to the trial court, and accordingly are not reflected in the record, this court cannot consider the question on this appeal. *People v. Carmen*, 43 Cal.2d 342, 349, 273 P.2d 521; *In re Roberts*, 40 Cal.2d 745, 748, 255 P.2d 782.

Judgment and order affirmed.

BARNARD, P. J., and MUSSELL, J.,
concur.



139 Cal.App.2d 620

C. P. HENRY, doing business as C. P. Henry
Lumber Company, Plaintiff and
Appellant,

v.

LAKE MILL LUMBER COMPANY, a co-
partnership, Benjamin C. Caplan, Barney
Margolis, and Louis Novick, Defendants
and Respondents.

Civ. 8677.

District Court of Appeal, Third District,
California.

Feb. 29, 1956.

Rehearing Denied March 30, 1956.

Hearing Denied April 25, 1956.

Action for damages for alleged breach of option agreement for sale of lumber. The Superior Court, El Dorado County, Arthur Coats, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Peek, J., held that where buyer of timber was in arrears in agreed weekly payments to seller, that buyer agreed to make payments to seller's assignee was not consideration for option to buy the next year's production, and the op-

tion was a mere offer which could be withdrawn prior to acceptance,

Affirmed.

1. Sales ⇐22(2), 24

Where buyer of timber was in arrears in agreed weekly payments to seller, that buyer agreed to make payments to seller's assignee was not consideration for option to buy the next year's production, and the option was a mere offer which could be withdrawn prior to acceptance. *West's Ann.Civ.Code*, § 1605.

2. Contracts ⇐172

An agreement for an option not based upon consideration is simply a continuing offer which may be revoked at any time. *West's Ann.Civ.Code*, § 1605.

Clewe, Blade & McDonald, Oroville, for
appellant.

Willens & Boscoe, Stockton, for Ben-
jamin C. Caplan.

Nathan M. Dicker, Beverly Hills, for
Barney Margolis.

Albert L. Wagner, Sacramento, for
Louis Novick.

PEEK, Justice.

This is an appeal by plaintiff from a judgment in favor of defendants in an action for damages for the alleged breach of an option agreement for the sale of lumber.

The defendant Lake Mill Lumber Company was a co-partnership consisting of the defendants Margolis, Caplan and Novick. In 1950 the partnership leased from the Placerville Lumber Company a mill in El Dorado County. During the spring of that year, the partners became financially involved and were unable to continue operation of the leased mill without financial assistance. The plaintiff Henry was engaged in the business of buying and selling lumber and was aware of these facts. By a purchase order dated June 20, 1950, executed by Caplan and Margolis, and by a purchase order dated June 23, 1950, executed by Caplan only, the partners agreed to sell a specified amount of lumber at a specified

price to plaintiff who agreed to pay each Thursday for all lumber cut during the preceding week. At the time of the June 20 order, plaintiff advanced the sum of \$3,000, and, prior to the delivery of any lumber, advanced the further sum of \$2,000. Thereafter, on August 3, 1950, a purchase order was executed by Caplan and Margolis by which the entire season's cut of pine lumber was sold to plaintiff who agreed to pay for the same on a weekly basis as in the two previous purchase orders.

On September 8, 1950, with only approximately a month left in the season, an attachment was levied upon the property of the partnership for its indebtedness to the Placerville Lumber Company. At that time, Caplan was in charge of the mill. In order to continue operations he executed on behalf of the partners an assignment, by the terms of which they assigned to the Placerville Lumber Company the total amount of its claim out of any moneys then due or which might thereafter become due to the partnership from plaintiff and directed that he pay the Placerville Lumber Company \$5,000 every Thursday until its claim was paid. On the same document, but under date of September 20, Caplan further directed plaintiff to pay the Placerville Lumber Company the sum of \$3,000 for deposit on timber stumpage, said sum to be in addition to the amounts included previously and to withhold that sum from moneys becoming due the partnership on further production. On September 20 Caplan, in order to secure funds to cover payroll checks previously issued by him, executed on behalf of the partnership and delivered to plaintiff a written option for the entire 1951 season's production under the same terms as the June 20 and August 3 purchase orders. However, no time limit was set forth within which plaintiff might exercise the rights granted.

Here it should be noted that by his original verified complaint, plaintiff alleged that on February 2, 1951, defendants withdrew the option; that on April 12, 1951, plaintiff notified defendants of his election to exercise the same; that plaintiff's first amended complaint set forth identical allegations;

that plaintiff's final "Amendment to Amended and Supplemental Complaint * * *" alleged the withdrawal by defendants as previously charged, and, contrary to the allegation in both his original and first amended complaints, alleged that he had notified defendants, at various times prior to the date of their withdrawal, of his election to accept the option. The amended and supplemental complaints further alleged that the option agreement of September 20 was in accordance with the oral agreement of September 8 which included plaintiff's promise to pay the Placerville Lumber Company \$5,000 weekly until its claim was fully paid, and the further consideration for said option was plaintiff's promise to pay Placerville Lumber Company an additional sum of \$3,000, all of which was denied by defendants.

It is apparent from the pleadings and the evidence as summarized that if there is support for the finding of the trial court that the option was without consideration, thereby resulting in a mere offer which could be withdrawn at any time prior to its acceptance, and that it was so withdrawn, the additional contentions of plaintiff are wholly immaterial to a determination of his appeal and the decision of the trial court must be affirmed.

[1] The record as regards the question of consideration shows that on September 20, the date of the alleged option, plaintiff was in arrears in the agreed weekly payments set forth in the purchase orders of June 20 and June 23. Under such circumstances his promise to do that which he was already bound to do was not a " * * benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, * * *." Section 1605, Civil Code; see also *Pacific Finance Corp. v. First Nat. Bk.*, 4 Cal.2d 47, 47 P.2d 460.

[2] It is equally well established that, " "An agreement for an option not based upon consideration is simply a continuing

offer which may be revoked at any time."'" Kelley v. Upshaw, 39 Cal.2d 179, 191, 246 P.2d 23, 30. Here the finding of the trial court that the offer was revoked prior to its acceptance is sustained by substantial evidence.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J.,
concur.



139 Cal.App.2d 304

Graeme K. MacDONALD, Plaintiff and
Appellant,

v.

MIDLAND MINING COMPANY, a copart-
nership, James Law, Mary Edna Law,
Harry Hudson, Glennis Hudson, Harry
Odgers, Geneveve Odgers, I. R. Toye, and
Molly Toye, Defendants,

Midland Mining Company, a copartnership,
Defendant and Respondent.

Civ. 8752.

District Court of Appeal, Third District,
California.

Feb. 17, 1956.

Rehearing Denied March 15, 1956.

Hearing Denied April 11, 1956.

Action for declaratory relief involving mining claim. The Superior Court, Mariposa County, Thomas Coakley, J., denied relief to the plaintiff and validated the opposing claim. The plaintiff appealed. The District Court of Appeal, Schottky, J., held, inter alia, that the record sustained the trial court's finding that the notice of location made on behalf of the plaintiff was made in bad faith and that plaintiff was not before the court with clean hands.

Judgment affirmed.

1. Mines and Minerals ⇨21(3)

Mining claim statute providing for filing of amended location notice means that if at any time a locator apprehends

that he failed to meet legal requirements before recording location notice, he may cure defect by performing discovery work and then record an amended location notice provided a third party has not in the meantime acquired rights in the property. Public Resources Code, §§ 2301, 2302, 2304-2307, 2310, 2313, 2321; 30 U.S.C.A. § 28.

2. Mines and Minerals ⇨21(3)

Mining claim statute providing that location shall be null and void if requirements of section relating to performance of discovery work within ninety days are not complied with did not prevent validation of location by filing of amended notice prior to time that notice of location relied upon by another was filed. Public Resources Code, §§ 2304, 2307, 2310, 2313.

3. Statutes ⇨223.2(26)

In construing statute providing that mineral location should be null and void if requirements of section relating to performance of discovery work within ninety days were not complied with and statute providing that if at any time locator apprehends that his original notice was defective or that legal requirements had not been complied with before filing he may file an amended notice if same does not interfere with existing rights of others, the two statutes were to be considered together and harmonized, if possible. Public Resources Code, §§ 2304, 2307, 2310, 2313.

4. Mines and Minerals ⇨21(3)

Statute providing that if at any time locator apprehends that his original notice was defective or that legal requirements had not been complied with before filing, he may file an amended notice if it does not interfere with existing rights of others means that any defects in the location may be corrected at any time provided third party's rights have not intervened. Public Resources Code, §§ 2301, 2302, 2304-2307, 2310, 2313.

5. Mines and Minerals ⇨27(1)

Where original locator discovered lode in June 1951 and sufficient discovery work was performed between October and December 1951, an incomplete notice of location was recorded on December 1951

and an amended notice meeting statutory requirements was recorded in February 1953, his successor in interest was owner of claim and entitled to possession notwithstanding notice of location recorded by another in March 1953. Public Resources Code, §§ 2304, 2307, 2310, 2313.

6. Mines and Minerals ⇨38(15)

In action for declaratory relief involving mining claim, evidence supported trial court's finding that notice of location made by plaintiff or in his behalf was made in bad faith and that plaintiff was not before court with clean hands. Public Resources Code, §§ 2307, 2310, 2313.

7. Declaratory Judgment ⇨253
Equity ⇨65(1)

Action for declaratory relief was an equitable action in which clean hands doctrine could be invoked.

8. Equity ⇨65(1)

Where plaintiff who sought declaratory relief in equitable action with respect to his mining claim was found to have come into court with unclean hands, he was properly denied relief. Public Resources Code, §§ 2307, 2310, 2313.

Edward R. Kay and Ferrari & Ferrari,
San Francisco, for appellant.

L. A. MacNicol, Merced, and E. R. Vaughn, Sacramento, for respondent.

SCHOTTKY, Justice.

This action involves the ownership of a mining claim in Mariposa County known as "Garnet Queen No. 3." Appellant commenced an action for declaratory relief against respondent and defendants Law, Hudson, Odgers and Toye, hereinafter referred to as the Law group. The defaults of all defendants except respondent were entered, and following a trial the court, sitting without a jury, found that appellant was before the court with unclean hands and therefore not entitled to any relief, and also that the location of the Law group, from whom respondent Midland Mining Company derived its right, was valid and prior to that of W. A. Neubert from whom appellant derived his right. This appeal

is from the judgment entered in accordance with said findings.

The record shows that the Garnet Queen No. 3 claim was located by the Law group on June 16, 1951, but the notice of location was not recorded as required by Section 2313 of the Public Resources Code, nor was any discovery work done within 90 days thereafter as required by Section 2304 of that code. The discovery work was never personally done by the Law group.

In September, 1951, the Law group leased the claim to one Newcomb. Between late October and December 1, 1951, discovery work was accomplished by W. J. Barnett and another man, both of whom were employed by the tenant Newcomb.

In November, 1951, the Law group realized that the required discovery work had not been performed and that notice of location had not been recorded, and on December 15, 1951, they recorded an amended location notice. This notice was incomplete because it made no reference to the performance of discovery work.

Plaintiff's agent and witness Burtt testified that when he surveyed the property in January, 1953, he found evidence of discovery cuts and then prepared an amended lode location notice for the Law group which was recorded on February 5, 1953. This notice stated that the discovery work had been accomplished within 90 days after the date of location. There was also testimony by Burtt refuting the positive statements of the amended notice, saying that he was confused by some "old" cuts, which testimony the trial court indicated it did not believe.

On March 30, 1953, Neubert recorded a notice of location on Garnet Queen No. 3, calling it the Garnet King Lode Claim. All of the papers were prepared by Burtt who also posted the notice, supervised the discovery work, and recorded the notice. He did this all on behalf of Neubert, just as he had done for the Law group a few weeks earlier. In both instances he was employed by plaintiff.

In November, 1952, the Law group entered into an agreement of sale with Peter DeMichelis, and in *Bufalini v. DeMichelis*,

136 Cal.App.2d 452, 288 P.2d 934, and 136 Cal.App.2d 458, 288 P.2d 937, recently decided by this court, it was held that De-Michelis held said interest in the Garnet Queen No. 3 in trust for the Midland Mining Company, plaintiff therein, defendants herein.

Appellant claims the property under his contract with Neubert on April 4, 1953.

The contention of the appellant at the trial was, and upon this appeal is, that not having performed the discovery work required by Public Resources Code, section 2304, within 90 days after posting their notice of location on the Garnet Queen No. 3 on June 16, 1951, said location by the Law group was null and void and by the terms of section 2307 the Law group was not eligible to relocate said claim within three years. That because the location by the Law group was thus null and void, the claim was open to anyone not connected with the Law group. That Neubert, through whom plaintiff derives his interest, thereafter made a valid location on the property, and therefore Neubert's (plaintiff's) claim is paramount.

The trial court, however, held contrary to appellant's contentions, the basis of its decision being (1) that the discovery work performed by Barnett for Newcomb and the recording of the amended notice of location on February 5, 1953, all before the time when Burtt attempted on behalf of Neubert to relocate the claim, met the requirements of the statutes, (2) that Neubert's location was in bad faith because he knew that the claim had been previously located by the Law group, and his location was therefore of no force or effect, and (3) that plaintiff was in court with unclean hands because he was bound by Burtt's acts as his employer and principal.

The trial court filed a memorandum opinion which correctly states the facts as shown by the record and the law applicable thereto, and we therefore adopt the following portion thereof as part of the opinion of this court:

"To summarize; a lode had been discovered (June 16, 1951); a Location Notice had been posted on the property on the

same day; sufficient discovery work was performed between late October and December 1, 1951 (by Barnett, employee of tenant Newcomb); an incomplete Notice of Location was recorded on December 15, 1951; finally on February 5, 1953 an Amended Notice meeting statutory requirements was recorded by the Law group.

"Whether the completion of these several steps was timely is the question to be resolved.

"12. Up to this point no third party questioned the ownership or the right of the Law group and no one had sought to relocate the property in his own right or on behalf of any third party. Not even Burtt, who, though employed by plaintiff in February 1953 nevertheless prepared and recorded the Amended Notice on February 5, 1953, in the name of and presumably as a friendly business gesture to the Law group, with whom, we infer, Burtt hoped to negotiate a sale or lease on behalf of his employers, the plaintiff and the plaintiff's associates.

"13. On March 29, 1953, Neubert recorded a Notice of Location on Garnet Queen No. 3, calling it the Garnet King Lode Claim.

"All of the Neubert papers were prepared for him by Burtt. Burtt also personally posted Neubert's notice on the property. Thereafter Burtt supervised the discovery work and personally recorded the notice, all on behalf of Neubert, just as he had done for the Law group a few weeks earlier. In both instances he was employed by plaintiff.

"14. On April 4, 1953, Neubert contracted to sell his interest in the Garnet King to plaintiff.

"In his brief defendant likens the Law group, Burtt and plaintiff to peas in a pod and charges them with bad faith in connection with Neubert's purported location. Defendant suggests that Law, who is employed by Neubert at the latter's store at El Portal, and the associates of Law have played ball with Neubert and plaintiff because they feel they have more to gain that way than by living up to the terms of their lease on the Garnet Queen No. 3 with DeMichelis, trustee for defendant. (Plaintiff's Exhibit 7.)

"This is denied by the Law group, each of whom testified that his willingness to have Neubert relocate the Garnet Queen No. 3 and his reason for not defending this action in which each was served as a defendant is because he believed the Law group had forfeited its ownership by failure to do the discovery work within 90 days of locating the claim.

"The court deems it unnecessary to labor this charge so far as the Law group and Neubert are concerned. But it is clear that it is Burt (1) who caused the Law group to believe that their location was invalid, after causing them to take the exact opposite position two months earlier, (2) who was the guiding spirit in immediately causing Neubert to relocate the claim, (3) who engineered the sale by Neubert to plaintiff and (4) who at all times herein mentioned knew that the Law group had sold their interest in the Garnet Queen No. 3 to Peter DeMichelis, since held by this Court to be the trustee of said interest for the benefit of the defendant herein.

"In short, Burt was determined, by whatever means, to obtain the Garnet Queen No. 3 for his employers. The evidence is silent to what extent plaintiff was aware of Burt's activities. However, as Burt's employer and principal, at all times herein mentioned, plaintiff is bound by Burt's acts.

"In conclusion on this point, the court finds that by reason of Burt's activities the plaintiff is not before this Court with clear hands. Such being the Court's view of the position in which the plaintiff stands, and this being a proceeding in equity (*Adams v. Cook*, 15 Cal.2d 352 [101 P.2d 484]), the Court declines to make the declaration prayed for in the complaint.

"Much more could be said on the matter of clean hands if this Court were permitted to take judicial notice of its record in *Bufallini v. DeMichelis* No. 3423 decided by this Court shortly before the institution of this action, and of the chronology of events as reflected by the record in that case and this.

"Independent of the question of clean hands, the court holds as a matter of law, that having performed the discovery work (Section 2304 and see testimony of Bar-

nett), and having recorded their Amended Location Notice as required by Section 2313 prior to the time that Burt attempted on behalf of Neubert to relocate the claim, the Law group thereby perfected their location and now have the superior right to the Garnet Queen No. 3 notwithstanding the language of Section 2307.

"In support thereof the Court points out:

"1. While Section 2307 provides that a location shall be null and void if the requirements of Section 2304 (performance of discovery work within 90 days) are not complied with, nevertheless Section 2310 provides that

"If at any time the locator * * * apprehends that his original notice was defective * * * or that the requirements of law had not been complied with before filing * * * he * * * may file an amended notice * * * if such amended location notice does not interfere with the existing rights of others at the time of posting and filing the amended location notice." [Emphasis added.]

"The things a locator must do to satisfy the requirements of law are:

"(a) Discover a vein or lode and post a notice containing the information called for in Section 2301.

"(b) Define the boundaries and erect his markers (2302).

"(c) Do his discovery work within 90 days (2304 but see 2310).

"(d) Record within 90 days (2313 but see 2310).

"Note, that Section 2310 does not state that the locator shall take corrective measures within 90 days of posting his original notice. *No time limit is prescribed* except that no third party rights shall have come into existence in the meantime.

"In this case it is undisputed that *all* of the steps enumerated in subdivisions (a) to (d) above were *completed* before Burt filed Neubert's Notice of Location, i. e. before third party rights came into being.

"The Court concludes that the correct interpretation of Section 2310 is that, if at *any time*, (in this case from June 1951 to

February 1953) a locator apprehends that he failed to meet *the requirements of the law* (in this case his discovery work required by 2304) before he recorded his location notice, then he may cure the defect by performing the discovery work and then record an amended location notice provided a third party has not in the meantime acquired rights in the property.

"2. In declaring a location null and void where the locator has failed to comply with the requirements of Sections 2301, 2, 4, 5, or 6, Section 2307 draws no distinctions and makes no exceptions.

"Thus, under plaintiff's theory, a failure to meet the requirements of Section 2301 by first discovering a vein or lode in place, and then to meticulously follow sub-divisions (a) to (e) of said section would render the location null and void and, under Plaintiff's theory, the defect could not be cured by subsequent compliance with Section 2310. So too with respect to a failure to meet the requirements of the other code sections referred to in Section 2307.

"To so hold is simply to read Section 2310 out of the law. This we cannot do. The Court is bound, if it be possible, to reconcile and give meaning to what may appear to be a conflict in the statutes.

"Thus it has been held that a code section which deals with but a single subject must be construed in its entirety, that the provisions of the entire code—or at least all such provisions as relate to the same subject matter—must be examined in order to ascertain the meaning of the language of one section; and that the various sections of a code should be read together and harmonized if reasonably possible, so that all may stand.'

"If Section 2310 means anything it means that any defect in the location may be corrected at any time provided *third party rights have not intervened*. So construed, Sections 2307 and 2310 may each stand, in harmony.

"3. Section 2321 deals with the failure to perform the annual assessment work of \$100 within the time required by law and provides that such failure

"shall disqualify such locator from re-locating * * * the original location * * * or any part thereof * * * within three years after the date of his original location, and any attempted relocation thereof by any of the original locators shall render such location void.'

"This is substantially the same language as 2307. Yet it has been uniformly held that a failure to perform the annual assessment work within the time prescribed by law does not work a forfeiture—as plaintiff would have the Court do in this case—so long as the assessment work is resumed before a third party relocater has perfected his claim.

"* * * a failure to do so [annual assessment work] does not ipso facto forfeit his claim but only renders it subject to loss by relocation. The law is clear 'that no relocation can be made if work be resumed, after default and before such relocation.'"" Wiltsee v. Utley, 79 Cal.App.2d 71 [179 P.2d 13, 17]; Pharis v. Muldoon, 75 Cal. 284 [17 P. 70].

"The Court is aware that the U.S. Statute, 30 U.S.C.A. § 28, providing for \$100 of annual assessment work makes express provision for the original locator holding his claim against a subsequent locator where the former resumes his assessment work before the subsequent locator has completed his location (Clarke v. Mallory, 22 Cal. App.2d 55 [70 P.2d 664]) for which reason cases dealing with a failure to do assessment work may be distinguished from the instant case. Nevertheless, the Court notes the strong parallel between Sections 2321 and 2307 and the Court cites the assessment work cases as indicating a policy of liberality in favor of the original locator whose rights shall not be defeated by a failure to meet statutory requirements in locating, and thereafter retaining, his claim where he cures the defect before rights of subsequent locators have been perfected.

"4. In Stock v. Plunkett, 181 Cal. 193 [183 P. 657], the Court held that the claim of the first locator was valid against a subsequent locator with notice where the first locator's notice was *undated* though the statute required that it be dated.

"Under plaintiff's theory an original locator who overlooked dating his original location notice (one of the requirements of Section 2301) would thereby cause his location to be null and void. And though, pursuant to Section 2310, he correct his oversight almost immediately, nevertheless because of Section 2307 his amended location notice would avail him nothing since, according to Plaintiff his location was null and void in the first instance. We do not believe the legislature intended any such harsh result.

"5. A failure to record his notice of location within the statutory period has been held not to work a forfeiture. *Dripps v. Allison's Mines Co.*, 45 Cal.App. 95, at [page] 103 [187 P. 448].

"6. Attention is directed to *Schlageter v. Cutting*, 116 Cal.App. 489 [2 P.2d 875], where a close parallel is noted between the facts of that case and the instant case. See also 58 C.J.S. [Mines & Minerals, § 35], p. 80 and 89.

"7. The following two rules, consistently applied by the courts to disputes over mining claims, support the Court's conclusion in this case. They are:

"A. *Liberal Construction of Statute Where There is Substantial Compliance.*

"It was held in *Betts v. Stephenson*, 100 Cal.App.2d 361, at [page] 363 [223 P.2d 651, at page 653] that:

"'Every reasonable doubt will be resolved in favor of the validity of a mining claim as against the assertion of a forfeiture.'

"And in *Kramer v. Sanguinetti*, 33 Cal. App.2d 303 [91 P.2d 604, 607], it was held that:

"'A statute specifying the requirements necessary for a valid location of a mining claim, as between conflicting claimants, should receive a liberal construction.' See also 58 C.J.S. [Mines & Minerals, § 34], p. 79.

"B. *One having Knowledge of Another's Claim Cannot in Good Faith Avail Himself of Technical Defects.*

"'It is well settled that one who has actual knowledge of the claims of an-

other to mineral land cannot, in good faith, relocate the land because of technical defects in the making of the location.' *Ehrhart v. Bowling*, 36 Cal. App.2d 503 [97 P.2d 1010, 1012].

"'Every reasonable doubt will be resolved in favor of the validity of a mining claim as against the assertion of a forfeiture.' *Betts v. Stephenson*, supra.

"'Good faith confronts any subsequent locator who enters upon the actual possession of a senior locator's land for the purpose of initiating a claim to the same ground, although the senior location be invalid, and when such entry is in bad faith such intrusion constitutes a naked trespass.' *Brown v. Murphy*, 36 Cal.App.2d 171 [97 P.2d 281, 286].

"8. Finally, plaintiff has cited no case, and the Court has found none, which holds that a forfeiture takes place where the original locator corrects his defects (whatever they may be) prior to the time a relocater has made his relocation."

[1-5] We believe that the record amply supports the findings of the court as to the factual situation and we believe also that the court has correctly construed sections 2307 and 2310 of the Public Resources Code. We cannot agree with appellant's contention that the provisions of section 2307 prevented respondent from validating its location by the filing of an amended notice as provided in section 2310 prior to the time that notice of location upon which appellant relies was filed. The two sections must be considered together and harmonized, if possible. To agree with the contention of appellant would in our opinion be to adopt a construction which is unnecessarily harsh and not in consonance with the liberal interpretation of the mining statutes which has so frequently been proclaimed by both state and federal courts. As stated by the trial court, "if section 2310 means anything it means that any defect in the location may be corrected at any time provided third party rights have not intervened." The record shows that in the instant case the amended notice upon which respondent relies was re-

corded on February 5, 1953, and the notice of location upon which appellant relies was recorded on March 30, 1953. Therefore, the court correctly determined that respondent was the owner of and entitled to the possession of said mining claim.

[6-8] The record also supports the findings of the court that the notice of location made by Neubert on behalf of appellant was made in bad faith and that appellant was not

before the court with clean hands. In view of the fact that an action for declaratory relief is an equitable action, these findings alone would be sufficient to support the denial of any relief to appellant.

No other points require discussion.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

CALIFORNIA REPORTER

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46 Cal.2d 313

Pearl C. HOPKINS, Plaintiff and Appellant,
v.

Guy B. HOPKINS, Defendant and
Respondent.

L. A. 23791.

Supreme Court of California.
In Bank.

March 2, 1956.

Rehearing Denied March 28, 1956.

Action by a divorced wife to recover accrued installments on a Colorado divorce decree. The Superior Court, Los Angeles County, Alfred L. Bartlett, J., rendered judgment for the defendant and the plaintiff appealed. The Supreme Court, Traynor, J., held that where there was evidence as to the meaning of the provision of a property settlement agreement that in event the wife should remarry, the husband's obligation should be limited to the proportionate part of monthly payments reasonably necessary for the support and education of their minor children, trial court should have made a finding on the basis of evidence and entered judgment accordingly.

Judgment reversed.

Spence, Shenk, and Schauer, JJ., dissented.

Opinion, 282 P.2d 974, vacated.

1. Divorce ⇨400(1)

Where property settlement agreement was incorporated in Colorado divorce decree and specified a gross amount for support of wife and children without segregation thereof and the children had attained majority, California court had jurisdiction to determine the proportion of the total support obligation attributable to the wife without a previous determination by the Colorado court, though the wife's contractual right to receive her proportionate

share of the monthly payment under the decree was not subject to modification by the California court.

2. Husband and Wife ⇨279(1)

Where property settlement agreement between spouses provided that in event the wife should remarry the husband's obligation should be limited to the proportionate part of a monthly payment that is reasonably necessary for the support and education of the children so long as they should remain minors, meaning of the provision could be ascertained by looking to the subsequent acts and declarations of the parties.

3. Divorce ⇨397(1), 403(9)

In action by divorced wife to recover accrued installments under a Colorado divorce decree, where there was evidence in view of parties' subsequent acts and declarations, as to the meaning of the property settlement agreement between the parties, providing that in event wife should remarry, husband's obligation should be limited to proportionate part of monthly payments reasonably necessary for support and education of children as long as they remained minors, trial court should have made a finding on basis of evidence and entered judgment accordingly.

Courtney A. Teel, San Marino, for appellant.

George B. Bush, Los Angeles, for respondent.

TRAYNOR, Justice.

Plaintiff brought this action in September 1950 to collect the accrued arrearages not barred by the statute of limitations, see Hopkins v. Hopkins, 116 Cal.App.2d 174, 253 P.2d 723, under a 1927 Colorado decree of divorce, which incorporated a property set-

tlement agreement providing that defendant should pay to plaintiff "in lieu of all payments of alimony and support money, and by way of support and maintenance for the first party [plaintiff] and their said minor children, the sum of One Hundred Fifty Dollars (\$150) per month * * *" in addition to certain lump-sum payments that were to be made within three years from the date of the decree of divorce. The property settlement agreement also provided that "if the first party hereto [plaintiff] shall at any time remarry, such re-marriage on the part of the party of the first part shall relieve second party [defendant] from the payment of any further alimony to the first party. But such marriage, if any such takes place, shall not relieve the party of the second part from the payment to the first party of such proportionate part of the monthly payments hereinbefore provided for as shall be reasonably necessary for the support, maintenance, and education of their said children as long as said children or any of them remains a minor and in the custody of the first party." In the present action, the trial court concluded as a matter of law that the Colorado "Judgment and Decree sought to be sued upon is too uncertain to be sued on and is unenforceable in California", cf. *Kahn v. Kahn*, 123 Cal.App.2d 819, 824, 268 P.2d 151, and entered judgment for defendant. Plaintiff appeals.

The uncertainty is said to arise from the fact that the property settlement agreement specifies a gross amount for the support of the wife and children, without segregating the amounts attributable to each, and that since the children have all reached the age of majority, defendant's obligation is limited to the support of plaintiff, who has not remarried. Relying on *Kahn v. Kahn*, 123 Cal.App.2d 819, 823-825, 268 P.2d 151, defendant contends that the California courts are "without power" to determine the proportion of the total support obligation attributable to plaintiff, and thus that defendant's obligation cannot be enforced in California until plaintiff obtains a determination by a Colorado court of the proportion of the total support obligation attributable to her.

In the *Kahn* case the court said that "if a wife seeks to recover the unpaid install-

ments on her decree from another court and the amount of her award is the combined sum of alimony and child support and her children have attained their majorities and the court is unable to determine the portion intended for alimony as distinguished from the part allowed for child support, then the entire award of such decree is illegal and nonenforceable. [Citations.] The judgment in suit can serve no purpose unless it is first resubmitted to the court of its origin for modification." 123 Cal.App.2d at page 824, 268 P.2d at page 154. The California cases cited as authority for that statement do not support it. See the review of those cases in *Wilkins v. Wilkins*, 95 Cal.App.2d 605, 607-611, 213 P.2d 748; see also, *Anderson v. Anderson*, 129 Cal.App.2d 403, 406-407, 276 P.2d 862 [following the *Wilkins* case and distinguishing the *Kahn* case as applicable only to actions on sister-state alimony and support decrees]. Furthermore, although the present case differs from the *Kahn* case in that defendant's obligation has its origin in an integrated property settlement agreement rather than in a judicial award of alimony and in that there was evidence presented to the trial court that would enable it "to determine the portion intended for alimony as distinguished from the part allowed for child support," the rationale of the holding in the *Kahn* case is inconsistent with *Worthley v. Worthley*, 44 Cal.2d 465, 471, 283 P.2d 19, and must therefore be disapproved. In the *Worthley* case this court rejected the contention that a prospectively and retroactively modifiable sister-state support decree is too uncertain to form the basis of an action in this state for a money judgment, and we held "that foreign-created alimony and support obligations are enforceable in this state. In an action to enforce a modifiable support obligation, either party may tender and litigate any plea for modification that could be presented to the courts of the state where the alimony or support decree was originally rendered." 44 Cal.2d at page 474, 283 P.2d at page 25.

[1-3] Plaintiff's contractual right to receive her proportionate share of the \$150 monthly payment under the Colorado decree is not subject to modification by this or any other court, *Zlaten v. Zlaten*, 117 Colo. 296, 298-299, 186 P.2d 583; *Hall v. Hall*, 105

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Colo. 227, 235-239, 97 P.2d 415; cf. *Dexter v. Dexter*, 42 Cal.2d 36, 40, 265 P.2d 873, and the crucial question presented to the trial court in the present case was to resolve the ambiguity latent in the property settlement agreement by determining the proportion of defendant's obligation attributable to plaintiff. See *Meck v. Meck*, 51 Cal.App.2d 492, 495, 125 P.2d 117; *Putnam v. Putnam*, 51 Cal.App.2d 696, 699, 125 P.2d 525. This proportion is indicated in part by the provisions of the property settlement agreement itself for it is provided therein that in the event plaintiff should remarry defendant's obligation should be limited to the proportionate part of the monthly payment that is "reasonably necessary for the support, maintenance, and education of their said children as long as said children or any of them remains a minor * * *" The meaning of this provision may be ascertained by looking to the subsequent acts and declarations of the parties, *Barham v. Barham*, 33 Cal.2d 416, 423, 202 P.2d 289, and cases cited, of which there was evidence presented in the trial of the present case. The trial court should have made a finding on the basis of that evidence and entered judgment accordingly.

The judgment is reversed.

GIBSON, C. J., CARTER, J., and DOOLING, Justice pro tem., concur.

SPENCE, Justice.

I dissent.

I am of the opinion that the trial court properly entered judgment for defendant, and that said judgment is in accord with the decision in *Kahn v. Kahn*, 123 Cal.App.2d 819, 268 P.2d 151. I would not disapprove the *Kahn* case, as does the majority opinion; and while the case of *Worthley v. Worthley*, 44 Cal.2d 465, 283 P.2d 19, cited in the majority opinion, is not directly in point, I adhere to the views expressed in my dissenting opinion in that case.

I would affirm the judgment.

SHENK and SCHAUER, JJ., concur.

Rehearing denied; SHENK, SCHAUER and SPENCE, JJ., dissenting.

DOOLING, J., pro tem., participating in place of McCOMB, J.

John H. EDGAR, Plaintiff, Cross-Defendant
and Respondent,
v.

Dan S. HITCH, Defendant, Cross-Complainant and Appellant,
and

E. Braden, Defendant.
L. A. 23739.

Supreme Court of California,
In Bank.

March 2, 1956.

Action for unpaid balance of purchase price of hay sold. By an amended answer the defendant set up the defense of accord and satisfaction. The Superior Court, Kern County, William L. Bradshaw, J., gave judgment for the plaintiff and the defendant appealed. The Supreme Court, Shenk, J., held that the defendant was entitled, under circumstances of the case, to a finding on the validity of his defense of accord and satisfaction and that the trial court's failure to make the finding was prejudicial error.

Reversed.

Opinion, 280 P.2d 484, vacated.

1. Accord and Satisfaction ⇨11(2)

Compromise and Settlement ⇨5(2)

Where there is a bona fide dispute as to a claim and a check is tendered in settlement thereof which gives creditor notice that it must be accepted in full discharge of claim or not at all, retention and cashing of the check constitutes an "accord and satisfaction."

See publication Words and Phrases, for other judicial constructions and definitions of "Accord and Satisfaction".

2. Accord and Satisfaction ⇨12(2)

Compromise and Settlement ⇨5(2)

Where there is a bona fide dispute as to a claim and a check is tendered in settlement thereof which gives creditor notice that it must be accepted in full discharge of claim or not at all, law permits creditor only to reject completely or to accept in accordance with condition, and creditor's protest against accepting check in full pay-

ment does not preclude the retention and cashing of check from constituting "accord and satisfaction".

3. Trial ⇨388(1)

In action for unpaid balance of purchase price of hay sold, defendant was entitled, under circumstances of the case, to a finding on validity of his defense of accord and satisfaction, and in absence of such finding, judgment for plaintiff could not stand. West's Ann.Code Civ.Proc. § 632.

4. Sales ⇨365

Trial court's findings, in action for unpaid balance of price of hay sold, to effect that price was \$42.50 per ton leaving balance unpaid of \$660, that admissions and denials in answer and amended answer contrary to such finding were untrue and that it was not true that price had been \$32.50 per ton, and trial court's conclusion that plaintiff was entitled to judgment for \$660 could not be construed to imply that court had rejected defendant's defense of accord and satisfaction because there had not been a bona fide dispute. West's Ann. Code Civ.Proc. § 632.

Donald D. Roff, Ventura, for appellant.
Conron, Heard & James and Calvin H. Conron, Jr., Bakersfield, for respondent.

SHENK, Justice.

The defendant Hitch appeals from a judgment awarding the plaintiff \$660 as the unpaid balance of the purchase price of hay he sold to the defendant.

On March 19, 1952, the defendant asked the price of a stack of hay which the plaintiff had offered for sale. The plaintiff testified that he specified "\$42.50" per ton, while the defendant testified that the plaintiff named "\$32.50." One of the plaintiff's witnesses testified that before the defendant met the plaintiff he had been informed that the plaintiff was asking \$42.50 for his hay. There is evidence that in March, 1952, the market price of hay of the quality that the plaintiff sold was \$42.50 or more, as well as evidence that it was \$32.50 or less.

In a subsequent telephone conversation in which price was not mentioned the defendant agreed to buy and the plaintiff agreed to sell the hay. On March 22, 1952, while the second loads of hay were being stacked on trucks, the defendant gave the plaintiff a check for the first loads of hay at \$32.50 per ton. The plaintiff then asserted that the agreed price was \$42.50 per ton and an argument ensued. The plaintiff testified that he permitted the defendant to take the second load of hay but stated to him that he was not "loading it for \$32.50." The defendant testified that the plaintiff agreed to let him take the second load for \$32.50 per ton. The defendant's agent gave the plaintiff a second check computed at \$32.50 per ton in payment for the second load; on the second check was the notation "Pd. in full for all Hay Bought From John Edgar @ 32.50 Ton." The plaintiff kept the two checks and on April 15, 1952, before the checks were cashed, the plaintiff's attorney wrote the defendant that notwithstanding the notation on the second check there was an additional sum of \$660 due the plaintiff on the transaction and that legal action would be taken if this sum was not paid within five days. On April 26, 1952, the plaintiff brought this action in the municipal court. The defendant filed a cross-complaint alleging damages in the sum of \$5,000 and the cause was transferred to the superior court for trial. On May 24, 1952, the plaintiff cashed the checks pursuant to the advice of his attorney.

A jury was waived and the matter was tried and submitted. After the court filed a minute order for judgment for plaintiff but before the judgment was entered, the defendant was permitted by stipulation to file an amended answer setting up the defense of accord and satisfaction. The trial court subsequently made the following findings, among others:

(1) "It is true that * * * Defendants purchased from Plaintiffs 66 tons of Alfalfa hay at the agreed and reasonable price of \$42.50 per ton, no part of which has been paid except the sum of \$2,150.04,

leaving a balance due Plaintiff in the amount of \$660.00."

(2) "That the admissions and denials contained in the Answer and Amended Answer of the Defendant contrary to the findings hereinabove made are untrue."

(3) "It is not true that * * * Defendant * * * agreed to buy and Plaintiff * * * agreed to sell 500 tons of rain-damaged alfalfa hay at the price of \$32.50 per ton."

From the foregoing findings the trial court concluded that the plaintiff was entitled to \$660 from the defendant and awarded him a judgment for that amount.

On the appeal the defendant contends that the evidence so conclusively established the validity of his defense of accord and satisfaction that the judgment in favor of the plaintiff was erroneous as a matter of law.

[1, 2] In this state it is established that where there is a bona fide dispute as to a claim and a check is tendered in settlement thereof which gives the creditor notice that it must be accepted in full discharge of the claim or not at all, retention and cashing of the check constitute an accord and satisfaction. It is immaterial that the creditor protests against accepting the check in full payment, for the law permits him only to reject completely or to accept in accordance with the condition. *Grayhill Drilling Co. v. Superior Oil Co.*, 39 Cal.2d 751, 249 P.2d 21; *Potter v. Pacific Coast Lumber Co.*, 37 Cal.2d 592, 234 P.2d 16. Were it not for two items of testimony in the record, it would be clear that a valid defense of accord and satisfaction was established as a matter of law.

The plaintiff contends that from testimony in the record (1) that before the defendant met the plaintiff he had been informed that the plaintiff was asking \$42.50 for his hay, and (2) that the market price of the hay was at least \$42.50, the trial court could properly find that the defendant's insistence on a price of \$32.50 was not the result of a genuine misunderstanding or failure of honest minds to meet but was merely an attempt to "get away with" paying less than he originally agreed to pay.

Hence the plaintiff argues that a ground exists on which the trial court could properly find that the defendant had not proved his defense of accord and satisfaction. See *Kelly v. David D. Bohannon Organization*, 119 Cal.App.2d 787, 260 P.2d 646.

Even if the record be viewed as showing substantial evidence of bad faith, cf. *Wilcox v. West*, 45 Cal.App.2d 267, at page 273, 114 P.2d 39, before the judgment may be affirmed it must appear that the trial court held for the plaintiff because the defendant failed to prove that the accord and satisfaction was the result of a bona fide dispute.

[3] Section 632 of the Code of Civil Procedure required the trial court to make findings on the material issues in the case, and the findings must be examined to determine whether the judgment was based on the defendant's bad faith. The defendant is entitled to a finding on the validity of his defense of accord and satisfaction. See *Shaw v. Wandersforde*, 53 Cal. 300; *Bertone v. City and County of San Francisco*, 111 Cal.App.2d 579, 245 P.2d 29; *San Jose Abstract and Title Ins. Co. v. Elliott*, 108 Cal. App.2d 793, 240 P.2d 41; *Wilcox v. West*, supra. In the absence of such a finding, sufficient support for the judgment for plaintiff cannot be ascertained. Therefore, under the circumstances here presented a failure to make a finding on the defense of accord and satisfaction of a bona fide dispute would constitute prejudicial error. See *Fairchild v. Raines*, 24 Cal.2d 818, 151 P.2d 260; *James v. Haley*, 212 Cal. 142, 297 P. 920; *Shenson v. Shenson*, 124 Cal.App.2d 747, 269 P.2d 170, 270 P.2d 896; *Hicks v. Barnes*, 109 Cal.App.2d 859, 241 P.2d 648.

[4] The court did not expressly find that the defendant's claim was made in bad faith; for that matter, it did not even make an express finding rejecting the defendant's plea of accord and satisfaction for any reason. In essence, the court expressly found only that there was originally a contract for \$42.50 and not one for \$32.50. Therefore, the judgment must be reversed unless from the express findings it is possible to imply a finding that the defense of a subsequent accord and satisfac-

tion was unmeritorious because no bona fide dispute was proved. *Rossini v. St. Paul Fire and Marine Ins. Co.*, 182 Cal. 415, 188 P. 564; *People v. Ocean Shore R.R., Inc.*, 22 Cal.App.2d 657, 72 P.2d 167; 4 Cal.Jur. 2d 447.

Such a finding cannot reasonably be implied. The record indicates that the trial court did not even pass on the defense of accord and satisfaction, much less reject it solely because the defendant's claim was not bona fide. Instead it appears that the judgment for plaintiff was based on the incorrect premise that so long as the contract price was in fact \$42.50 per ton, the plaintiff was legally entitled to the \$660 whether or not he cashed a check given in settlement of a bona fide dispute.

The judgment is reversed.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.



46 Cal.2d 301

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

ElJoe MADDOX, Defendant and Appellant.
Cr. 5683.

Supreme Court of California.
In Bank.

Feb. 28, 1956.

Rehearing Denied March 21, 1956.

Defendant was found guilty on two counts of selling heroin and one count of maintaining a place for purpose of selling, giving away, or using heroin. The Superior Court, Alameda County, James R. Agee, J., entered judgment and order denying motion for new trial, and defendant appealed. The Supreme Court, Traynor, J., held that where police officers had home of defendant under surveillance for about a month and had observed known narcotics

users frequenting it, and a narcotics user, who had just come from defendant's home, told officers that he had just taken a shot of heroin in defendant's home, and officers went to defendant's home and knocked, and one of the officers heard the sound of retreating footsteps, and he kicked door open and rushed into kitchen where he saw defendant running toward bedroom, officers were excused from compliance with statute requiring that police officer demand admittance and explain purpose for which admittance is desired before breaking open door or window of house to arrest person therein, and that evidence obtained by officers was not required to be excluded.

Judgment and order affirmed.

1. Criminal Law ⇨322

In absence of evidence to the contrary, it is presumed that officers acted legally in arresting defendant for the commission of a felony.

2. Arrest ⇨63(4)

Where police officers had home of defendant under surveillance for about a month and had observed known narcotics users frequenting it, and a narcotics user, who had just come from defendant's home, told officers that he had just taken a shot of heroin in defendant's home, officers had reasonable cause to arrest defendant. *West's Ann.Pen.Code*, § 836, subd. 3.

3. Searches and Seizures ⇨7(1)

The primary purpose of constitutional guarantees against unreasonable searches and seizures is to prevent unreasonable invasions of the security of people in their persons, house, papers, and effects.

4. Searches and Seizures ⇨7(10, 12)

When an officer has reasonable cause to enter a building to make an arrest, and, as an incident to that arrest, is authorized to make a reasonable search, his entry and search are not unreasonable.

5. Searches and Seizures ⇨7(10)

No basic constitutional guarantees are violated because a police officer succeeds in getting into a place, where he is entitled to be, more quickly than he would have gotten in had he complied with stat-

ute providing that a police officer should demand admittance and explain the purpose for which admittance is desired before breaking open door or window of house to arrest person therein. West's Ann.Pen.Code, § 844.

6. Arrest ⇨68

The demand and explanation requirements of statute providing that a police officer may break open door or window of house to arrest a person therein after having demanded admittance and having explained the purpose for which admittance is desired, are a codification of the common law and may reasonably be interpreted as limited by common law rules that compliance is not required if the officer's peril will be increased or arrest frustrated had he demanded entrance and stated his purpose. West's Ann.Pen.Code, § 844.

7. Criminal Law ⇨394

Searches and Seizures ⇨3(1)

Where police officers had home of defendant under surveillance for about a month and had observed known narcotics users frequenting it, and narcotics user, who had just come from defendant's home, told officers that he had just taken heroin in defendant's home, and officers went to defendant's home and knocked, and one of the officers heard sound of retreating footsteps and kicked door open and rushed in, officers were excused from compliance with statute requiring that police officer demand admittance and explain purpose for which admittance is desired before breaking open door, and evidence obtained by officers was admissible in prosecution for selling heroin and for maintaining a place for selling, giving away, or using heroin. West's Ann. Health & Safety Code, §§ 11500, 11557; West's Ann.Pen.Code, § 844.

8. Criminal Law ⇨394

When there is a reasonable cause to make an arrest and search, and facts known to police officer before his entry are not inconsistent with a good faith belief on part of officer that he is excused from complying with statute requiring a peace officer to demand admittance and explain purpose for which admittance is desired before breaking open door or window of house to make

arrest, failure of police officer to comply with formal requirements of the statute does not justify exclusion of evidence he obtains. West's Ann.Pen.Code, § 844.

Eljoe Maddox, in pro. per., and Clinton Wayne White, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Leo J. Vander Lans, Deputy Atty. Gen., for respondent.

TRAYNOR, Justice.

Defendant was found guilty by a jury of two counts of selling heroin, Health and Safety Code, § 11500, and one count of maintaining a place for the purpose of selling, giving away, or using heroin. Health and Safety Code, § 11557. His motion for a new trial was denied, and judgment was pronounced against him. He appeals from the judgment and the order denying his motion for a new trial.

Roy Cleek testified that on June 23, 1954, he visited defendant's home in Oakland and bought a \$10 "paper" of heroin, as he had done many times in the preceding six months. He used defendant's equipment to take a shot of heroin and left it on the kitchen table. Both Cleek and Joe Davis testified that at about 3:30 p.m., Davis came to defendant's residence, bought a "paper" from defendant, and used the same equipment to take a shot of heroin. Shortly after 4:30 p.m. Cleek and Davis left the premises and had not gone far when they were arrested by Officers Taylor and Hilliard of the Oakland Police Department. Officer Taylor testified that he had the premises under surveillance for about a month, that he saw known users of narcotics frequenting them, and that on June 23rd he and Officer Hilliard arrived at their lookout a few minutes before Cleek and Davis left defendant's home. Davis told the officers that he had been to defendant's home and had taken a shot of heroin. Officer Taylor and Davis then went to defendant's door and knocked. Officer Taylor heard a male voice say, "Wait a minute" and also heard the sound of retreating footsteps. He kicked the door open and rushed

to the kitchen where he saw defendant with a spoon in his hand running toward the bedroom. He grappled with defendant, who threw the spoon into the bedroom. He found a small parcel containing two hypodermic needles, a syringe, and an eye dropper on the kitchen table. There were traces of heroin on the spoon. Within two hours after the officers arrived, seven persons came to the premises, five were known to Officer Taylor as narcotics users, and a sixth had needle marks on his arm.

Defendant testified in his own behalf and denied that he had sold heroin to Cleek or Davis or had ever had heroin in his possession. Cleek was a friend of his who visited him that day for a friendly conversation, and Davis came to discuss a new fender for defendant's car. After Cleek and Davis left, defendant discovered the parcel on the kitchen table and concluded that one of his visitors had left it. He denied any knowledge of the spoon or having it in his hand when Officer Taylor entered.

Defendant contends that the spoon and hypodermic equipment were illegally obtained and therefore inadmissible. The Attorney General contends that the officers had reasonable cause to arrest defendant for the commission of a felony, that they could lawfully enter his premises to make the arrest, and that the seizure of the evidence was lawful as an incident to the arrest. He also contends that since no objection was made in the trial court, the admissibility of the evidence cannot be challenged for the first time on appeal.

[1, 2] This case was tried before the decision in *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905. We held in *People v. Kitchens*, Cal.Sup., 294 P.2d 17, that the rule that the admissibility of evidence will not be reviewed on appeal in the absence of a proper objection in the trial court, is not applicable to appeals based on the admission of illegally obtained evidence in cases tried before the decision in the *Cahan* case. In such cases, however, in the absence of evidence to the contrary, it is presumed that the officers acted legally. *People v. Farrara*, Cal.Sup., 294 P.2d 21. Moreover, in the present case Officer Taylor had de-

fendant's home under surveillance for about a month and had observed known narcotics users frequenting it, and the information Davis gave him before the arrest was reasonable cause for the arrest. See, *People v. Boyles*, 45 Cal.2d 652, 290 P.2d 535; Penal Code, § 836(3).

Defendant contends, however, that the arrest was illegal because Officer Taylor did not comply with Penal Code section 844. That section provides: "To make an arrest, a private person, if the offense be a felony, and in all cases a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired." It is undisputed that Officer Taylor did not demand admittance and explain the purpose of the demand before he kicked in defendant's door.

The question is thus presented whether or not evidence obtained by a search incident to an arrest must be excluded when the officer has reasonable cause to make the arrest and search but fails to comply with the requirements of section 844. In previous cases we considered the requirements of both section 844 and section 841 of the Penal Code, but found it unnecessary to determine whether a violation of either section without more compels exclusion of evidence obtained at the time of an arrest, since those sections were complied with, see, e. g., *People v. Martin*, 45 Cal.2d 755, 290 P.2d 855; *People v. Rios*, Cal.Sup., 294 P.2d 39; *Willson v. Superior Court*, Cal. Sup., 294 P.2d 36, or the evidence was otherwise unlawfully obtained. See, *People v. Cahan*, supra, 44 Cal.2d 434, 282 P.2d 905.

The answer to this question must be sought in the basic reasons for the exclusionary rule. We considered those reasons again in *People v. Martin*, supra, 45 Cal.2d 755, 290 P.2d 855, and expressly rejected the theory that evidence is excluded to redress or punish a past wrong. The evidence is excluded "on the ground that the government must not be allowed to profit by its own wrong and thus encour-

aged in the lawless enforcement of the law." 45 Cal.2d 761, 290 P.2d at page 857. Accordingly, we held in the *Martin* case and in *People v. Boyles*, supra, 45 Cal.2d 652, 290 P.2d 535, that illegal conduct that was entirely unrelated and collateral to the securing of the evidence objected to does not render that evidence inadmissible. See also, *Rogers v. Superior Court*, 46 Cal.2d 3, 291 P.2d 929. An example of such conduct would be the failure to comply with the requirements of Penal Code section 841,¹ which are analogous to the requirements of section 844. If the officer has reasonable cause to make an arrest, a violation of section 841 would be unrelated and collateral to the securing of evidence by a search incident to the arrest, for what the search turns up will in no way depend on whether the officer informed "the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it."

The demand and explanation requirements of section 844 present a more difficult problem. The officer's compliance with them will delay his entry, and cases might arise in which the delay would permit destruction or secretion of evidence so that what the search turns up would depend on the officer's compliance with the section. In other cases, however, the evidence may not be readily disposed of, and in still others it may be impossible to determine whether or not the evidence would still have been available had there been the delay incident to complying with the section.

[3-8] It must be borne in mind that the primary purpose of the constitutional guarantees is to prevent unreasonable invasions of the security of the people in their persons, houses, papers, and effects, and when an officer has reasonable cause to enter a dwelling to make an arrest and as an incident to that arrest is authorized to make a reasonable search, his entry and his search are not unreasonable. Suspects have no constitutional right to destroy or dispose of

evidence, and no basic constitutional guarantees are violated because an officer succeeds in getting to a place where he is entitled to be more quickly than he would, had he complied with section 844. Moreover, since the demand and explanation requirements of section 844 are a codification of the common law, they may reasonably be interpreted as limited by the common law rules that compliance is not required if the officer's peril would have been increased or the arrest frustrated had he demanded entrance and stated his purpose. *Read v. Case*, 4 Conn. 166, 170; see, *Restatement, Torts*, § 206, comment d. Without the benefit of hindsight and ordinarily on the spur of the moment, the officer must decide these questions in the first instance. When as in this case, he has reasonable grounds to believe a felony is being committed and hears retreating footsteps, the conclusion that his peril would be increased or that the felon would escape if he demanded entrance and explained his purpose, is not unreasonable. In this proceeding we are not concerned with whether or not the officer's failure to do so would have justified defendant in using force to protect his person or property, or whether or not a jury in a trespass action might conclude that reasonable cause for the officer's failure to comply with the demand and explanation requirements did not exist. Moreover, since the officer's right to invade defendant's privacy clearly appears, there is no compelling need for strict compliance with the requirements of section 844 to protect basic constitutional guarantees. Cf., *People v. Boyles*, supra, 45 Cal.2d 652, 290 P.2d 535; *People v. Cahan*, supra, 44 Cal.2d 434, 442, footnote, 282 P.2d 905. We conclude therefore that when there is reasonable cause to make an arrest and search and the facts known to him before his entry are not inconsistent with a good faith belief on the part of the officer that compliance with section 844 is excused, his failure to comply with the formal requirements of that section does not

1. "The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it, except when the person to be arrested is

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actually engaged in the commission of or an attempt to commit an offense, or is pursued immediately after its commission, or after an escape."

justify the exclusion of the evidence he obtains.

The judgment and order are affirmed.

GIBSON, C. J., and SCHAUER, SPENCE and McCOMB, JJ., concur.

SHENK, Justice.

I concur in the judgment of affirmance because I believe that on the record before us the officers had reasonable grounds to believe that defendant was engaged in the commission of a felony at the time the search was executed and that the evidence obtained as the result of the search was therefore admissible against him.



46 Cal.2d 247

The PEOPLE of the State of California,
Plaintiff and Appellant,

v.

James W. SANDERS, Defendant and
Respondent.

Cr. 5763.

Supreme Court of California,
In Bank.

Feb. 24, 1956.

Rehearing Denied March 21, 1956.

Defendant was charged with keeping and occupying a business building for the purpose of horse-race bookmaking. The Superior Court, Los Angeles County, Allen T. Lynch, J., granted defendant's motion to set information aside, and the People appealed. The Supreme Court, Traynor, J., held that there was nothing incriminating about phonograph record shop proprietor's sitting at desk, in nonpublic room behind his shop, and writing on pads of paper, even if pads were of kind used by bookmakers in area, and fact that he was known by officers to have been convicted of bookmaking, and fact that another person had been arrested for bookmaking at record shop on day before did not justify officers, who observed proprietor through hole in

door between room open to public and second room, in entering such room without a search warrant to make an arrest and conduct search in connection therewith.

Affirmed.

Spence and Shenk, JJ., dissented.

Arrest $\Rightarrow$ 63(4), 71

There was nothing incriminating about phonograph record shop proprietor's sitting at desk, in non-public room behind his shop, and writing on pads of paper, even if pads were of kind used by bookmakers in area, and fact that he was known by officers to have been convicted of bookmaking and fact that another person had been arrested for bookmaking at record shop on day before did not justify officers, who observed proprietor through hole in door between room open to public and second room, in entering such room without a warrant to make an arrest and conduct search in connection therewith. West's Ann.Pen.Code, §§ 337a, subd. 2, 836, subds. 1, 3.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty., Jere J. Sullivan and Lewis Watnick, Deputy Dist. Attys., Los Angeles, for appellant.

G. Vernon Brumbaugh, Los Angeles, for respondent.

A. L. Wirin and Fred Okrand, Los Angeles, amici curiae on behalf of respondent.

TRAYNOR, Justice.

By information defendant was charged with keeping and occupying a business building for the purpose of horse-race bookmaking in violation of Penal Code section 337a, subdivision 2. Defendant was arrested at his place of business, and evidence taken by the officers from defendant's person and the premises was introduced at the preliminary hearing. It consisted of keys to the premises that were in defendant's possession, betting markers, owe sheets, and scratch sheets. One of the officers testified that at the time of the arrest he answered the telephone, and a

female voice said, "This is Maude. Give me your answer on Devil's Sound in the 2d race at Hialeah." Five or six other callers asked for Jimmy, and when the officer told them that Jimmy had stepped out, they hung up. The officers were not questioned at the preliminary hearing with respect to facts bearing on the legality of their search or the lawfulness of the arrest. When, however, defendant moved to set the information aside on the ground that the evidence was illegally obtained, the parties stipulated to the following additional facts: The officers went to defendant's place of business, a phonograph record shop, in the morning in search of another man they had arrested the day before at the record shop for bookmaking. They entered the front room of the shop, which was open to the public and used to display records. No one was in the front room, and the officers went to a door that separated it from a second room behind, which was not open to the public. There was a large hole cut in this door, and the officers looked through the hole and saw defendant, who was known to them personally as a bookmaker, in the second room standing with a pencil in his hand. On a table in front of him they observed some pads of paper that appeared to be "the kind and character of pads of paper used in that area where the record shop was located by bookmakers who make book on horse races," and they saw writing on the pads. They then entered the second room without permission by opening the door for the purpose of arresting defendant for bookmaking. They arrested defendant and then secured the evidence introduced at the preliminary hearing by searching the premises. The telephone that the officer answered was located in a third or back room, "entry being made into that room from the center or second room through an opening in a partition which does not have a door." Neither of the officers had a search warrant or a warrant for defendant's arrest.

The trial court held admissible the evidence of what the officers could see by looking through the hole in the door between the room open to the public and the second room that was not. It concluded, however,

that what the officers could see from the door was not sufficient to justify their entry without a search warrant to make an arrest, and pointed out that the presence of pads with writing on them, even of the type ordinarily used by bookmakers in the vicinity, was consistent with the legitimate business of a record shop being conducted on the premises. Accordingly, it held that the evidence obtained after the officers entered the second room without a warrant or permission was incompetent, and since the remaining evidence was insufficient, it granted defendant's motion to set the information aside. The People appeal.

The Attorney General contends that when the officers looked through the door into the second room, they had reasonable cause to believe that defendant had committed a felony and that he was committing the offense of occupying premises for the purposes of bookmaking in their presence, and that therefore the arrest and search were lawful. See Pen.Code § 836(1, 3); *People v. Martin*, 45 Cal.2d 755, 290 P.2d 855. We cannot agree with this contention.

When the officers looked through the door they saw nothing that was incriminating. They merely saw defendant standing behind a desk with a pencil in his hand and two pads of paper in front of him. There was writing on the pads. Defendant was operating a record store open to the public, and just as in the case of any shopkeeper, businessman, or professional man, he might reasonably be expected to have pencils and pads of paper available for making notes and memoranda for use in the legitimate conduct of his business. Moreover, the fact that the pads of paper were of the kind used by bookmakers in the area is of no significance. They were ordinary small pads of paper of the sort that may be purchased in any stationery store and that are undoubtedly used by all sorts of persons for all sorts of purposes. Similar pads may be found in almost every office, and certainly, the fact that bookmakers also use them cannot constitute reasonable cause to believe that everyone using them is engaged in bookmaking.

The attorney general contends, however, that when what the officers saw is viewed in the light of the fact that another person had been arrested at the record shop for bookmaking the day before and the fact that defendant was known personally to them as a bookmaker, reasonable cause for the arrest appears. It is true that the stipulated fact that defendant was known personally to the officers as a bookmaker might be interpreted as of itself justifying an arrest. Thus the stipulation is consistent with the conclusion that before the officers saw defendant in the record shop they knew he had committed felonies for which he was subject to prosecution, and that therefore they were justified in arresting him for such past offenses whenever he was found. Defendant, however, was not arrested for or charged with any offenses other than the one discovered at the time of his arrest, and neither in the trial court nor on appeal has it been contended that the arrest may be justified as one for some past offense. Accordingly, we conclude that the stipulated fact that defendant was a known bookmaker does not mean that he was currently subject to arrest for past bookmaking, but only that he had that reputation or was known to the officers as a person who had been convicted of bookmaking. As pointed out above, however, before the arrest and search defendant's activities appeared to be perfectly consistent with the lawful conduct of his record business. Defendant was merely present in his office with a pencil in his hand and pads of paper on the table in front of him, and there was no basis for concluding that he was using these items for bookmaking rather than for his business that was then open to the public. Moreover, since there was no telephone in the room where defendant was, or any indication that he had just completed a telephone call, or that any other person was present, there was absolutely no basis from appearances for concluding that the writing on the pads was in response to a call or calls that might have been made to place bets or to record bets placed by persons visiting the shop.

The Attorney General contends, however, that the officers could reasonably conclude

that defendant's apparently innocent activities were bookmaking on the ground that another person had been arrested for bookmaking at the record shop the day before. If it had been stipulated that the other person had been caught in the act of bookmaking on the premises, or that at the time of his arrest, evidence had been obtained that the premises were being used for bookmaking purposes, it might reasonably be contended that when a known bookmaker was found on the premises the next day, there was reasonable cause to believe that he also was occupying them for the purposes of bookmaking. The prosecution made no such showing, however, and the fact that defendant had been a bookmaker in the past or bore that reputation and the fact that another bookmaker had been on the premises the day before, would not of themselves constitute reasonable cause to believe that defendant's conduct, which was perfectly consistent with the lawful conduct of his business, in fact constituted occupancy of the premises for the purpose of bookmaking. *Pearson v. United States*, 10 Cir., 150 F.2d 219, 221; *Brown v. United States*, 9 Cir., 4 F.2d 246, 247; *Baumboy v. United States*, 9 Cir., 24 F.2d 512, 513; *People v. Ford*, 356 Ill. 572, 576, 191 N.E. 315; see, *Brinegar v. United States*, 338 U.S. 160, 176-177, 69 S.Ct. 1302, 93 L.Ed. 1879; *United States v. Di Re*, 332 U.S. 581, 592-594, 68 S.Ct. 222, 92 L.Ed. 210; *Hernandez v. United States*, 9 Cir., 17 F.2d 373.

The order is affirmed.

GIBSON, C. J., and CARTER, SCHAUER and McCOMB, JJ., concur.

SPENCE, Justice.

I dissent.

The evidence admitted at the preliminary hearing clearly showed that defendant had committed, and was committing, a felony at the time of his arrest. The offense with which he was charged is in the nature of a continuing offense, as it covers any person who "keeps or occupies, for any period of time whatsoever, any * * * place * * * with a book or books, paper or papers * * * or paraphernalia, for the

purpose of recording or registering any bet or bets, * * *." Penal Code, § 337a, subd. 2.

In my opinion, the evidence introduced as the result of the arrest and search was admissible on either of two grounds. First, the search was made as an incident of a lawful arrest under subdivision 2 of section 836 of the Penal Code, and was therefore a reasonable search rather than one violating the constitutional guarantee against "unreasonable searches and seizures." U.S.Const. 4th Amend.; Calif. Const. Art. I, sec. 19. Second, the search was made as the incident of a lawful arrest and the arresting officers had "reasonable cause" before the arrest and search to believe that defendant had committed, and was committing, a felony. *People v. Martin*, 45 Cal.2d 755, 290 P.2d 855; *People v. Boyles*, 45 Cal.2d 652, 290 P.2d 535.

In reaching the conclusion here that the challenged evidence was admissible, I deem it unnecessary to discuss the first ground above mentioned. That question was raised in *People v. Brown*, 45 Cal.2d 640, 290 P.2d 528, and *People v. Simon*, 45 Cal.2d 645, 290 P.2d 531; and I voted for a rehearing in those cases because of doubt concerning the soundness of those opinions. The question is also presented in *Badillo v. Superior Court*, Cal.Sup., 294 P.2d 23, and it will suffice to discuss it in that case. In the present case, my conclusion may be rested solely upon the second ground above mentioned.

As above stated, the evidence shows that defendant had kept and occupied, and was keeping and occupying, a place with the specified paraphernalia for the specified purpose; and the stipulation shows as a matter of law that the officers had "reasonable cause" to believe that defendant had so done and was so doing. Said stipulation, which was made by the parties for the purpose of the motion to dismiss the information, shows that "Officers Nelson and Gough also knew the defendant in this case, James W. Sanders, in person, and that he was known to them as a bookmaker on horse races"; that another person had been arrested on the same premises for bookmaking on the previous day; and that

the officers, immediately prior to the entry and arrest, saw defendant standing by a table with a pencil in hand and saw on the table "the kind and character of pads of paper used in that area where the record shop was located by bookmakers who make book on horse races." If such knowledge on the part of the officers does not show as a matter of law that the officers had "reasonable cause" for believing that defendant had committed, and was committing the offense charged, it is difficult to ascribe any rational meaning to the term "reasonable cause."

To summarize, I am of the opinion that the arrest in the present case was not only a lawful arrest but was also one made by the officers upon "reasonable cause"; that the search made as an incident to that arrest was therefore reasonable; and that the evidence obtained as a result of the search was therefore admissible.

I would reverse the order dismissing the information.

SHENK, J., concurs.

Rehearing denied; **SHENK** and **SPENCE, JJ.,** dissenting.



46 Cal.2d 253

The PEOPLE of the State of California,
Plaintiff and Appellant,

v.

Paul Edson GALE, Defendant and
Respondent.

Cr. 5769.

Supreme Court of California,
In Bank.

Feb. 24, 1956.

As Modified on Denial of Rehearing
March 21, 1956.

Defendant was charged with possessing a narcotic. The Superior Court, San Diego County, John A. Hewicker, J., granted defendant's motion to set the information aside and the People appealed. The Supreme Court, Traynor, J., held that neither the fact that defendant was about to depart

the country nor the fact that the front end of his vehicle was damaged justified county officers in stopping his vehicle and subjecting it to routine search they were conducting for "anything that looked suspicious."

Affirmed.

Spence and Shenk, JJ., dissented.

1. Searches and Seizures ⇨3(1)

Automobile search without warrant is not unreasonable if officer has reasonable cause to believe it is carrying contraband; but ordinarily, in absence of such reasonable cause or right to arrest occupant of automobile, search of vehicle is not permissible without a warrant.

2. Searches and Seizures ⇨3(1)

That defendant was leaving country did not justify county officers in stopping his vehicle and subjecting it to routine search.

3. Searches and Seizures ⇨3(1)

Mere fact that front end of defendant's vehicle was damaged did not constitute reasonable cause for believing that defendant had been guilty of hit-and-run driving, so as to justify officers in stopping vehicle and searching it without warrant. Vehicle Code, § 480.

4. Arrest ⇨63(4), 71

Even if damaged condition of automobile justified officers in stopping it and questioning driver, when that questioning elicited an explanation wholly consistent with innocence, no basis was established for arresting driver and searching him and his vehicle. Vehicle Code, § 680.

5. Searches and Seizures ⇨7(26)

Defendant's rights were violated when automobile in his possession was subjected to unreasonable search, and he had standing to object to seizure of narcotic found therein, even though he denied that same was his.

6. Criminal Law ⇨395

Narcotic discovered as result of illegal search of defendant's automobile could not be used as evidence against him. West's Ann.Health & Safety Code, § 11500; West's Ann.Pen.Code, § 925.

7. Searches and Seizures ⇨3(1)

A search cannot be justified by what it turns up.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for appellant.

Giles B. Jackson and H. Clay Jacke, Los Angeles, for respondent.

A. L. Wirin and Fred Okrand, Los Angeles, amici curiae on behalf of respondent.

TRAYNOR, Justice.

By information defendant was charged with one count of possessing a narcotic in violation of Health and Safety Code section 11500, a felony. His motion to set the information aside (see Penal Code § 995) was granted on the ground that all of the evidence against him was obtained by an illegal search and seizure in violation of his constitutional rights. The People appeal.

Defendant was arrested after he had stopped at approximately 12:15 a. m. on April 9, 1955, at the San Diego County sheriff's check station at the Mexican border. He was driving toward Mexico with a friend in a car registered in his mother's name. He told the officers that the car belonged to him. One of the officers noticed that the front of the car appeared to have been in a recent accident and asked defendant to drive to the side of the road and stop in front of the sheriff's substation office. Defendant got out and told one of the officers that the car had been damaged in an accident about a month before in Los Angeles. This officer asked defendant and his friend to come into the office and told another officer to give the car a complete "shake-down." With the aid of his flashlight, the inspecting officer found under the right-hand side of the front seat a spoon, a capsule of white substance, a needle, a medicine dropper, and a small scabbard. The white substance was later identified as a narcotic. The first officer examined defendant's arm and found old puncture marks, and defendant told him he had not used any heroin for a long time. A recent puncture mark was found on the

friend's arm, and he told the officer that he had had a shot of heroin earlier in the day in Los Angeles. Both defendant and his friend told the officer that they did not know how the articles found under the front seat got into the car and that neither of them had ever seen them before. Defendant was searched and three papers taken from his wallet were introduced in evidence. On each of them there appeared to be a drawing of a map. The officer asked defendant what it was and he said he did not know. The officer then suggested to him that it was a map of the Tijuana area made for a narcotic contact, but defendant denied it. At the preliminary hearing the court sustained objections to defendant's questions designed to elicit from the officers their purpose in stopping and checking automobiles. There was testimony, however, that the officers were making a routine search of vehicles. "That is one of the purposes of the road block, sir, is to curb the juvenile problem and also check for, well, anything that we might find, anything that looked suspicious."

The Attorney General contends that the search of the automobile in this case was reasonable whether or not it was incidental to a lawful arrest.

[1] Since an automobile may readily be moved from place to place, its search without a warrant is not unreasonable if the officer has reasonable cause to believe it is carrying contraband. *Carroll v. United States*, 267 U.S. 132, 153, 45 S.Ct. 280, 69 L.Ed. 543; *Husty v. United States*, 282 U.S. 694, 700-701, 51 S.Ct. 240, 75 L.Ed. 629; *Scher v. United States*, 305 U.S. 251, 254-255, 59 S.Ct. 174, 83 L.Ed. 151; *Brinegar v. United States*, 338 U.S. 160, 164, 69 S.Ct. 1302, 93 L.Ed. 1879. The foregoing cases all recognized, however, that ordinarily in the absence of such reasonable cause, or the right to arrest an occupant of the automobile, its search is not permissible without a warrant. "It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search." *Carroll v. United States*, supra,

267 U.S. 132, 153-154, 45 S.Ct. 280, 285; accord: *Wirin v. Horrall*, 85 Cal.App.2d 497, 501, 193 P.2d 470; *Pearson v. United States*, 10 Cir., 150 F.2d 219, 221; *Smith v. State*, 182 Tenn. 158, 184 S.W.2d 390, 391; see also, *United States v. Di Re*, 332 U.S. 581, 584-586, 68 S.Ct. 222, 92 L.Ed. 210.

[2] The Attorney General seeks to avoid the effect of the foregoing rule in this case on the ground that the car was stopped and searched at the international border. He points out that the *Carroll* case recognized that travelers coming into the county may be stopped and searched to prevent illegal entry of persons or property and contends that persons leaving the country may also be stopped and searched to prevent illegal departures or exports. It does not appear, nor is it contended, however, that the deputy sheriffs were attempting to enforce any law, state or federal, dealing with the movement of persons or property into or out of the country or that they were attempting to apprehend any known fleeing criminals. They were conducting a routine search of vehicles "to curb the juvenile problem and also check for, well, anything that we might find, anything that looked suspicious." It is unnecessary to determine whether county officers may lawfully conduct routine searches of persons entering the country or whether such authority is limited to federal officers. In the present case, cars stopped and searched were leaving the county, and the possibility that such cars were being used to further criminal ventures was certainly of no greater concern to local officers than the possibility of similar use within the county. As the cases cited above establish, however, that possibility alone cannot justify stopping and searching all automobiles being lawfully used on the highways in the hope that some criminals will be found.

[3,4] The Attorney General contends that since the front of the car appeared to have been in a recent accident, the officers had reasonable cause to arrest defendant for hit-and-run driving. Vehicle Code § 480. In view of the large number of traffic accidents and the fact that only a small percentage of these involve violations of

Vehicle Code section 480, however, the mere fact that the front end of the car was damaged would not constitute reasonable cause to believe defendant had violated that section. See, *Hughes v. Oreb*, 36 Cal.2d 854, 858, 228 P.2d 550. Moreover, it does not appear, nor is it contended, that the car's lights were defective or that there was any reason to believe its equipment did not comply with the provisions of the Vehicle Code, or that the officers were conducting an investigation authorized by that Code. See Vehicle Code § 680. Even if it is assumed that the damaged condition of the car would justify the officers in stopping it and questioning the driver, see, *People v. Marvin*, 358 Ill. 426, 193 N.E. 202, 203; *Smith v. State*, supra, 182 Tenn. 158, 184 S.W.2d 390, 391; *People v. Simon*, 45 Cal.2d 645, 290 P.2d 531, when that questioning elicited an explanation wholly consistent with innocence no basis was established for arresting defendant and searching him and his car.

[5,6] The Attorney General contends that defendant has no standing to object to the seizure of the narcotic on the ground that he denied it was his. Defendant's rights were violated, however, when the car in his possession was subjected to an unreasonable search. See, *United States v. Jeffers*, 342 U.S. 48, 52-54, 72 S.Ct. 93, 96 L. Ed. 59; *Alvau v. United States*, 9 Cir., 33 F.2d 467, 470; *Matthews v. Correa*, 2 Cir., 135 F.2d 534, 537; *Scoggins v. United States*, 92 U.S.App.D.C. 29, 202 F.2d 211, 212; *United States v. Blok*, 88 U.S.App.D.C. 326, 188 F.2d 1019, 1021. Since the narcotic was discovered as a result of that search, it was obtained in violation of defendant's constitutional rights and may not be used as evidence against him. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392, 40 S.Ct. 182, 64 L.Ed. 319; *People v. Berger*, 44 Cal.2d 459, 462, 282 P.2d 509. Moreover, in *People v. Martin*, 45 Cal.2d 755, 761, 290 P.2d 855, 857, we held that "whenever evidence is obtained in violation of constitutional guarantees, such evidence is inadmissible whether or not it was obtained in violation of the particular defendant's constitutional rights."

[7] Similarly, there is no merit in the Attorney General's contention that the search was lawful on the ground that the car was forfeited to the state. The record does not disclose that there was a judgment forfeiting the car to the state, and even if it is assumed that a forfeiture would relate back to the time of the seizure, it would still be necessary for the state to base its right to forfeiture on the fruits of an unreasonable search. It is settled, however, that a search cannot be justified by what it turns up. *People v. Brown*, 45 Cal.2d 640, 290 P.2d 528.

The order is affirmed.

GIBSON, C. J., and CARTER, SCHAUER and McCOMB, JJ., concur.

SPENCE, Justice.

I dissent.

Defendant was charged by information with the possession of a narcotic in violation of Health and Safety Code section 11500, a felony. The majority opinion affirms an order setting aside the information upon the ground that all the incriminating evidence was obtained by an alleged "unreasonable" search in violation of defendant's constitutional rights. I cannot agree with the conclusion reached in the majority opinion, as I believe that the search was reasonable, and was not therefore in violation of the constitutional guarantees against "unreasonable searches and seizures." U.S.Const. 4th Amend.; Calif. Const. Art. I, sec. 19.

The facts in the present case are essentially different from those in any other case which has been presented; and the conclusion that the search was reasonable may be rested solely upon its inherent reasonableness under the circumstances, and without regard to the question of whether such search was made as an incident of a lawful arrest.

The facts are adequately set forth in the majority opinion. The search was made shortly after midnight "at the San Diego County sheriff's check station at the Mexican border" in a "routine check" made as defendant was driving the automobile along the public highway toward Mexico. Under

these circumstances, it is my opinion that any such "routine search" at the border by local or federal officers is entirely reasonable.

The privilege of entering or leaving this state and country at the international border is one that must necessarily be subject to reasonable regulation in the interest of the enforcement of domestic and international law; and one seeking that privilege should not be heard to object to any routine search of his person and automobile made by any duly authorized officer. It is a matter of common knowledge that such searches by federal officers are customarily made in the enforcement of our customs and other regulations; and that such searches are customarily made by state and federal officers in the enforcement of regulations designed to prevent the spread of disease among persons, animals and crops, as well as in the enforcement of other regulations. It is further a matter of common knowledge that crime in general has assumed international proportions, and that the international traffic in contraband articles, and particularly narcotics, has become a serious menace to society, not only in this state and country, but in all countries including those bordering on our own. It is therefore essential that routine searches at the borders be not only permitted but encouraged if we are to have any system of law enforcement that is worthy of the name. No authority has been called to our attention holding that such a routine search violates any constitutional guarantee; and it is indicated in *Carroll v. United States*, 267 U.S. 132, at page 154, 45 S.Ct. 280, 69 L.Ed. 543, that searches at the international borders are distinguishable from other searches.

I am therefore of the opinion that no invasion of any constitutional right may be predicated merely upon a routine search by duly authorized officers at the international border of the person and automobile of one seeking the privilege of entering or leaving this state and country; and as it is undisputed that defendant was seeking that privilege, I conclude that the search was reasonable, and that the evidence obtained

through that search was properly admitted at the preliminary hearing.

In view of this conclusion, it is unnecessary to determine here whether the search may be justified upon the further ground that it was an incident of a lawful arrest.

I would reverse the order dismissing the information.

SHENK, J., concurs.

Rehearing denied; SHENK and SPENCE, JJ., dissenting.



46 Cal.2d 230

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Billy KITCHENS, Defendant and Appellant.
Cr. 5774.

Supreme Court of California.
In Bank.

Feb. 24, 1956.

Rehearing Denied March 21, 1956.

Defendant was convicted in the Superior Court, City and County of San Francisco, Daniel R. Shoemaker, J., of possessing marijuana, and he appealed. The Supreme Court, Traynor, J., held that since case had been tried prior to Supreme Court decision rendering illegally obtained evidence inadmissible and there was sufficient evidence in record to support conclusion that search and seizure had been unlawful, retrial must be had.

Reversed.

Shenk, J., dissented; Spence, J., dissented in part.

I. Criminal Law §1036(1)

Ordinarily, admissibility of evidence will not be reviewed on appeal in absence of proper objection in trial court; but such rule is not applicable to appeals based on admission of illegally obtained evidence

in cases tried before Supreme Court decision rendering illegally obtained evidence inadmissible. West's Ann.Civ.Code, § 3532.

2. Arrest ☞63(4)

Mere presence of defendant in another person's apartment would not justify his arrest and search, unless officers were justified in arresting such other person and reasonably mistook defendant for him. West's Ann.Pen.Code, § 836, subd. 3.

3. Criminal Law ☞1189

Where case had been tried prior to Supreme Court decision rendering illegally obtained evidence inadmissible, and there was evidence in record to support conclusion that search and seizure had been illegal, Supreme Court, on appeal taken subsequent to judicial change in law, would order retrial. West's Ann.Code Civ.Proc. § 1963, subs. 1, 15, 20, 33.

4. Searches and Seizures ☞7(20)

Defendant's rights were violated if his person and clothing in his possession were subjected to an unreasonable search, regardless of whether marijuana seized belonged to him.

5. Criminal Law ☞395

If marijuana was discovered as result of unreasonable search, it was obtained in violation of defendant's constitutional rights and could not be used as evidence against him.

Wainwright & Racanelli and Harry S. Wainwright, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., Thomas C. Lynch, Dist. Atty., San Francisco, and Philip Hanley, Deputy Dist. Atty., for respondent.

TRAYNOR, Justice.

Defendant was found guilty by a jury of one count of possessing marijuana in violation of Health and Safety Code section 11500. His motion for a new trial was denied, and he was sentenced to one year in the county jail. He appeals from the judgment and the order denying his motion for a new trial.

At about 3:40 p. m. on March 9, 1954, Officer Getchell and Officer McKinley of the San Francisco Police Department and Agent Casey, a federal narcotics inspector, went to an apartment house on Sutter Street. They called on the manager, and she went with them to the door of apartment 24, knocked or rang and identified herself as the manager. Mary Palermo, who lived in the apartment with Eden Germane, opened the door and the officers entered. Officer Getchell went immediately into the living room where defendant was seated on a couch. He identified himself as an officer and ordered defendant to stand up. He then searched him and found a small plastic bottle containing marijuana in the left-hand front pocket of his trousers. Thereafter he placed him under arrest. The officers searched the apartment and found other marijuana belonging to Germane, who entered while the search was under way. Officer Getchell questioned defendant about the marijuana found in his pocket and defendant told him that he "didn't know why he had it in his pocket. He rolled a couple of cigarettes and smoked it and it did nothing for him, he got no kick out of it. He just could give no other reason." Lieutenant Stafford of the Redwood City Police Department testified that he called on the proprietor of the apartment house where defendant had lived before his arrest. The proprietor gave him access to personal property of defendant's that had been placed in a warehouse section of the apartment premises. Lieutenant Stafford found a pair of defendant's trousers that had marijuana seeds in a pocket. Defendant testified that on the day of the arrest he had called at Germane's apartment to pick up a new suit that he had left with Germane to have altered. Germane was a friend of his whom he had visited five or six times. Before the officers arrived, defendant had taken off his work clothes and put on the trousers of the new suit. He had not put on the coat, which the officers found lying on the back of the couch where he was sitting. According to defendant, the bottle of marijuana was discovered by Officer Getchell, not in the trousers pocket, but in

one of the coat pockets, and defendant did not know it was there. Germane testified that he had worn defendant's coat the day before and that the marijuana was not defendant's but his. He also testified that he had borrowed defendant's trousers that were found in Redwood City and that he had probably put the marijuana seeds in the trousers pocket.

Defendant contends that the principal evidence against him was obtained by an illegal search of his person and of his personal property at Redwood City. The Attorney General contends that defendant cannot rely on any error in this respect, since he failed to object to the introduction of the evidence on the ground that it was illegally obtained.

[1] This case was tried before the decision in *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905, at a time when the trial court was bound by the earlier decisions of this court that illegally obtained evidence was admissible, and the record demonstrates that it would have admitted the evidence even had objections been made. Thus, on cross-examination Officer Getchell was asked whether he had a search warrant, a warrant for defendant's arrest, or any doubt when he entered the apartment and searched defendant that defendant "was responsible for having possession of marijuana," and a prosecution objection on the ground of irrelevancy to each question was sustained. It is unnecessary to decide whether under ordinary circumstances the asking of such questions would be sufficient to permit reviewing the admissibility of the evidence on appeal. Although we adhere to the rule that ordinarily the admissibility of evidence will not be reviewed on appeal in the absence of a proper objection in the trial court, we conclude that it is not applicable to appeals based on the admission of illegally obtained evidence in cases that were tried before the *Cahan* decision. This practice was adopted by the federal courts following the decision of the United States Supreme Court in *McNabb v. United States*, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819, holding confessions obtained during a period of illegal detention inadmissible even if voluntarily made.

Gros v. United States, 9 Cir., 136 F.2d 878, 880-881; *Runnels v. United States*, 9 Cir., 138 F.2d 346, 347; *United States v. Haupt*, 7 Cir., 135 F.2d 661, 668-669; see also, *Gambino v. United States*, 275 U.S. 310, 319, 48 S.Ct. 137, 72 L.Ed. 293; *Clyatt v. United States*, 197 U.S. 207, 221-222, 25 S.Ct. 429, 49 L.Ed. 726; *Wiborg v. United States*, 163 U.S. 632, 658, 16 S.Ct. 1127, 1197, 41 L.Ed. 289; *Mott v. Smith*, 16 Cal. 534, 555; *People v. Evans*, 39 Cal.2d 242, 248-249, 246 P.2d 636. A contrary holding would place an unreasonable burden on defendants to anticipate unforeseen changes in the law and encourage fruitless objections in other situations where defendants might hope that an established rule of evidence would be changed on appeal. Moreover, in view of the decisions of this court prior to *People v. Cahan*, supra, an objection would have been futile, and "The law neither does nor requires idle acts." Civ.Code § 3532. To the extent that *People v. Brooksher*, 134 Cal.App.2d 266, 285 P.2d 298, is inconsistent with our decision herein, it is disapproved.

[2] The Attorney General contends, however, that in the absence of evidence to the contrary it must be presumed that the search and seizure were lawful. See, Code Civ.Proc. § 1963 (1, 15, 20, 33). There is, however, sufficient evidence in the record to support the conclusion that the search and seizure at the time of defendant's arrest were unlawful. Officer Getchell testified that he went to the apartment where defendant was arrested "acting upon certain information." He and the other officers secured the cooperation of the manager who induced Mary Palermo to open the door. The officers immediately entered, and it does not appear that they requested permission to do so or asserted that they had a right to enter pursuant to a warrant or for the purpose of making an arrest. It may be inferred that the officers were looking for Germane who rented the apartment. It does not appear whether they had reasonable cause to believe that Germane was guilty of possessing narcotics or whether they went to the apartment hoping to secure evidence to justify an arrest. The officers did not know who

defendant was, and his mere presence in the Germane's apartment would not justify his arrest and search, *United States v. Di Re*, 332 U.S. 581, 587, 68 S.Ct. 222, 92 L.Ed. 210; *People v. Sanders*, Cal.Sup., 294 P.2d 10, and cases cited, unless the officers were justified in arresting Germane and reasonably mistook defendant for him. Pen.Code § 836(3).

[3] The Attorney General contends that there is evidence that Officer Getchell was reasonably mistaken as to defendant's identity and that, in any event, it must be presumed that he was. In view of the fact, however, that the prosecution successfully prevented defendant from eliciting direct evidence from Officer Getchell on this point, we do not believe that the issue may be determined at this time on the basis of conflicting inferences in favor of the People. Since this case was tried before the decision in the Cahan case, the prosecution was no more at fault for objecting to defendant's questions in this respect than defendant was for not objecting to the introduction of the evidence in the first instance. Fairness to both parties compels that they be given an opportunity to litigate the issue of the legality of the search and seizure on the basis of all of the facts.

[4,5] The Attorney General also contends that defendant has no standing to object to the seizure of the marijuana on the ground that he denied that it was his. Defendant's rights were violated, however, if his person and clothing in his possession were subjected to an unreasonable search. *People v. Gale*, Cal.Sup., 294 P.2d 13; *United States v. Stappenback*, 2 Cir., 61 F.2d 955, 957. Just as in the *Gale* case, if the marijuana was discovered as a result of such a search, "it was obtained in violation of defendant's constitutional rights and may not be used as evidence against him. [Citations.] Moreover, in *People v. Martin*, 45 Cal.2d 755, 761, 290 P.2d 855, 857, we held that 'whenever evidence is obtained in violation of constitutional guarantees, such evidence is inadmissible

whether or not it was obtained in violation of the particular defendant's constitutional rights.'"

Defendant contends that the evidence of the marijuana found in his trousers stored in Redwood City should also have been excluded on the ground that it was illegally obtained. Since the judgment must be reversed for the reasons stated above, and since on retrial the facts bearing on the question of the legality of the seizure of defendant's trousers will be more fully explored, no purpose would be served by deciding this question on the basis of the limited facts bearing on the issue presented in this record.

The judgment and order are reversed.

GIBSON, C. J., and CARTER, SCHAUER and McCOMB, JJ., concur.

SHENK, J., dissents.

SPENCE, Justice (concurring and dissenting).

I concur in that portion of the majority opinion which states that "Although we adhere to the rule that ordinarily the admissibility of evidence will not be reviewed on appeal in the absence of a proper objection in the trial court, we conclude that it is not applicable to appeals based on the admission of illegally obtained evidence in cases that were tried before the Cahan decision."

I dissent, however, from those portions of the decision which hold that the evidence was illegally obtained. I am of the opinion that the arrest was a lawful one and that the search made as an incident to such lawful arrest was a reasonable search rather than an unreasonable search. See dissenting opinion in *Badillo v. Superior Court*, Cal.Sup., 294 P.2d 23.

I would affirm the judgment and order denying a new trial.

Rehearing denied; SHENK and SPENCE, JJ., dissenting.

46 Cal.2d 265

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

James FARRARA, Helen Farrara and
Maxine Shaman, Defendants,

James Farrara and Helen Farrara,
Defendants and Appellants.

Cr. 5822.

Supreme Court of California.
In Bank.

Feb. 24, 1956.

5. Criminal Law 322

In absence of evidence to contrary, it must be presumed that officers regularly and lawfully performed their duties. West's Ann.Code Civ.Proc. § 1963, subds. 1, 15, 33.

6. Criminal Law 1144(1)

Even though case had been tried prior to Supreme Court decision rendering illegally obtained evidence inadmissible, conviction would not be reversed in absence of evidence to support conclusion that officers had acted illegally in making search and seizure which produced incriminating evidence. West's Ann.Pen.Code, § 844.

G. Vernon Brumbaugh, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., and Joan D. Gross, Deputy Atty. Gen., for respondent.

TRAYNOR, Justice.

Defendants James and Helen Farrara appeal from orders granting them probation and denying their motion for a new trial entered after they were found guilty of violations of Penal Code section 337a. A jury trial was waived and it was stipulated that the case should be submitted on the transcript of the preliminary hearing. Each defendant was found guilty of one count of recording bets on horse races, Penal Code § 337a(4), and Helen was found guilty of one count of occupying premises for the purpose of bookmaking. Penal Code § 337a(2).

On October 28, 1954, Officer Sherrer of the Los Angeles Police Department observed James Farrara get into his car near the corner of 8th and Cochran in Los Angeles. Two other officers got into the car with James and the car was driven for a little less than a block. James then got out of the car, and Officer Sherrer searched him. He found keys, a scratch sheet for October 27th, and several pieces of paper that were identified as records of bets for races run on the 27th. Although James told Officer Sherrer that he did not know

Each defendant was found guilty in the Superior Court, Los Angeles County, Clement D. Nye, J., of recording bets on horse races, and one defendant was found guilty of occupying premises for purpose of bookmaking, and an appeal was taken. The Supreme Court, Traynor, J., held that even though case had been tried prior to Supreme Court decision rendering illegally obtained evidence inadmissible, conviction would not be reversed in absence of evidence to support conclusion that officers had acted illegally in making search and seizure which produced incriminating evidence.

Affirmed.

Carter, J., dissented.

Opinion, 288 P.2d 1002, vacated.

1. Gaming 98(3)

Bookmaking conviction was sustained by evidence. West's Ann.Pen.Code, § 337a (4).

2. Gaming 98(5)

Conviction for occupying premises for purpose of bookmaking was sustained by evidence. West's Ann.Pen.Code, § 337a (2).

3. Criminal Law 564(1)

In bookmaking prosecution, evidence was sufficient to justify finding venue in Los Angeles county. West's Ann.Pen.Code, §§ 337a, 995.

4. Criminal Law 1141(1)

Error will not be presumed on appeal.

anything about these papers, there was evidence that the handwriting was his.

Shortly thereafter at approximately 12:35 p. m. on October 28th, Officer Sherrer and two other officers gained entrance to an apartment about half a block away on South Cochran by the use of one of the keys taken from James. They found Helen Farrara in the bedroom with a scratch sheet for October 28th and several pieces of paper similar to those taken from James. These papers were identified as records of bets in Helen's handwriting for races run on the 28th, and Helen admitted taking bets over the telephone for two days. The apartment was regularly occupied by Maxine Shaman, a friend of the defendants, who was present when the officers arrived.¹

Before the arrests, the officers had had the apartment and defendants under observation and had seen both of them go to the apartment on the 27th. James arrived before ten a. m. and left shortly after one p. m. Helen left her home about 12:30 p. m., went to the apartment, and left there at about 5:25 p. m.

Neither defendant took the stand or presented any evidence other than by cross-examining prosecution witnesses.

[1-3] The foregoing evidence is sufficient to support the conclusion of the trial court that each defendant was guilty of recording bets and that Helen was guilty of occupying the apartment "with * * * papers * * * for the purpose of recording * * * bets." Penal Code § 337a(2). There is no merit in defendants' contention that venue was not proved. Helen admitted taking bets in the apartment, which was located in Los Angeles County, and James was observed at or near the apartment on both the 27th and the 28th. Moreover, since the defendants' home was also located in Los Angeles, it may reasonably be inferred that James did not leave the county to record the bets on races run on the 27th.

[4-6] Defendants contend that the officers did not have reasonable cause to believe that either of them had committed a felony and that the arrests and the searches and seizures incident thereto were therefore illegal. In addition, Helen contends that the officers violated section 844 of the Penal Code by using the key to enter the apartment to make an arrest without first "having demanded admittance and explained the purpose for which admittance is desired." Accordingly, they conclude that the evidence should have been excluded.

This case was tried before the decision in *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905, no objection was made to the introduction of the evidence in the trial court, and no evidence was presented for the purpose of showing whether or not the officers acted lawfully. Thus it does not appear whether or not the officers had warrants for defendants' arrest or for the search of the premises or reasonable cause to believe that they had committed a felony. From the fact, however, that the officers had defendants and the apartment under observation, it may be inferred that they had some information indicating guilt, but the record is completely silent as to whether or not such information was sufficient to constitute reasonable cause to justify the arrests. Similarly, it may be inferred from the fact that the officers used the key taken from James to enter the apartment they did not enter with the consent of the occupants, but the record is also completely silent as to whether or not the entry was preceded by the demand and explanation required by section 844.

In *People v. Kitchens*, Cal.Sup., 294 P.2d 17, we held that the rule that the admissibility of evidence will not be reviewed on appeal in the absence of a proper objection in the trial court, is not applicable to appeals based on the admission of illegally obtained evidence in cases that were tried before the *Cahan* decision. We were care-

pursuant to her motion made under Penal Code section 995.

1. Maxine Shaman was also charged with violations of Penal Code section 337a, but as to her the information was set aside

ful to point out, however, that there was "sufficient evidence in the record to support the conclusion that the search and seizure at the time of defendant's arrest were unlawful." In *Badillo v. Superior Court*, Cal. Sup., 294 P.2d 23, we held in this respect that "the defendant makes a prima facie case when he establishes that an arrest was made without a warrant or that private premises were entered or a search made without a search warrant, and the burden then rests on the prosecution to show proper justification. [Citations.]"

In the present case, on the contrary, there is no such evidence, and to reverse the judgment it would be necessary to presume that the officers acted illegally and that the trial court erred in admitting the evidence so obtained. It is settled, however, that error will not be presumed on appeal, *Vaughn v. Jonas*, 31 Cal.2d 586, 601, 191 P.2d 432; *People v. Gutierrez*, 35 Cal.2d 721, 727, 221 P.2d 22; *Lynch v. Birdwell*, 44 Cal.2d 839, 846-847, 285 P.2d 919; *People v. McManis*, 122 Cal.App.2d 891, 899, 266 P.2d 134, and in the absence of evidence to the contrary it must also be presumed that the officers regularly and lawfully performed their duties. Code Civ.Proc. § 1963 (1, 15, 33); *People v. Serrano*, 123 Cal. App. 339, 341, 11 P.2d 81; see also, *Vaughn v. Jonas*, supra, 31 Cal.2d 586, 601, 191 P.2d 432.

The orders are affirmed.

GIBSON, C. J., and SCHAUER and McCOMB, JJ., concur.

SHENK and SPENCE, JJ., concur in the judgment.

CARTER, Justice.

I dissent.

For the reasons stated in my dissenting opinion in *People v. Martin*, Cal.Sup., 293 P.2d 52, and *People v. Beard*, Cal.Sup., 294 P.2d 29 I would reverse the judgment in the case at bar.

Victor BADILLO, Petitioner,
v.

The SUPERIOR COURT of the State of California, IN AND FOR the CITY AND COUNTY OF SAN FRANCISCO, Respondent.

S. F. 19346.

Supreme Court of California.
In Bank.

Feb. 24, 1956.

Rehearing Denied March 21, 1956.

Proceeding on a petition for writ of prohibition to prevent trial. The Supreme Court, Traynor, J., held that defendant had made prima facie showing of illegal entry by establishing, at preliminary hearing, that officers had broken into house without search warrant, and that burden had then rested on prosecution to introduce evidence that officers had had reasonable cause to break and enter to make an arrest; and no such evidence having been presented, it would have to be taken as established, for purpose of present proceeding, that entry into house had been unlawful.

Writ issued.

Spence and Shenk, JJ., dissented.

1. Criminal Law 238

Indictment and Information 137(5)
Prohibition 11

A defendant has been held to answer without reasonable or probable cause if his commitment is based entirely on incompetent evidence; and accordingly, in such case, trial court should grant motion to set aside information; and if it does not do so, a peremptory writ of prohibition will issue to prohibit further proceedings. West's Ann.Pen.Code, §§ 995, 999a.

2. Indictment and Information 137(5)

Information should not be set aside on ground that essential evidence was illegally obtained if there is any substantial evidence or applicable presumption to support contrary conclusion.

3. Criminal Law 322

In absence of evidence to the contrary, it is presumed that officers acted legally.

4. Criminal Law Ⓒ394

When question of legality of an arrest or of search or seizure is raised either at preliminary hearing or at trial, defendant makes a prima facie case when he establishes that an arrest was made without a warrant or that private premises were entered or search made without search warrant, and burden then rests on prosecution to show proper justification.

5. Indictment and Information Ⓒ137(5)

Where issue as to legality of arrest or of search and seizure is raised for first time on motion to set aside information, motion should be denied unless evidence before committing magistrate established that essential evidence was illegally obtained.

6. Criminal Law Ⓒ394**Prohibition** Ⓒ27

Defendant made prima facie showing of illegal entry by establishing, at preliminary hearing, that officers had broken into house without search warrant, and burden then rested on prosecution to introduce evidence that officers had had reasonable cause to break and enter to make an arrest; and no such evidence having been presented, it would have to be taken as established, for purpose of prohibition proceeding brought to prevent trial, that entry into house had been unlawful. West's Ann.Pen. Code, §§ 844, 999, 1021.

7. Criminal Law Ⓒ394

Illegally obtained evidence is inadmissible, whether or not it was obtained in violation of particular defendant's constitutional rights.

8. Criminal Law Ⓒ175

Where defendant procures writ of prohibition to prevent his trial because his commitment was based entirely on incompetent evidence, he has not been in jeopardy, and there is nothing to prevent prosecution from instituting new proceeding and proving that evidence justifying commitment was not illegally obtained. West's Ann.Pen.Code, §§ 999, 1021.

9. Criminal Law Ⓒ395

Where defendant's flight out of front door of house, and his attempted disposal

of evidence, was direct result of officer's illegal entry into house, evidence was obtained in violation of constitutional guarantees, even though it was thrown toward another officer.

MacInnis, Alaga & Glassman and Harry P. Glassman, San Francisco, for petitioner.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., and Arlo E. Smith, Deputy Atty. Gen., for respondent.

TRAYNOR, Justice.

By information petitioner was charged with possessing heroin in violation of Health and Safety Code section 11500. His motion to set aside the information on the ground that the evidence against him was obtained by an illegal search and seizure was denied, and he now seeks a writ of prohibition to prevent his trial.

Evidence was presented at the preliminary hearing of the following facts: At approximately 6 p. m. on January 6, 1955, federal narcotics Agents Hipkins and Casey and Officers Getchell and McKinley of the San Francisco Police Department went to a house on Sycamore Street in San Francisco. Agent Hipkins remained in front of the house, and the three other officers went to the rear. Officer Getchell knocked at the back door, which was locked, and received no response. He then forced the door open and entered the house followed by Agent Casey. Shortly thereafter, petitioner, followed closely by Officer Getchell, ran out the front door and threw a package of heroin toward Agent Hipkins, who recovered it. None of the officers had a search warrant.

[1-5] In *Rogers v. Superior Court*, 46 Cal.2d 3, 291 P.2d 929, 931, we held that a "defendant has been held to answer without reasonable or probable cause if his commitment is based entirely on incompetent evidence", and accordingly, in such a case the trial court should grant a motion to set aside the information, Penal Code § 995, and if it does not do so, a peremptory writ of prohibition will issue to prohibit further proceedings. Pe-

nal Code § 999a. No problem is presented in applying this rule in cases involving searches and seizures in which the facts bearing on the legality of the search or seizure are undisputed and establish as a matter of law that the evidence is or is not admissible. In many cases, however, the evidence before the magistrate bearing on this issue may be in conflict or susceptible of conflicting inferences or consist only of the testimony of prosecution witnesses, and under these circumstances the court in ruling on a motion to set aside the information will frequently not be in a position to make a final determination as to the admissibility of the evidence. Accordingly, the information should not be set aside on the ground that essential evidence was illegally obtained if there is any substantial evidence or applicable presumption to support a contrary conclusion, see, *People v. Michael*, 45 Cal.2d 751, 290 P.2d 852; *People v. Martin*, 45 Cal.2d 755, 290 P.2d 855, and in such cases the ultimate decision on admissibility can be made at the trial on the basis of all of the evidence bearing on the issue. See, *People v. Gorg*, 45 Cal.2d 776, 291 P.2d 469; *People v. Berger*, 44 Cal.2d 459, 464, 282 P.2d 509. In the absence of evidence to the contrary, it is presumed that the officers acted legally, see, *People v. Farrara*, Cal.Sup., 294 P.2d 21, and if the issue is raised for the first time on a motion to set aside the information, the motion should be denied unless the evidence before the committing magistrate establishes that essential evidence was illegally obtained. When, however, the question of the legality of an arrest or of a search and seizure is raised either at the preliminary hearing or at the trial, the defendant makes a prima facie case when he establishes that an ar-

rest was made without a warrant or that private premises were entered or a search made without a search warrant, and the burden then rests on the prosecution to show proper justification. *Dragna v. White*, 45 Cal.2d 469, 289 P.2d 428; *Coverstone v. Davies*, 38 Cal.2d 315, 319, 239 P.2d 876; *Hughes v. Oreb*, 36 Cal.2d 854, 858, 228 P.2d 550; *People v. Boyles*, 45 Cal.2d 652, 290 P.2d 535; *People v. Gorg*, supra, 45 Cal.2d 776, 291 P.2d 469.

[6-8] In the present case defendant made a prima facie showing of illegal entry by establishing that the officers broke into the house without a search warrant, and the burden then rested on the prosecution to introduce evidence that the officers had reasonable cause to break and enter to make an arrest. See Penal Code § 844. Since no such evidence was presented, it must be taken as established for the purposes of this proceeding that the entry into the house was unlawful,¹ and it is immaterial whether or not it was defendant's house. *People v. Martin*, supra, 45 Cal.2d 755, 290 P.2d 855.

[9] The Attorney General contends that defendant abandoned the evidence when he threw it toward Agent Hipkins and that therefore he may not object to its use against him. It clearly appears, however, that defendant's flight out the front door and attempted disposal of the evidence was the direct result of Officer Getchell's illegal entry, and accordingly, the evidence was obtained in violation of constitutional guarantees. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392, 40 S.Ct. 182, 64 L.Ed. 319; *People v. Berger*, 44 Cal.2d 459, 462, 282 P.2d 509; *People v. Stewart*, 232 Mich. 670, 206 N.W. 337, 338.

Let the peremptory writ of prohibition issue as prayed.

1. Although the preliminary hearing in this case was held before the decision in *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905, defendant anticipated a possible change in the law, and the magistrate permitted him to establish that the entry was made without a search warrant. Presumably in reliance on the non-exclusionary rule, the prosecution made no attempt to prove that the officers had reasonable cause to enter the house to

make an arrest. Since defendant has not been in jeopardy, *In re Harron*, 191 Cal. 457, 466, 217 P. 728; see, *People v. Godlewski*, 22 Cal.2d 677, 681-682, 140 P.2d 381; Penal Code §§ 999, 1021, there is nothing to prevent the prosecution from instituting a new proceeding and proving, if it can, that the officers had reasonable cause to enter the premises to make an arrest.

GIBSON, C. J., and SCHAUER and McCOMB, JJ., concur.

CARTER, Justice.

I concur in the judgment and generally in the reasoning in the majority opinion but I wish to point out that under a recent decision of the Supreme Court of the United States, *Rea v. United States*, 76 S.Ct. 292, it would seem that evidence illegally obtained by federal agents would not be admissible in a state court notwithstanding the rule announced by this court in *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905.

SPENCE, Justice.

I dissent.

Petitioner was charged with the possession of heroin in violation of section 11500 of the Health and Safety Code. Possession of narcotics is in the nature of a continuing offense, and the evidence shows that petitioner had committed and was committing the offense at the time of the arrest and search. I am therefore of the opinion that this case presents two material questions: (1) whether the arrest without a warrant was a lawful arrest; and (2) if so, whether the search was reasonable as an incident to such lawful arrest.

Heretofore this court has deemed it unnecessary to determine whether an arrest without a warrant under the circumstances presented here is a lawful arrest under subdivision 2 of section 836 of the Penal Code. It was so declared in *People v. Brown*, 45 Cal.2d 640, at page 643, 290 P.2d 528, at page 530, where it was held that "the legality of an arrest is not necessarily determinative of the lawfulness of a search incident thereto." This court further said: "Moreover, whether or not the arrest of a guilty defendant is lawful, it is clearly unreasonable if the officer has no 'reasonable cause' to believe the defendant guilty, and a search incident thereto can be no more reasonable than the arrest itself." 45 Cal.2d at page 644, 290 P.2d at page 530. Thus it appears that this court has made a distinction between a lawful arrest and a reasonable arrest. I had doubt concerning the validity of any such distinction, and it was for this reason that I

voted for a rehearing in *People v. Brown*, supra, 45 Cal.2d 640, 290 P.2d 528, and *People v. Simon*, 45 Cal.2d 645, 290 P.2d 531. I have concluded that the question of the lawfulness of the arrest is a material one in the determination of the present case and of other pending cases, and that it should be decided here.

Section 836 of the Penal Code provides: "A peace officer may * * * without a warrant, arrest a person:

"1. For a public offense committed or attempted in his presence.

"2. When a person arrested has committed a felony, although not in his presence.

"3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it.

"4. On a charge made, upon a reasonable cause, of the commission of a felony by the party arrested.

"5. At night, when there is reasonable cause to believe that he has committed a felony."

In my opinion, the arrest without a warrant in the present case was lawful under the above-quoted subdivision 2. An analysis of section 836 shows that there is a marked difference between the provisions of subdivision 2 and those of subdivisions 3, 4, and 5. The three last-mentioned subdivisions specify the circumstances under which "reasonable cause" is required in order to make lawful an arrest without a warrant, but subdivision 2 makes no mention of "reasonable cause" and makes lawful an arrest without a warrant "when a person arrested has committed a felony."

In determining the lawfulness of an arrest, all subdivisions of section 836 must be considered together, and subdivision 2 must be given its obvious meaning. If we depart from the clear language of that subdivision by engrafting thereon an additional requirement of "reasonable cause," we do violence to the terms of the subdivision and also render it meaningless and purposeless. The remaining subdivisions cover those lawful arrests which require "reasonable cause" and cover every arrest

which might be made under subdivision 2 if an arrest under subdivision 2 is held to be conditioned upon an unexpressed requirement of "reasonable cause." We cannot assume that the Legislature intended to enact a purposeless provision when it included subdivision 2 in that section, but that conclusion is inevitable if we fail to give effect to its plain and unambiguous terms. I therefore conclude that an arrest without a warrant is a lawful arrest if the person arrested has committed a felony, regardless of whether the arresting officer acted upon such prior knowledge as might be deemed to constitute "reasonable cause." Of course the arresting officer acts at his peril, *Hughes v. Orb*, 36 Cal.2d 854, 228 P.2d 550; *Coyne v. Nelson*, 107 Cal.App.2d 469, 237 P.2d 45, but there appears to be no sound reason for holding the arrest unlawful if the person arrested has in fact committed a felony. It further appears that the officer making such lawful arrest may do so by using such means as are sanctioned by section 844 of the Penal Code. *People v. Martin*, 45 Cal.2d 755, 290 P.2d 855.

The question remains as to whether the search and seizure here made was reasonable as an incident of a lawful arrest.

Since the adoption of the exclusionary rule, which declares inadmissible any evidence obtained through "unreasonable searches and seizures", *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905, 907; *People v. Berger*, 44 Cal.2d 459, 282 P.2d 509; *People v. Tarantino*, 45 Cal.2d 590, 290 P.2d 505, this court has been considering a series of cases presenting the question of whether searches under varying circumstances were reasonable or unreasonable. In deciding these cases, this court has been endeavoring to establish "workable rules governing searches and seizures" and is committed to the avoidance of "needless refinements and distinctions" and "needless limitations on the right to conduct reasonable searches and seizures." *People v. Cahan*, supra, 44 Cal.2d at pages 450-451, 282 P.2d at page 915. The unfinished task of establishing such rules is of the utmost importance, not only by reason of the relation of such rules to the application of the exclusionary rule but also because of their relation to actions

which may be brought against law enforcement officers, seeking to impose criminal and civil sanctions upon them for the making of searches which may be claimed to be unreasonable.

The inherent difficulty of establishing logical, workable, and understandable rules to supplement the exclusionary rule has been generally recognized. It seems clear, however, that in establishing these rules, we should endeavor to balance the interests of the individual with the interests of society; that we should not unduly hamper the legitimate efforts of those who are charged with the solution of the perplexing problems of law enforcement; and that we should not unnecessarily open unduly wide the avenues of escape for those who apparently have no regard for our laws except insofar as those laws may appear to provide a shield to protect them in their illegal operations. To this end we should not hold unreasonable those searches which may properly be held to be reasonable, and we should strive to formulate logical rules which will establish a consistent pattern to guide our law enforcement officers.

This court has already properly determined that a lawful arrest, accompanied by a search and seizure incident to such arrest, does not violate constitutional guarantees under certain circumstances regardless of the fact that no warrant of arrest or search warrant may have previously issued. *People v. Boyles*, 45 Cal.2d 652, 290 P.2d 535; *People v. Martin*, supra, 45 Cal.2d 755, 290 P.2d 855. As above indicated, however, this court has held that the reasonableness of the search incident to the arrest depends not only upon the lawfulness of the arrest, but also upon the reasonableness of the arrest. It is with this conclusion that I cannot agree, for if an arrest is lawful it does not appear appropriate to declare that such lawful arrest is unreasonable.

As was said in *State v. Williams*, Mo., 14 S.W.2d 434, at page 436, in affirming a judgment of conviction based upon evidence obtained through a search incident to an arrest without a warrant: "As applicable to this case it would not matter a particle, when the deputy sheriff made the arrest,

whether reasonable ground to believe a felony had been committed was presented to his mind or not; he is justified *because the reasonable ground existed*; the crime had in fact been committed. That is a complete justification. The arrest was therefore lawful."

If we are to formulate logical rules which will establish a consistent pattern, it appears to be illogical to hold reasonable the searches made as incidents of lawful arrests in some of the decided cases, and at the same time to hold unreasonable the search made as an incident of a lawful arrest in the present case, as well as the searches made as incidents of lawful arrests in the Brown and Simon cases. The adoption of the rules laid down by the majority opinion here and in the cited cases means that a search made as an incident of an arrest declared lawful by subdivisions 3, 4, or 5 of section 836, is reasonable, regardless of whether the person arrested has or has not committed a felony, provided that the arresting officer acts upon prior knowledge which may be subsequently held to fall within the nebulous realm of "reasonable cause," but that a search made as an incident of an arrest declared lawful by subdivision 2 of section 836 is unreasonable, regardless of the fact that the person arrested has actually committed a felony, unless the arresting officer acts upon prior knowledge which may be subsequently held to fall within that nebulous realm. In my opinion, rules which bring about this undesirable result are illogical, and they fail to establish any consistent pattern. The difficulty can be avoided if one logical, workable, and understandable rule is applied to all cases by holding that if the arrest is lawful, then the search made as an incident of the lawful arrest is a reasonable search, rather than an "unreasonable" search.

While it is recognized that the guilty as well as the innocent are entitled to the benefit of the constitutional guarantee against "unreasonable searches and seizures", *People v. Cahan*, supra; *People v. Berger*, supra; *People v. Tarantino*, supra, the cited cases did not present any question of the reasonableness of a search made as an incident of a lawful arrest. The claimed "unreasonable searches" or other invasions of the defendants' rights in those cases were made over a long period of time and without any direct connection with any arrest. Here the search was made as an incident of a lawful arrest, in the sense that it was made at the time and place of such lawful arrest; and in my opinion, it should be held to be reasonable under these circumstances.

By way of summary, I am of the opinion that the arrest in the present case was a lawful arrest under subdivision 2 of section 836 of the Penal Code, as it appears that the petitioner Badillo had committed and was committing a felony at the time of his arrest; that the search was an incident of his lawful arrest and was therefore reasonable, and not in violation of the constitutional guarantee against "unreasonable searches and seizures"; that the evidence obtained by such search was therefore properly admitted upon the preliminary hearing; and that petitioner's motion to set aside the information upon the ground that the evidence was obtained by an alleged "unreasonable" search and seizure was properly denied by the trial court.

I would therefore discharge the alternative writ of prohibition and deny the peremptory writ.

SHENK, J., concurs.

Rehearing denied; SHENK and SPENCE, JJ., dissenting.

46 Cal.2d 278

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Alfred Leonza BEARD, Defendant and
Appellant.

Cr. 5809.

Supreme Court of California.

In Bank.

Feb. 24, 1956.

Defendant was convicted in the Superior Court, Los Angeles County, Thomas L. Ambrose, J., of possessing marijuana and one prior misdemeanor conviction of the same offense, and he appealed from the judgment of conviction and from an order denying his motion for a new trial. The Supreme Court, Traynor, J., held that even though case had been tried prior to Supreme Court decision rendering illegally obtained evidence inadmissible, it would be presumed that arrest, in connection with which seizure of incriminating evidence had taken place, had been justified, where there was no evidence as to whether or not officers had had reasonable cause for making arrest.

Affirmed.

Carter, J., dissented.

Opinion 287 P.2d 830, vacated.

1. Criminal Law § 1144(1)

Even though case was tried prior to Supreme Court decision rendering illegally obtained evidence inadmissible, it would be presumed that arrest, in connection with which seizure of incriminating evidence had taken place, had been justified, where there was no evidence as to whether or not officers had had reasonable cause for making arrest.

2. Arrest § 68

It was not necessary that defendant, subsequently found guilty of possessing marijuana at time, have been informed of intention to arrest him, of cause of arrest, and authority to make it. West's Ann.Pen. Code, § 841.

3. Criminal Law § 911

Motion for new trial is addressed to sound discretion of trial court. West's Ann.Pen.Code, § 1181, subd. 8.

4. Criminal Law § 938(1)

Before trial court, in its discretion, may properly grant a new trial on ground of newly discovered evidence, it must appear (1) that evidence, and not merely its materiality, is newly discovered, (2) that evidence is not cumulative merely, (3) that evidence is such as to render different result probable on retrial of cause, (4) that party could not with reasonable diligence have discovered and produced it at trial, and (5) that these facts are shown by best evidence of which case admits. West's Ann.Pen.Code, § 1181, subd. 8.

5. Criminal Law § 939(2)

It was not an abuse of discretion to deny new trial, on ground of newly discovered evidence that marijuana which defendant had been found guilty of possessing had been "planted", where there was no showing as to why witnesses could not have been located and subpoenaed at time of trial. West's Ann.Pen.Code, § 1181, subd. 8.

Joseph H. Lewis and E. V. Cavanagh,
Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Marvin Gross and Joan D. Gross, Deputy Attys. Gen., for respondent.

TRAYNOR, Justice.

By information defendant was charged with one count of possessing marijuana, Health and Safety Code § 11500, and one prior misdemeanor conviction of the same offense. A jury trial was waived, and by stipulation the prosecution's case was submitted on the transcript of the preliminary hearing. Defendant testified in his own behalf. He was found guilty and sentenced to the state prison for the term prescribed by law. He appeals from the judgment and from the order denying his motion for a new trial.

Officer Buckner of the Los Angeles Police Department testified that shortly after

noon on September 17, 1954, he and another officer were driving north on Maple Avenue when they observed defendant and a friend of his named Fortier driving west on 29th Street. Defendant was driving. The officers overshot 29th Street, went around the block and came back on 29th Street approaching Maple Avenue from the west. They observed defendant's car parked ahead of them. Defendant and Fortier then started driving down the street toward the officers' car, and when they had gone about half a block, the officers stopped them, got them out of the car, and searched them and the car. A marijuana cigarette was found under the left-hand side of the front seat, and some brown cigarette paper was found in one of defendant's pockets. Defendant then accused the officers of "planting him." Officer Buckner also searched the area near the place where defendant's car had been parked, and inside a fence found six marijuana cigarettes wrapped in wax paper.¹

Defendant testified that he stopped for Fortier at his home about ten minutes before he was stopped by the officers. He stopped again at 29th and Maple so that Fortier could buy something at the corner, and defendant also got out of the car to fix his foot pedal. He did not see the officers find a cigarette in his car, and neither of them showed him the cigarette that Officer Buckner testified was found in the car, and he did not know that there was any marijuana cigarette in his car. He worked as a janitor and had left his car open on various occasions.

After he was found guilty, defendant secured new counsel and moved for a new trial on the ground of newly discovered evidence. Penal Code § 1181(8). He presented affidavits of Fortier and a person who lived near the scene of the arrest, and each affiant stated that he had observed the search of the car and that neither officer had found a marijuana cigarette in the car. He also filed an affidavit in his own behalf stating that he was personally unable to secure the evidence before the trial be-

cause he was in custody. His new counsel filed an affidavit stating that he had no knowledge as to why defendant's witnesses were not produced at his trial.

[1] Defendant contends that the officers did not have reasonable cause to believe that he had committed a felony and that therefore his arrest and the search of his automobile were illegal. This case was tried before the decision in *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905, no evidence was presented for the purpose of determining whether or not the officers had reasonable cause for making an arrest, and the record is completely silent on this question. In *People v. Farrara*, Cal.Sup., 294 P.2d 21, we held that under these circumstances it must be presumed that the arrest was justified.

[2] Defendant also contends, however, that the officers failed to comply with section 841 of the Penal Code and the arrest was therefore unlawful. That section provides: "The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it, except when the person to be arrested is actually engaged in the commission of or an attempt to commit an offense, or is pursued immediately after its commission, or after an escape." The record is not clear as to just what the officers said to defendant at the time of the arrest and search, and it may be conceded that there is some evidence that they did not expressly inform him "of the intention to arrest him, of the cause of the arrest, and the authority to make it." Since the trial court found, however, that defendant was arrested while engaged in the commission of the offense, there was no violation of section 841.

[3-5] Defendant contends that the trial court erred in denying his motion for a new trial on the ground of newly discovered evidence.

Penal Code section 1181 provides:

court stated that he did not consider the testimony of the officer concerning them in finding defendant guilty.

1. The committing magistrate refused to admit these cigarettes in evidence on the ground that they had not been sufficiently connected with defendant, and the trial

"When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial, in the following cases only:
* * *

"8. When new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial.
* * *"

In *People v. McGarry*, 42 Cal.2d 429, 432, 267 P.2d 254, it was pointed out that a motion for a new trial is addressed to the sound discretion of the trial court, and that "The elements of the standard by which a trial court in its discretion may properly grant a new trial on the ground of newly discovered evidence are set forth in *People v. Sutton*, 73 Cal. 243, 15 P. 86. At page 247, of 73 Cal., at page 88 of 15 P. it is stated that 'it must appear—"First, that the evidence, and not merely its materiality, be newly discovered; second, that the evidence is not cumulative merely; third, that it be such as to render a different result probable on retrial of the cause; fourth, that the party could not with reasonable diligence have discovered and produced it at the trial; and, that these facts be shown by the best evidence of which the case admits." 1 Hayne, *New Trial & App.* § 83.' More recent cases have turned on a lack of one or more of the foregoing requirements, but the overall rules have withstood the test of time and properly state the existing law. See *People v. Richard*, 101 Cal.App.2d 631, 635-636, 225 P.2d 938." 42 Cal.2d at page 433, 267 P.2d at page 256.

In the light of the foregoing rules it cannot be said that the trial court abused its discretion in this case. Thus, Fortier was present in defendant's car at the time of the arrest and search and was also charged with a violation of Health and Safety Code section 11500, which charge was dismissed at the preliminary hearing. Obviously defendant was aware that Fortier was a potential witness, and it is not claimed that his former attorney could not have had him subpoenaed had his testimony been wanted at the trial. Similarly there is no showing as to why the other

witness could not be located and subpoenaed. She lived near the scene of the arrest, and the trial court could reasonably infer from the fact that she was close enough to observe the search, that defendant was aware of her presence at the time. Although, while he was in custody, defendant could not personally locate this witness, there is no showing why the same investigation made to locate her after the trial would not have succeeded had reasonable diligence been used earlier. Moreover, although defendant now contends that he should not be penalized for any lack of diligence on the part of his former attorney, neither his nor his present attorney's affidavit states facts indicating that the failure to obtain the evidence now presented was owing to any lack of diligence of the former attorney. Defendant does not state that he informed his former attorney that bystanders witnessed the search, that he requested that she attempt to locate such witnesses, or that she refused to make any attempt to secure witnesses in his behalf. Under these circumstances the trial court could reasonably conclude that defendant had not shown that the decision to rely solely on his own testimony was other than his own, or that the evidence now presented was evidence "which he could not, with reasonable diligence, have discovered and produced at the trial." Pen.Code § 1181(8).

The judgment and order are affirmed.

GIBSON, C. J., and SCHAUER, SPENCE and McCOMB, JJ., concur.

SHENK, J., concurs in the judgment.

CARTER, Justice.

I dissent.

Since the facts of this case with respect to the reasonableness of the search are quite similar to those in the case of *People v. Martin*, Cal.Sup., 293 P.2d 52, I refer to my dissent in that case as an expression of my views on the law applicable to the case at bar.

There is another reason why I would reverse the judgment in the case at bar which is not mentioned in my dissent in the Mar-

tin case, *supra*. As pointed out in the majority opinion in the case at bar, this case was tried before the decision of this court in *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905, and therefore the trial court did not have before it or take into consideration the rule announced in the *Cahan* case with respect to the admissibility of illegally obtained evidence. Neither did the trial court have occasion to pass upon the reasonableness of the search and seizure as this factor was not considered material under the rule and practice which existed prior to the decision of this court in the *Cahan* case. For this reason we do not have the benefit of the finding of the trial court on the question of whether or not the officers who conducted the search here had reasonable cause to believe that defendant had committed a felony or was engaged in the commission of a felony at the time of the search. While it is my opinion, that on the record before us, no reasonable cause is shown for the search of the defendant, and it must therefore be declared to be an illegal search, it may be that if the case against the defendant was being prosecuted in the light of what was said by this court in the *Cahan* case and cases which have followed that case, the prosecution would no doubt offer any evidence available for the purpose of showing the reasonableness of the search and the trial court would necessarily make a finding on this issue in ruling on the admissibility of the evidence obtained as the result of the search. If there was a conflict in the evidence on this issue, we would be bound by the finding of the trial court the same as we should be bound by such a finding in any other case.

I can see no justification whatsoever for the holding of the majority in this case that the evidence as a matter of law shows that the officers had reasonable grounds to believe that defendant had committed or was engaged in the commission of a felony at the time they made the search and seizure here involved, but on the contrary it appears from the face of the record that the only conclusion that can be drawn is that the officers had no cause whatever to believe defendant had committed or was engaged in the commission of a felony and

therefore the search and seizure was illegal and the evidence obtained thereby should be held inadmissible under the rule in the *Cahan* case.

I would therefore reverse the judgment and remand the case for a new trial so that the trial court would have an opportunity to pass upon the reasonableness of the search in view of evidence which might then be presented in the light of the decision of this court in the *Cahan* case and other cases involving this same subject matter since the decision of this court in the *Cahan* case.



46 Cal.2d 284

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Anthony CITRINO, Defendant and
Appellant.

Cr. 5779.

Supreme Court of California,
In Bank.

Feb. 24, 1956.

Defendant was convicted in the Superior Court, City and County of San Francisco, Eustace Cullinan, Jr., J., of second degree burglary, and he appealed. The Supreme Court, Traynor, J., held that even though case had been tried before Supreme Court decision rendering inadmissible illegally obtained evidence, Supreme Court would have to assume, in absence of any evidence showing illegality of search which produced incriminating evidence, that officers had regularly and lawfully performed their duties.

Affirmed.

I. Criminal Law ⇨1036(1)

Where case had been tried prior to Supreme Court decision rendering inadmissible illegally obtained evidence, defendant was not precluded from raising, on appeal,

question as to whether illegally obtained evidence had been admitted against him, even though he had not objected to admissibility of evidence at trial.

2. Criminal Law  1144(1)

Even though case had been tried before Supreme Court decision rendering inadmissible illegally obtained evidence, Supreme Court would have to assume, in absence of any evidence showing illegality of search producing incriminating evidence, that officers had regularly and lawfully performed their duties. West's Ann.Code Civ. Proc.   1963, subs. 1, 15, 33.

3. Criminal Law  1169(1)

Where officers could have testified to presence of contract without removing it from house and thus have shown defendant's ownership of automobile, defendant was not prejudiced by admission into evidence of contract, allegedly seized by officers acting in excess of any authority given them by search warrant. West's Ann.Pen.Code,   1524.

4. Criminal Law  369(2)

Except when it shows merely criminal disposition, evidence, which tends, logically and by reasonable inference, to establish any fact material for prosecution or to overcome any material fact sought to be proved by defense, is admissible, even though it may connect accused with an offense not included in charge.

5. Criminal Law  369(2)

In prosecution for burglary involving theft of tools and other garage equipment, defendant's possession of stolen tools was material fact, and evidence that some of tools had been found early in morning in liquor store under circumstances indicating that they had been recently abandoned, coupled with fact that defendant's recently driven automobile had been parked nearby, was circumstantial evidence that defendant had been in possession of tools, and there was no error in admitting such evidence.

6. Burglary  42(3)

Possession alone of property stolen in burglary is not of itself sufficient to sustain possessor's conviction of that burglary, it being essential that there be corroborating

evidence of acts, conduct, or declarations of accused tending to show his guilt; but when possession is shown, corroborating evidence may be slight, and failure to show that possession was honestly obtained is itself a strong circumstance tending to show possessor's guilt of burglary.

7. Burglary  41(1)

Second degree burglary conviction was sustained by evidence.

8. Criminal Law  338(2)

When defendant takes stand and makes general denial of crime with which he is charged, prosecution can show circumstances that tend to connect him with it. West's Ann.Pen.Code,   1323.

9. Criminal Law  730(7)

In burglary prosecution, district attorney's statement, in argument, to effect that 22 year old defendant had devoted latter part of his years to life of crime was not supported by evidence, and was therefore improper, but would not require reversal where jury had been immediately instructed to disregard it and it could not be said, in light of whole record, that it had affected their verdict.

Anthony Citrino, in pro. per., and Robert E. Tarbox, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., and Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

TRAYNOR, Justice.

Defendant appeals from a judgment of conviction entered on a jury verdict finding him guilty of two counts of second degree burglary.

During the evening of June 3, 1954, or the early morning of June 4th, the premises of William and Frederick Motors in San Francisco were burglarized. An automobile, various items of garage equipment, a battery, and tools were taken. During the evening of June 5, 1954, or the early morning of June 6th, the premises of Pacific Nash Motor Sales were burglarized. An automobile and a safe containing the company's records and automobile ownership

certificates were taken. A few days later defendant sold to Ralph Astengo, a service station operator, some of the tools and equipment belonging to William and Frederick Motors and their employees. The sale price of \$25 was much below the market value of the items sold. Defendant told Astengo that the tools and equipment were his and that "[he] got them from his father. * * *" Astengo requested and received a bill of sale from defendant, who signed it with the name "Anthony Colla." He returned in about five minutes and changed the signature to "Anthony Cotelli." At the trial, however, defendant testified that an acquaintance named Gino Cotelli gave him the tools and equipment and that he did not know where Cotelli was. When arrested he was asked if he had sold property under the alias of Cotelli and he refused to answer. He admitted that he had lived at 345 Second Avenue in San Francisco under the name of Anthony Colla. He testified that he shared this house with Bill Bragg and Gino Cotelli, and that the three of them moved out of the house on June 17th because an informant told him that Inspector Keating of the San Francisco Police Department was looking for him and Bragg. Before defendant's arrest, Inspector Keating and other officers searched the premises and defendant's automobile, which was parked nearby. They found property taken in both burglaries in the garage and on the back porch and in the basement of the house. On a mantelpiece, together with some of defendant's personal papers, they found a number of the stolen ownership certificates. On July 9th, tools stolen from William and Frederick Motors were found in a liquor store in Oakland, following a burglary thereof. An automobile purchased by defendant under the name of Robert Jennings was parked in a service station adjacent to the liquor store. The motor and hood were warm. Defendant testified that he gave the car to Bragg on about July 6th, that he did not commit the burglaries, that the property found by the officers at 345 Second Avenue was put there by Cotelli, and that he did not know how the ownership certificates got onto the mantelpiece.

[1-3] He contends that illegally obtained evidence was admitted against him. Since this case was tried before our decision in *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905, he is not precluded from raising this question now although he did not object to the admissibility of the evidence at the trial. *People v. Kitchens*, Cal.Sup., 294 P.2d 17. The record, however, is silent as to whether the officers had a search warrant, and in the absence of any evidence showing the illegality of the search, we must presume that the officers regularly and lawfully performed their duties. *People v. Farrara*, Cal.Sup., 294 P.2d 21; Code Civ.Proc. § 1963(1, 15, 33); *People v. Serrano*, 123 Cal.App. 339, 341, 11 P.2d 81; see also, *Vaughn v. Jonas*, 31 Cal.2d 586, 601, 191 P.2d 432. Defendant argues that even if the officers had a search warrant they exceeded any authority it might give them (see Penal Code, § 1524) when they took a conditional sales contract showing his purchase of the automobile found near the liquor store in Oakland. Since the officers could have testified to the presence of the contract without removing it from the house and thus have shown his ownership of the automobile, he was not prejudiced by the admission into evidence of the contract itself. Cf. *People v. Boyles*, 45 Cal.2d 652, 290 P.2d 535.

[4, 5] Defendant contends that the evidence of the commission of another crime, the burglary of the Oakland liquor store, was erroneously admitted. It is now "settled in this state that except when it shows merely criminal disposition, evidence which tends logically and by reasonable inference to establish any fact material for the prosecution, or to overcome any material fact sought to be proved by the defense, is admissible although it may connect the accused with an offense not included in the charge." *People v. Woods*, 35 Cal.2d 504, 509, 218 P.2d 981, 984. Defendant's possession of the stolen tools was a material fact, and the evidence that some of the tools were found early in the morning in a store under circumstances indicating that they had been recently abandoned coupled with the fact that defendant's recently driven automobile was parked nearby was cir-

cumstantial evidence that defendant had been in possession of the tools.

[6, 7] Defendant's main contention is that the evidence is insufficient to support the verdict. He argues that there is nothing in the record to connect him with the burglaries other than the evidence of his sale of some of the stolen property to Astengo. Possession alone of property stolen in a burglary is not of itself sufficient to sustain the possessor's conviction of that burglary. There must be corroborating evidence of acts, conduct, or declarations of the accused tending to show his guilt. *People v. Boxer*, 137 Cal. 562, 563-564, 70 P. 671; *People v. Carroll*, 79 Cal.App.2d 146, 148, 179 P.2d 75. When possession is shown, however, the corroborating evidence may be slight, *People v. Morris*, 124 Cal. App. 402, 404, 12 P.2d 679; *People v. Taylor*, 4 Cal.App.2d 214, 217, 40 P.2d 870; *People v. Russell*, 34 Cal.App.2d 665, 669, 94 P.2d 400; *People v. Thompson*, 120 Cal. App.2d 359, 363, 260 P.2d 1019, and the failure to show that possession was honestly obtained is itself a strong circumstance tending to show the possessor's guilt of the burglary. *People v. Lang*, 142 Cal. 482, 484-485, 76 P. 232; *People v. Taylor*, supra, 4 Cal.App.2d 214, 217, 40 P.2d 870. Defendant's explanation that Cotelli gave him the property was not contradicted by any witness, but in view of defendant's own use of that name and the fact that he did not know where Cotelli was at the time of the trial, the jury could reasonably conclude that Cotelli and his gift were both fictitious. *People v. Buratti*, 96 Cal.App.2d 417, 418-419, 215 P.2d 500. Other corroborative evidence was his false statement to Astengo that he received the property from his father, see, *People v. Conrad*, 125 Cal.App.2d 184, 185, 270 P.2d 31; *People v. Goodall*, 104 Cal.App.2d 242, 247, 231 P.2d 119; *People v. Mercer*, 103 Cal.App.2d 782, 789, 230 P.2d 4; *People v. Buratti*, supra, 96 Cal. App.2d 417, 419, 215 P.2d 500; *People v. Russell*, supra, 34 Cal.App.2d 665, 669, 94 P.2d 400, his selling tools and equipment worth more than \$150 for \$25, see, *People v. Buratti*, supra, 96 Cal.App.2d at page 419, 215 P.2d at page 501, his using the aliases "Anthony Colla" and "Anthony Cotelli" in

making the sale, see *People v. Buratti*, supra, 96 Cal.App.2d at page 419, 215 P.2d at page 501; *People v. Morris*, supra, 124 Cal.App. 402, 404, 12 P.2d 679, and his testimony that he and the others moved out of the house on Second Avenue because an informant told him that Inspector Keating was looking for him and that he bought the automobile found in Oakland under the name of Robert Jennings because the Inspector was looking for him under the name of Anthony Colla.

[8] Defendant also contends that the trial court erroneously permitted the district attorney to question him beyond the proper limits of cross-examination. Penal Code, § 1323. On direct examination defendant denied any participation in the two burglaries charged. On cross-examination he was asked how his automobile got to Oakland and whether he had been in the vicinity at the time it was found. The questions were proper, for when a defendant takes the stand and makes a general denial of the crime with which he is charged, the prosecution can show circumstances that tend to connect him with it. *People v. Zerillo*, 36 Cal.2d 222, 227-229, 223 P.2d 223. Questions relating to defendant's use of false addresses in purchasing the automobile were improper, but he could not have been prejudiced by them, since his use of a false name at the same time had already properly been shown.

[9] Defendant contends that the district attorney was guilty of prejudicial misconduct in making an offer of proof and in his argument to the jury. In attempting to determine defendant's reason for flight when he heard that Inspector Keating was looking for him, the district attorney asked defendant why he abandoned an automobile at the Second Avenue residence. Upon defendant's objection and the court's observation that the examination was somewhat afiel, the district attorney stated, "Well, your Honor, the car was seen at Second Avenue. The man was carefully avoiding that address after the burglary." The observation that defendant was "carefully avoiding that address" was a reasonable inference from defendant's own testimony that he left because the police were looking

for him, and even if the statement that "the car was seen at Second Avenue" was "somewhat afieid," it would not justify a reversal. The district attorney's statement in his argument to the jury, "Here you have a man at the age of 22 who has devoted the latter part of his years to a life of crime" was not supported by the evidence and was therefore improper. The jury, however, was immediately instructed to disregard it, and in the light of the whole record we do not believe that it affected their verdict.

The judgment is affirmed.

GIBSON, C. J., and SCHAUER, SPENCE and McCOMB, JJ., concur.

SHENK, J., concurs in the judgment.

CARTER, Justice.

I concur in the judgment of affirmance but I do not agree with what is said in the majority opinion with respect to the rule announced in *People v. Woods*, 35 Cal.2d 504, 218 P.2d 981, in which case I dissented. I do not believe that the facts in the *Woods* case are analogous to the facts in the case at bar or that it is necessary to rely on the *Woods* case as authority for the conclusion reached in the case at bar.



46 Cal.2d 291

Mona Floy WILLSON, Petitioner,

v.

The SUPERIOR COURT of the State of California, IN AND FOR the COUNTY OF SAN DIEGO, Respondent.

L. A. 23924.

Supreme Court of California,

In Bank.

Feb. 24, 1956;

Petitioner sought a writ of prohibition to prevent further criminal proceedings against her. The Supreme Court, Traynor, J., held that conduct of petitioner, who was observed standing by scratch pad with pen-

cil and slips of paper in her hand and near telephone in bar where anonymous informer had said she would be, had been sufficient to justify officer's reliance on information given by anonymous informer relative to defendant's alleged bookmaking activities, and officer had had reasonable cause to arrest defendant, and search her in connection therewith.

Alternative writ discharged and peremptory writ denied.

Carter, J., dissented.

1. Arrest ⇨68

Where accused was taken into custody, by person she realized was police officer, while apparently engaged in commission of an offense, it was immaterial that she was not expressly informed of officer's authority and purpose. West's Ann.Pen.Code, §§ 835, 841.

2. Arrest ⇨71

If, before search and seizure, officer was justified in making arrest, it was immaterial that search and seizure preceded rather than followed the arrest. West's Ann.Pen.Code, §§ 835, 841.

3. Arrest ⇨63(4)

Reasonable cause to justify arrest may consist of information obtained from others, and is not limited to evidence that would be admissible at trial on issue of guilt. West's Ann.Pen.Code, § 836, subd. 3.

4. Arrest ⇨63(4)

In absence of some pressing emergency, an arrest may not be based solely on information provided by an anonymous informer; but such information is relevant on issue of reasonable cause to justify arrest. West's Ann.Pen.Code, § 836, subd. 3.

5. Arrest ⇨63(4)

To support finding that there was reasonable cause to justify an arrest, evidence must be presented to court that would justify conclusion that police officer's reliance on information provided by an anonymous informer was reasonable; but in some cases identity of, or past experience with, informer may provide such evidence, and in others it may be supplied by similar information

from other sources or by personal observations of police.

6. Arrest $\Rightarrow$ 63(4), 71

Conduct of accused, who was observed standing by scratch pad with pencil and slips of paper in her hand and near telephone in bar where anonymous informer had said she would be, was sufficient to justify officer's reliance on information given by anonymous informer relative to defendant's alleged bookmaking activities, and officer had reasonable cause to arrest defendant and search her in connection therewith. West's Ann.Pen.Code, § 337a.

Edgar B. Hervey and James Edgar Hervey, San Diego, for appellant.

James Don Keller, Dist. Atty., and Luther L. Leeger, Deputy Dist. Atty., San Diego, for respondent.

TRAYNOR, Justice.

By information petitioner Mona Willson was charged with one count of occupying premises for the purpose of horse-race bookmaking and one count of recording a bet on a horse race. Penal Code § 337a (2, 4). Her motion to set aside the information on the ground that there is no reasonable or probable cause to believe she committed the offenses charged was denied, see Penal Code § 995, and she now seeks prohibition to prevent further proceedings against her. See Penal Code § 999a.

Petitioner contends that her commitment was based entirely on incompetent evidence and that the peremptory writ should therefore issue. See *Rogers v. Superior Court*, 46 Cal.2d 3, 291 P.2d 929.

At the preliminary hearing, San Diego Chief of Police Adam Jansen testified that on May 25 or 26, 1955, a man stopped him in the hallway of the police station. The man appeared to know Chief Jansen, but Chief Jansen did not know him and did not find out who he was or where he lived. The man told him that "there was a considerably large book making operation in progress in the Monte Carlo bar. * * * He said he had been in the place; that he had observed it, and he described what the operation

was." Part of the information given concerned a waitress named Mona. The man said that she would generally be found near the telephone, that she occasionally answered it, and that she took bets from customers in the place. "He said that the girl Mona used food checks, restaurant checks. I gathered it was the customary tab that the waitress would make out when you were served food from the way he described it. She wrote the wagers on these slips, and that she had two pockets in her—he didn't say uniform, he said she had two pockets, one, I don't know which one, one contained money and the other one contained betting slips. * * *" Chief Jansen also testified that he later secured other information indicating that bookmaking activities were going on at the Monte Carlo bar, but the record does not indicate what the source of this information was.

The substance of the information stated above was communicated to other police officers including Officer Marilyn Sunday, who, in the company of three other officers, went to the Monte Carlo bar during the afternoon of June 10th. The purpose of the visit was to secure evidence of bookmaking, and if such evidence was found, to make arrests. On entering the bar, Officer Sunday observed petitioner standing at the far end of the bar. She was wearing a belt with a metal plate that had the name "Mona" written on it. Officer Sunday testified that "She was standing facing the bar, and I approached her at that point. When I came up to [petitioner], I observed on the bar a telephone, a small scratch pad and a pencil. I stated to her—I noticed first that she had something in her hand, appeared to be papers. I asked her if I may see what was in her hand. And as I said that, these papers that were in her hand, she attempted to crumple them, and extended her hand to the back and to the side of her." Officer Sunday took the papers from her hand and then searched petitioner's pockets. Three slips of paper were taken from petitioner's hand and another from her left pocket, and approximately \$270 in cash was found in her other pocket. Officer Sunday then asked petitioner to come with her, and she and another officer took petitioner to the police

station. The officers were not in uniform and did not identify themselves as such or inform petitioner expressly that she was being arrested, and they did not have a search warrant or a warrant for petitioner's arrest. There was evidence that the slips were registered bets on horses running in races on the day that they were seized.

[1,2] Section 835 of the Penal Code provides that "An arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of an officer. The defendant must not be subjected to any more restraint than is necessary for his arrest and detention." Section 841 provides that "The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it, except when the person to be arrested is actually engaged in the commission of or an attempt to commit an offense, or is pursued immediately after its commission, or after an escape." Since petitioner was taken into custody while apparently engaged in the commission of an offense, there is evidence that the requirements of these sections were met. Moreover, since petitioner was arrested in a public bar, but made no outcry or objection, it may be inferred that she realized that Officer Sunday was a police officer and that her purpose was to make an arrest. Under these circumstances it is immaterial that petitioner was not expressly informed of Officer Sunday's authority and purpose. See, *People v. Martin*, 45 Cal.2d 755, 290 P.2d 855, and cases cited. Furthermore, if before the search and seizure, Officer Sunday was justified in making an arrest, it is also immaterial that the search and seizure preceded rather than followed the arrest. *People v. Simon*, 45 Cal.2d 645, 290 P.2d 531.

Defendant contends, however, that before the search and the arrest, Officer Sunday had no reasonable cause to believe she had

committed or was committing a felony, Penal Code § 836(3), and that the search and seizure were therefore unlawful. See, *People v. Brown*, 45 Cal.2d 640, 290 P.2d 528; *People v. Simon*, supra, 45 Cal.2d 645, 290 P.2d 531; *People v. Boyles*, 45 Cal.2d 652, 290 P.2d 535.

[3-6] In *People v. Boyles*, 45 Cal.2d 652, 656, 290 P.2d 535, 537, we held that "reasonable cause to justify an arrest may consist of information obtained from others and is not limited to evidence that would be admissible at the trial on the issue of guilt." Accordingly, the question presented is whether the information given by the unidentified man to the Chief of Police and passed on to Officer Sunday was sufficient in the light of the other evidence to constitute reasonable cause to believe that defendant was guilty of a felony. Although information provided by an anonymous informer is relevant on the issue of reasonable cause, in the absence of some pressing emergency, see *People v. Kilvington*, 104 Cal. 86, 92-93, 37 P. 799, an arrest may not be based solely on such information, *United States v. Kind*, 2 Cir., 87 F.2d 315, 316; *United States v. Blich*, D.C., 45 F.2d 627, 629; *United States v. Keown*, D.C., 19 F.Supp. 639, 646; *State v. Arregui*, 44 Idaho 43, 254 P. 788, 793-794, 52 A.L.R. 463; *Hill v. State*, 151 Miss. 518, 118 So. 539, 539-540; *Smith v. State*, 169 Tenn. 633, 90 S.W.2d 523, 524, and evidence must be presented to the court that would justify the conclusion that reliance on the information was reasonable. See, *People v. Boyles*, supra, 45 Cal.2d 652, 290 P.2d 535. In some cases the identity of, or past experience with, the informer may provide such evidence, see, *Aitken v. White*, 93 Cal. App.2d 134, 145, 208 P.2d 788,¹ and in others it may be supplied by similar information from other sources or by the personal observations of the police. In the present case the identity of the informer was unknown, the San Diego police had had no

1. Since in the present case Chief Jansen did not know the identity of the informer, no question is presented as to when, if ever, a claim of privilege not to reveal the identity of an informer may defeat the right to rely on his information in making an arrest or search. See, *Scher*

v. United States, 305 U.S. 251, 253-254, 59 S.Ct. 174, 83 L.Ed. 151; *United States v. One 1941 Oldsmobile Sedan*, 10 Cir., 158 F.2d 818, 820; *Hill v. State*, supra, 151 Miss. 518, 118 So. 539, 539-540; *Smith v. State*, supra, 169 Tenn. 633, 90 S.W.2d 523, 524.

previous experience with him indicating that his information was reliable, and the source and character of the other information with respect to bookmaking at the Monte Carlo bar was not sufficiently revealed to permit its evaluation. We must consider, therefore, whether the evidence observed by Officer Sunday in the bar before the search was sufficient to justify her reliance on the information that she had received.

Petitioner was found in the bar near the telephone where the informer had stated she would generally be. Since such innocent conduct could be known, however, to anyone who frequented the bar, it is doubtful whether its verification alone would justify reasonable reliance on the additional information charging petitioner with bookmaking. In addition, however, Officer Sunday observed petitioner standing by a scratch pad and a pencil with slips of paper in her hand. Contrary to Chief Jansen's assumption, the pad was not a pad of ordinary printed checks given to customers, but was a pad of plain scratch paper, and although such a pad would be commonplace equipment in an office, see *People v. Sanders*, Cal. Sup., 294 P.2d 10, it is not ordinarily part of the equipment of a bar. Moreover, when Officer Sunday asked to see what was in petitioner's hand, she attempted to conceal and dispose of it. Although petitioner's conduct observed by Officer Sunday in the bar would not of itself constitute reasonable cause to believe she was committing a felony, it was sufficient to justify Officer Sunday's reliance on the information given her of petitioner's bookmaking. Under these circumstances the evidence before the magistrate was sufficient to justify the conclusion that a violation of Penal Code section 337a had been committed, that Officer Sunday had reasonable cause before the search and seizure to believe that petitioner was guilty thereof, and that therefore the search, seizure, and arrest were lawful. See, *Husty v. United States*, 282 U.S. 694, 701, 51 S.Ct. 240, 75 L.Ed. 629; *United States v. One 1941 Oldsmobile Sedan*, 10 Cir., 158 F.2d 818, 820; *Wisniewski v. United States*, 6 Cir., 47 F.2d 825, 826; *Hawthorne v. State*, 110 Tex.Cr.R. 646, 10 S.W.2d 724, 725.

The alternative writ of prohibition is discharged and the peremptory writ is denied.

GIBSON, C. J., and SCHAUER and McCOMB, JJ., concur.

SHENK and SPENCE, JJ., concur in the judgment.

CARTER, Justice.

I dissent.

For the reasons stated in my dissenting opinion in *People v. Martin*, Cal.Sup., 293 P.2d 52, I am of the opinion that the search and seizure in the case at bar was unreasonable and therefore illegal and that the evidence obtained thereby was inadmissible. Since the evidence so obtained was the only evidence which tended to support the charge against petitioner, it should follow that there was no reasonable or probable cause to believe that she had committed the offenses charged in the information and a writ of prohibition should issue to prevent further proceedings against her.



46 Cal.2d 297

The PEOPLE of the State of California,
Plaintiff and Appellant,
v.

Frederick Edward RIOS, Defendant and
Respondent.

Cr. 5786.

Supreme Court of California,
In Bank.

Feb. 24, 1956.

Defendant was charged with possessing marijuana. The Superior Court, Los Angeles County, David Coleman, J., granted defendant's motion to set the information aside on the ground that all of the evidence of the crime other than admissions had been obtained by an illegal search of his person in violation of his constitutional rights, and the People appealed. The Supreme Court,

Traynor, J., held that officer who observed defendant sitting behind wheel of automobile parked across sidewalk and who, upon approaching automobile, recognized defendant as person he had previously arrested on narcotics charge and observed marks on defendant's right arm resembling marks made by hypodermic needle, had lawfully made arrest without warrant when defendant admitted to officer that he had taken injection of heroin two weeks before.

Reversed.

Carter, J., dissented.

1. Arrest ⇨63(4)

Officer, who observed defendant sitting behind wheel of automobile parked across sidewalk and who, upon approaching automobile, recognized defendant as person he had previously arrested on narcotics charge and observed marks on defendant's right arm resembling marks made by hypodermic needle, lawfully made arrest without warrant when defendant admitted to officer that he had taken injection of heroin two weeks before. West's Ann.Pen.Code, § 836, subd. 3.

2. Arrest ⇨62

Validity of an arrest does not depend on whether defendant may in fact be found guilty of offense for which he is arrested.

3. Arrest ⇨63(4)

In determining validity of arrest, court is not limited to consideration of evidence that would be admissible at trial on issue of guilt.

4. Arrest ⇨68

Evidence would sustain finding that officer arresting defendant for possession of narcotics had substantially complied with Penal Code section requiring that defendant be informed of arresting officer's intention to arrest him, of cause of arrest, and authority to make it. West's Ann.Health & Safety Code, § 11500; West's Ann.Pen.Code, § 841.

5. Criminal Law ⇨234

Where evidence at preliminary hearing justified magistrate's conclusion that defendant's arrest had been lawful, magistrate

properly relied on evidence procured by search of defendant's person incident to that arrest to establish probable cause to believe defendant guilty of offense charged.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty., Jere J. Sullivan, Lewis Watnick and Fred N. Whichello, Deputy Dist. Attys., Los Angeles, for appellant.

Charles Chorna, Los Angeles, for respondent.

TRAYNOR, Justice.

By information defendant was charged with one count of possessing marijuana in violation of Health and Safety Code section 11500, a felony, and one prior conviction of violating the same section. His motion to set the information aside, see Penal Code § 995, was granted on the ground that all of the evidence of the crime other than admissions was obtained by an illegal search of his person in violation of his constitutional rights. The People appeal.

At the preliminary hearing Deputy Sheriff Henry of Los Angeles County testified that on May 27, 1955, he observed defendant sitting behind the wheel of an automobile parked across the sidewalk and obstructing pedestrian traffic. On approaching the car, Henry recognized defendant as a person he had arrested on March 17, 1955, on a narcotics charge. He spoke to defendant, who was wearing a short-sleeved shirt, and observed marks on his right arm that resembled the marks made by a hypodermic needle. He asked defendant if he was still using narcotics, and defendant stated that he had had his last "fix" or injection of heroin approximately two weeks ago. Defendant then stated that "I guess I have had it," and Henry replied, "Yes, you are busted now." Henry then made a routine search for weapons and found a marijuana cigarette in defendant's right front trousers pocket. Defendant thereafter told Henry that he was using marijuana "to kick the heroin addiction."

[1-3] Section 836, subdivision 3, of the Penal Code provides that an officer may

make an arrest without a warrant "When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it." The foregoing testimony of Deputy Sheriff Henry was sufficient to justify the magistrate in concluding that the defendant's arrest was lawful under this subdivision. From defendant's admission that he had taken an injection of heroin two weeks before it could be inferred that he had possessed heroin in violation of Health and Safety Code section 11500. Moreover, since the validity of an arrest does not depend on whether the defendant may in fact be found guilty of the offense for which he is arrested, *Coverstone v. Davies*, 38 Cal.2d 315, 319, 239 P.2d 876, and since in determining its validity the court is not limited to a consideration of evidence that would be admissible at the trial on the issue of guilt, *People v. Boyles*, 45 Cal.2d 652, 290 P.2d 535; *People v. Gorg*, 45 Cal.2d 776, 291 P.2d 469, it is immaterial that defendant could not be convicted of possessing heroin without independent proof of the corpus delicti.

[4] Section 841 of the Penal Code provides that "The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it, except when the person to be arrested is actually engaged in the commission of or an attempt to commit an offense, or is pursued immediately after its commission, or after an escape." The magistrate was justified in concluding that this section was substantially complied with in this case. Defendant knew that Henry was an officer, and there is evidence that the expression "busted" is commonly used to indicate an arrest. Moreover, since defendant had just admitted the commission of an offense, the cause of the arrest was reasonably apparent. See, *People v. Martin*, 45 Cal.2d 755, 290 P.2d 855; *Willson v. Superior Court*, Cal. Sup., 294 P.2d 36.

[5] Since the evidence justified the magistrate's conclusion that defendant's arrest was lawful, he properly relied on evidence secured by the search of defendant's person incident to that arrest to establish

probable cause to believe defendant guilty of the offense charged.

The order is reversed.

GIBSON, C. J., and SCHAUER, SPENCE and McCOMB, JJ., concur.

SHENK, J., concurs in the judgment.

CARTER, Justice.

I dissent.

For the reasons stated in my dissenting opinion in *People v. Martin*, Cal.Sup., 293 P.2d 52, and *People v. Beard*, Cal.Sup., 294 P.2d 29, I would affirm the order in the case at bar.



139 Cal.App.2d 734

Sam A. SAMPSON, Plaintiff and
Respondent,

v.

S. M. TANGYE et al., Defendants.

Harry Stoner, Defendant and Appellant.
Civ. 21440.

District Court of Appeal, Second District,
Division 1, California.

March 7, 1956.

Action for a declaratory relief and possession of wind machines sold under a conditional sales contract. Judgment for plaintiff in the Superior Court of Los Angeles County, Kurtz Kauffman, J., and defendant appeals. The District Court of Appeal, Doran, J., held that the wind machines still retained their character as personalty notwithstanding attachment to the realty and did not pass to the party foreclosing a trust deed covering the realty upon which the machines had been placed.

Judgment affirmed.

I. Appeal and Error — 1010(1)

Where the findings of the trial court are amply sustained by substantial evidence

and the stipulation of facts and no reversible error is shown, an affirmance is required.

2. Fixtures Ⓒ4

Intent of the parties is usually the controlling factor in ascertaining the nature of personalty which has been attached to realty.

3. Fixtures Ⓒ20

Under terms of conditional sales contract under which wind machines were sold, and other circumstances, machines did not lose their character of personalty, by being fastened to a concrete base so as to entitle party foreclosing a trust deed covering the realty to possession of the machines which had been placed on the realty by the conditional seller.

4. Fixtures Ⓒ20

Where wind machines were sold under conditional sales contract and had not lost their character as personalty by attachment to the real estate and trust deed on the realty was foreclosed, owner of the realty had not lost all interest in the wind machines, and could take an assignment of rights of the seller under the conditional sales contract for the machines.

Will H. Winston, Long Beach, and Orly O. Davis, Visalia, for appellant.

J. F. Marshall, Long Beach, for respondent.

DORAN, Justice.

The plaintiff herein, owner of certain real property in Tulare County, on July 30, 1951, purchased on conditional sale contract, four wind machines, three of which are involved in the present controversy. These wind machines, designed for the purpose of preventing frost damage to citrus fruits, were installed by the seller, National Frost Protection Company, on plaintiff's real estate, and were securely fastened to a concrete base by bolts embedded therein.

Several months thereafter, namely, on February 28, 1952, plaintiff sold the real property to defendant Tangye, who received possession of both the real property and

the wind machines, plaintiff transferring all rights therein. As a part of the purchase price Tangye executed a promissory note and trust deed to plaintiff and agreed to keep up the payments on the conditional sale contract. Plaintiff Sampson assigned the trust deed and note to one Schneider who in turn transferred the same to the appellant Stoner. Thereafter, by reason of Tangye's default, Stoner foreclosed the trust deed and obtained title to the real estate. It is alleged in the complaint, and the trial court found that at the time of the assignment of the trust deed to Stoner, the latter "had constructive notice and knowledge of the said conditional sale contract and * * * that said wind-machines were not fixtures, but, on the contrary, were personal property owned by the said (seller) corporation".

In plaintiff's complaint for declaratory relief and for possession of the wind machines, it is alleged and the trial court found that at the time of the sale by plaintiff to Tangye, there was a balance due on said wind machines of \$7,399.50, of which \$3,699.75 was paid by Tangye, and that at the time of filing this action there was still due and unpaid upon the conditional sale contract, the sum of \$3,699.75.

Subsequent to the transfer to Tangye but before the filing of action, and on February 17, 1954, plaintiff paid the balance due on the wind machine contract, and on March 29, 1954, plaintiff took an assignment of the conditional sale contract from the seller, National Frost Protection Co. Judgment was granted against both Tangye and Stoner for possession of the wind machines or the sum of \$3,699.75; a money judgment in that amount was ordered against the defendant Tangye. The present appeal is by Stoner who had foreclosed the trust deed and obtained title to the real estate.

It is appellant's claim that "plaintiff has lost all of his right, title and interest in and to the wind machines by his transfer to Tangye"; further, that "Plaintiff being liable on the contract as a principal debtor could not take an assignment to himself but his payment of his own obligation extinguished and cancelled the contract and the purported assignment, which was pure-

ly an afterthought, was of no legal force or effect whatsoever". Appellant also insists that "The wind-machines were securely fastened to a concrete base by bolts imbedded in said base, and * * * are fixtures and have therefore become a part of the realty. * * * Fixtures are a 'question of fact' and the facts stipulated to in this case certainly make them fixtures in every detail required by law".

As stated in respondent's brief, "plaintiff is not concerned with any differences as between the defendants alone. And, in considering the appeal of the defendant Stoner, it should be remembered that he had the wind machines, that they have not been paid for, and that Stoner had notice thereof when he acquired them." The principal point, "as near as Respondent can make out, is that for some reason, in view of the findings, plaintiff is not entitled to a judgment against Stoner".

[1] An examination of the record indicates that the judgment rendered by the trial court is supported by the findings of fact; likewise, such findings are amply sustained by substantial evidence and a stipulation of facts entered into at the pre-trial hearing. Such being the case, and no reversible error being shown, an affirmance is in order.

So far as concerns the appellant Stoner, the situation appears to be that Stoner has possession of and claims to be entitled to hold the wind machines in question by reason of having foreclosed a trust deed covering real property upon which such machines had been placed by the conditional sale seller. This contention made by appellant is untenable.

[2, 3] As said in *Estus v. Weber*, 76 Cal. App.2d 724, 726, 173 P.2d 870, 871, "The intent of the parties is usually the controlling factor" in ascertaining the nature of personal property which has been attached to realty, and "various matters may and should be taken into consideration for the purpose of ascertaining that intent". In the instant case, considering the terms of the conditional sale contract under which the wind machines were sold, and all other

circumstances connected with the transaction, it is a reasonable conclusion that the machines never lost the character of personalty, and that appellant Stoner must have had at least constructive notice of this fact.

[4] Appellant's other contentions to the effect that plaintiff had lost all interest in the wind machines, and could not take an assignment of rights under the conditional sale contract, must, under the circumstances of this case, be deemed without merit. No decision has been pointed out in which, under comparable facts, such contentions have been sustained.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.



139 Cal.App.2d 742

Mildred Johnston BEALE and John P.
Beale, her husband, Plaintiffs,

v.

JOSEPH MAGNIN CO., Inc., a corporation,
L. & E. Emanuel, Inc., a corporation,
Frank O. Klassen, et al., Defendants,

Joseph Magnin Co., Inc., a corporation,
Defendant, Cross-Complainant and
Appellant,

L. & E. Emanuel, Inc., a corporation,
Defendant, Cross-Defendant and
Respondent.
Civ. 16514.

District Court of Appeal, First District,
Division 2, California.

March 8, 1956.

Personal injury action against owner and contractor. The owner cross complained against contractor for indemnification. The Superior Court, City and County of San Francisco, Thomas M. Foley, J., rendered judgment in favor of the contractor on the cross-complaint, and the owner

appealed. The District Court of Appeal, Dooling, J., held that contract provision, making owner responsible for, and giving him option to maintain such insurance as would protect him from liability for, personal injuries arising from operations under contract, amounted to an assumption of personal responsibility for such liability, and therefore owner could not recover from contractor for expenses incurred in defending action brought by third party injured by temporary door installed by contractor on owner's premises in performance of work contracted to be done.

Affirmed.

Indemnity $\S$ 15(4)

Contract provision, making owner responsible for, and giving him option to maintain such insurance as would protect him from liability for, personal injuries arising from operations under contract, amounted to an assumption of personal responsibility for such liability, and therefore owner could not recover from contractor for expenses incurred in defending action brought by third party injured by temporary door installed by contractor on owner's premises in performance of work contracted to be done.

Edward A. Friend, San Francisco, for appellant.

Jesse H. Steinhart, John J. Goldberg, San Francisco, for respondent.

DOOLING, Justice.

Appellant, Joseph Magnin Co., Inc. (hereafter called Magnin) appeals from a judgment in favor of respondent L. & E. Emanuel, Inc. (hereafter called Emanuel) on Magnin's cross-complaint.

Magnin and Emanuel had entered into a written contract by which Emanuel agreed to make certain described alterations on Magnin's store building and one Mrs. Mildred Beale was injured by a temporary door installed by Emanuel on Magnin's premises in performance of the work so contracted to be done. Mrs. Beale and

her husband brought action for these injuries, joining both Emanuel and Magnin as defendants.

Emanuel was represented in this action by the attorneys for Emanuel's liability insurance carrier, and Emanuel's insurance carrier compromised the action with the plaintiffs and paid them an agreed amount in settlement of their claim against both defendants, without any contribution from Magnin or its insurer, Saint Paul Mercury Indemnity Company.

Before this settlement Magnin's insurer through its attorneys had filed an answer to the Beales' complaint for Magnin and a cross-complaint against Emanuel for indemnification for whatever loss Magnin might suffer as a result of the action. After the dismissal of the plaintiffs' complaint with prejudice following the settlement with them, Magnin brought its cross-complaint against Emanuel to trial asking reimbursement for \$340.82 incurred by Magnin's insurer for attorneys' fees and costs paid out by the insurer in defending the action against Magnin.

We are satisfied that the trial court was correct in its finding that Magnin by its contract with Emanuel had assumed personal responsibility for any liability to third persons which might arise from the performance of the contract. The controlling provision is Article 28 which reads:

"Art. 28. Owner's Liability Insurance—The Owner shall be responsible for and at his option may maintain such insurance as will protect him from his contingent liability for damages for personal injury, including death, which may arise from operations under this contract."

We agree with the trial court that this provision amounts to an assumption of personal responsibility for such liability and is inconsistent with the existence of whatever right of indemnification might otherwise exist.

Judgment affirmed.

NOURSE, P. J., and KAUFMAN, J., concur.

139 Cal.App.2d 704

Winifred B. MORGAN, Plaintiff and Respondent,

v.

Daniel R. MORGAN, Defendant and Appellant.

Civ. 16766.

District Court of Appeal, First District,
Division 2, California.

March 6, 1956.

Wife brought action for divorce. The Superior Court, County of San Mateo, Edmund Scott, J., entered judgment awarding custody of five year old daughter to wife, and husband appealed. The District Court of Appeal, Devine, J. pro tem., held that Superior Court acted well within its discretion.

Judgment affirmed.

1. Attorney and Client $\S$ 86

Stipulations $\S$ 14(7)

Stipulation that reports of probation officers concerning child be received in evidence in divorce action was an act within the power of counsel to make, and the effect of the stipulation was to establish the competency of the probation reports as evidence. West's Ann.Code Civ.Proc. $\S$ 283, subd. 1.

2. Divorce $\S$ 298(4)

In divorce action, question of fitness of wife to have custody of child related to the time of the hearing.

3. Divorce $\S$ 301

In divorce action, evidence of any prior dereliction of wife was admissible if it had a direct bearing on the issue of her alleged present unfitness to have custody of child, but such evidence should be limited to that issue alone.

4. Divorce $\S$ 296

Discretion of trial court in divorce action in determining whether husband or wife should have custody of child is very broad.

5. Divorce $\S$ 312.6(5)

A clear case of abuse of discretion on part of trial court in divorce action in de-

termining whether husband or wife should have custody of child must be made out to call forth interference by reviewing court with trial court's decision.

6. Divorce $\S$ 298(6)

In determining custody of child in divorce action, court was required to consider the predilection of the law for granting custody of a child of tender years to the mother. West's Ann.Civ.Code, $\S$ 138 (2).

7. Divorce $\S$ 298(6)

In determining custody of child in divorce action, court must consider proposition that in case of daughters the care of the mother is especially to be desired.

8. Divorce $\S$ 293(1)

In determining custody of child in divorce action, court must consider the unsalutary and unsettling effect of changing possession of the child.

9. Divorce $\S$ 296

In divorce action, court acted well within its discretion in awarding custody of five year old daughter to wife. West's Ann.Civ.Code, $\S$ 138(2).

Millington & Dell'Ergo, Redwood City, for appellant.

Roy W. Seagraves, Redwood City, for respondent.

DEVINE, Justice pro tem.

This is an appeal from that portion of an interlocutory judgment of divorce which awards custody of a five year old daughter to the mother, the plaintiff.

Many witnesses appeared, all of them no doubt concerned with the welfare of the child, most of the witnesses testifying on behalf of the father. There were admitted in evidence by stipulation two reports of probation officers, one dated December 18, 1953, and one dated April 14, 1954. Each of these reports contained the recommendation that the child be placed with the mother.

[1] Appellant protests that these reports were not competent evidence, and cites the cases of Moon v. Moon, 62 Cal.

App.2d 185, 144 P.2d 596, and *Fewel v. Fewel*, 23 Cal.2d 431, 144 P.2d 592. The stipulation that the reports be received into evidence was an act within the power of counsel to make, § 283, subd. 1, Code Civ. Proc., and its effect was to establish the competency as evidence of the probation reports.

[2, 3] It would serve no purpose to perpetuate in this opinion a detailed account of asserted delinquencies of the mother in respect of caring for the child. The trial took place in September, 1954, and the findings of fact and conclusions of law and judgment were signed in November, 1954. The question of fitness of the mother to have the child's custody relates to the time of the hearing. *Stewart v. Stewart*, 130 Cal.App.2d 186, 194, 278 P.2d 441. Evidence of any prior dereliction is admissible if it has a direct bearing on the issue of present unfitness, but such evidence should be limited to this issue alone. *Wilkinson v. Wilkinson*, 105 Cal.App.2d 392, 399, 233 P.2d 639. The court in the instant case admitted evidence of past events very liberally, and came to its conclusion, after mature deliberation.

[4, 5] The discretion of the trial court in determining who should have custody is very broad, *Prouty v. Prouty*, 16 Cal.2d 190, 105 P.2d 295, and a clear case of abuse of discretion would have to be made out to call forth interference with the trial court's decision.

[6-8] The court heard the evidence relating to uncleanness, enuresis of the child and similar matters during the time the mother has had custody, and, on the other hand, evidence that the mother, while admitting some negligence, is endeavoring to correct her deficiencies. Likewise, the court had before it the conclusion of a probation officer (probably fortified by its own observations) that appellant and his relatives have become overpossessive in their attitude toward the child and that appellant has a tendency to exaggerate and to dramatize. Also the court had to consider the predilection of the law for granting custody of a child of tender years to the mother, § 138, subd. 2, Civ.Code,

the proposition that in the case of daughters the care of the mother is especially to be desired, *Washburn v. Washburn*, 49 Cal. App.2d 581, 588, 122 P.2d 96, and the salutary and unsettling effect of changing possession of the child.

[9] The court acted well within its discretion.

The judgment is affirmed.

DOOLING, Acting P. J., and KAUFMAN, J., concur.



139 Cal.App.2d 754

Mary KUTNYAK, Plaintiff and Respondent,

v.

U. S. N. JOHNSON and Lucille Johnson,
Defendants and Appellants.

Civ. 8739.

District Court of Appeal, Third District,
California.

March 8, 1956.

Action was brought on note, and defendants admitted the making of the note and, as a defense, alleged generally cash payments and merchandise offsets. The Superior Court of Nevada County, Bertram D. Janes, J., entered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Peek, J., held that evidence sustained judgment.

Judgment affirmed.

1. Bills and Notes ⇨527(1)

In action on note, wherein defendants admitted making of note and as a defense alleged generally cash payments and merchandise offsets, evidence sustained judgment for plaintiff.

2. Witnesses ⇨275(6)

In action on note, wherein defendants admitted making of note and as a defense alleged generally cash payments and mer-

chandise offsets, trial court did not improperly limit defendants' cross-examination of plaintiff in refusing to permit defendants to question plaintiff concerning her married name, whether money had come from an inheritance or elsewhere, or how much she may have had in a savings account, and similar matters, since such matters were wholly unrelated and immaterial to the main issue as to whether or not the note had been paid.

Albert L. Johnson, Nevada City, for defendants-appellants.

Harold A. Berliner, Nevada City, for plaintiff-respondent.

PEEK, Justice.

Plaintiff's complaint alleged the execution by defendants, and delivery to her, of a promissory note and that no part thereof had been paid. Defendants' answer admitted the making of the note, and as a defense alleged generally cash payments and merchandise offsets. The court found in favor of plaintiff, and defendants appeal. From our examination of the record we conclude the judgment must be sustained.

[1] The attack upon the judgment is principally that the evidence is insufficient. The record discloses no basis for a detailed discussion of such contention. It is sufficient to note that plaintiff's testimony and defendants' admission establish without conflict the execution of the note. Mr. Johnson's testimony concerning the alleged payments and offsets, for which he had no receipts, did not compel the court to find in accordance therewith. His testimony which was refuted by plaintiff merely presented a conflict for the trial court to resolve.

[2] Equally without merit is the further contention of defendants' counsel that the trial judge improperly limited his cross-examination of plaintiff. What may or may not have been her married name; whether the money came from an inheritance or elsewhere; or how much she may have had in a savings account, and simi-

lar questions, were all quite obviously matters wholly unrelated and immaterial to the main issue as to whether or not the note had been paid.

The judgment is affirmed.

VAN DYKE, P. J., and SCHIOTTKY, J., concur.



**The PEOPLE of the State of California,
Plaintiff and Respondent,**

v.

Ed FARMER, Defendant and Appellant.*
Cr. 2641.

District Court of Appeal, Third District,
California.

March 7, 1956.

Hearing Granted April 3, 1956.

Defendant was convicted in the Superior Court, Merced County, R. R. Sischo, J., of having sold mortgaged cows without giving mortgagee prior notice in writing of intended sale, and he appealed. The District Court of Appeal, McMurray, J. pro tem., held that it had been error to exclude offered evidence as to intent.

Reversed.

1. Chattel Mortgages ⇨230

Payment of mortgage obligation, after offense of selling mortgaged chattel without notice has been committed, is no defense to prosecution for such offense. West's Ann. Pen.Code, § 538.

2. Chattel Mortgages ⇨230

Sole purpose of requiring, on pain of criminal prosecution, written notice to mortgagee before selling mortgaged chattel is to prevent alienation of mortgaged property without mortgagee's knowledge. West's Ann.Pen.Code, § 538.

3. Chattel Mortgages ⇨136

Chattel mortgagee's consent to sale extinguishes mortgage lien as to property as to which such consent is given.

* Opinion vacated 304 P.2d 713.

4. Chattel Mortgages ⇨230

Chattel mortgagee's prior consent to sale of mortgaged property obviates necessity of giving notice, and mortgagor receiving such a consent can sell property without violating statute punishing sale of mortgaged property without giving of prior notice. West's Ann.Pen.Code, § 538.

5. Chattel Mortgages ⇨230

Intent is an element of offense of selling mortgaged chattels without giving notice to mortgagee. West's Ann.Pen.Code, § 538.

6. Chattel Mortgages ⇨233

In prosecution for selling mortgaged cows without giving mortgagee prior notice in writing of intended sale, it was error to exclude offered evidence as to intent.

Robert R. Elledge, Modesto, for appellant.

Edmund G. Brown, Atty. Gen., G. A. Strader, Deputy Atty. Gen., for respondent.

McMURRAY, Justice pro tem.

The appellant was convicted upon an amended information, wherein he was accused of having sold mortgaged cows without giving the mortgagee a prior notice in writing of the intended sale, a violation of Section 538 of the Penal Code. Appellant's wife, who was tried upon the same charge, was acquitted. This is an appeal from the judgment entered upon the jury's verdict, from the order denying the motion for a new trial and from the order denying the motion for a stay of execution. Appellant's brief, however, only attacks the judgment.

Appellant was a dairy farmer in the Merced area. The number of cows in his herd varied from time to time as he bought and sold in an attempt to dispose of dry cows and obtain productive ones. On June 23, 1953, appellant and his wife executed a chattel mortgage covering thirty branded cows, to secure a loan in the amount of \$3,300 from the Acme Investment Company, a subsidiary of the Golden State Company. The manager of this company was Mr. Terkildsen, and his assistant was Miss Silva. Appellant and his wife did not meet

either Mr. Terkildsen or Miss Silva until June or July of 1954, having negotiated the original loan through a field representative of the Acme Investment Company; their first meeting with the manager and his assistant was relative to a further loan which appellant and his wife were seeking. At that meeting they disclosed that on April 30, 1954, they had sold twenty-seven of the mortgaged cows for \$4,300, but that the check that they had received therefor had proved to be worthless. Despite this fact, appellant and his wife were granted a further loan in the amount of \$300 "on the strength" of the prior mortgage. Appellant continued to make payments on that mortgage until October 2, 1954, when appellant discontinued his dairy operations.

The evidence is uncontradicted as to the foregoing facts and it is admitted that neither appellant nor his wife personally gave any prior notice, oral or written, to the manager or his assistant of the sale of the cows on April 30, 1954. Appellant and his wife, however, claim that prior to the April sale Mr. Nunes, a field representative for the company, purporting to act for Miss Silva, assured them that it would be agreeable for them to sell the cows and pay the balance of the secured loan which then amounted to some \$2,310. Mr. Nunes admitted having a conversation regarding the amount of the loan, but denied having consented to any sale of the cattle. At the trial, the trial judge refused to allow appellant to prove that Mr. Nunes not only had consented to the sale, but had advised Mr. Terkildsen and Miss Silva that he had done so, on the ground that such evidence was irrelevant, immaterial and constituted no defense to the offense here charged. The trial court also rejected an offer of proof by appellant that, prior to the sale of the cows on April 30, 1954, he had arranged to purchase others in replacement in order to increase the milk production of his herd.

The court said that such offer of proof was "nothing more or less of an argument from your side that the person holding that mortgage consented to the sale and the transfer. He could consent to it, and could

consent to the transfer and replacements and all of that, yet if you still failed to give notice, you violate the law. You violate the law of where and when. Now that is the whole question here. So I will have to reject your offer on the ground that it constitutes no defense, and it is immaterial here." The court further said, "the mortgagee can give consent to the sale, and yet if you do it without notifying him where and when, you are going to do it, you violate the law." The court also refused to give appellant's requested instruction that "should you believe from the evidence that oral consent to a sale of the dairy cattle was given to the defendants, Ed Farmer and Lorene Farmer, by Acme Investment Company, that you must find the defendants 'not guilty' of the offense charged."

The court did instruct the jury that: "If you find that it has been established beyond a reasonable doubt as a fact that the defendant sold or transferred cows mortgaged to the Acme Investment Company without having informed the Acme Investment Company of the intended sale or transfer by a notice in writing, giving the Acme Investment Company the name and place of residence of the party or parties to whom the sale or transfer was being made, then the defendants are guilty of the crime with which they are charged." The appellant urges that these rulings of the trial court were prejudicially erroneous, and appellant further urges that there were other errors committed during the course of the trial: a reference to another crime and a statement by the district attorney to which the defendant takes exception.

[1-6] Respondent contends that the provisions of Section 538 of the Penal Code make it impossible for a mortgagee to give consent to a sale of mortgaged property in such manner as to relieve the mortgagor of the duty therein specified, namely, to give written notice to the mortgagee of the time and place of intended sale and the name and address of the intended purchaser. The respondent cites *People v. Iden*, 24 Cal. App. 627, 634, 142 P. 117, for the proposition that the payment of a mortgage after an offense under Section 538 of the Penal Code has been committed, is no defense to

a prosecution under this section. This is no doubt the law and is founded on good reason. An intentionally fraudulent mortgagor, having sold mortgaged property without notice, might escape just punishment by discharging the debt after discovery of his wilful crime, which is not the case here. The declaration in *People v. Phillips*, 30 Cal.App. 31, 34, 157 P. 1003, 1004, that "the giving of mere permission to sell does not work a waiver of the right to have notice of the sale" is not binding upon this court for the reason that the Supreme Court, in denying a hearing in this matter, expressly stated, 30 Cal.App. at page 35, 157 P. at page 1005:

"In denying the application we do not wish to be understood as holding that if permission to sell was given by the mortgagee it would not operate as a complete waiver of the requirement of the statute that notice of the sale shall be given to the mortgagee. We express no opinion upon that question. The complaint that error was committed in the giving of an instruction bearing on this question was sufficiently answered by what is said in the opinion of the District Court of Appeal that: 'The information contained a twofold charge, to wit, not only that there was a failure to give notice to the mortgagee, but also a failure to give notice to the purchaser of the animals sold.'"

The sole purpose of the required written notice to the mortgagee under Section 538 of the Penal Code is to prevent alienation of the mortgaged property without the mortgagee's knowledge. If a mortgagee gives his prior consent to the sale of such property, the need for the written notice would not exist as such consent extinguishes the mortgage lien as to the property to which such consent is given. *Reno v. A. L. Boyden Co.*, 115 Cal.App. 697, 700-701, 2 P.2d 214.

A mortgagee holds a property interest in the property mortgaged. This interest may be extinguished by his oral consent to a sale of the mortgaged property. See *Reno v. A. L. Boyden Co.*, *supra*. Once this mortgage lien is extinguished, the mortgagee holds no property interest in the

mortgaged property. In effect the mortgage obligation is extinguished as such and becomes merely a contractual obligation as between the mortgagor and the mortgagee, the mortgagee being relegated to a personal action against the mortgagor for any balance owing under the mortgage. If the mortgagee were the sole owner of the entire legal title to property, it could not be argued that he could not consent to another's taking thereof to the detriment of the People of the State of California, which is, in effect, what the argument of respondent here amounts to. If the owner of personal property consents to its taking by another, it is unthinkable that the owner could thereafter, in the absence of fraud or deceit, cause a criminal action to be commenced against the person taking such property after such consent.

In *Kuehn v. Don Carlos*, 5 Cal.App.2d 25, 27-28, 41 P.2d 585, 586, it is said:

"A chattel mortgagee may waive his mortgage lien or be estopped to enforce it by conduct inconsistent with its existence, 11 C.J., p. 674; 5 Cal.Jur., p. 88. Thus, consent to sell under certain circumstances may constitute a waiver. 5 R.C.L., p. 458. A sale authorized by the mortgagee upon condition that the proceeds be deposited to his account operates to extinguish the mortgage lien. *Maier v. Freeman*, 112 Cal. 8, 44 P. 357, 53 Am.St.Rep. 151."

In *People v. Phillips*, 27 Cal.App. 409, 412-413, 150 P. 75, the court, in considering that portion of Section 538 of the Penal Code here under consideration, as well as the provision therein contained that a purchaser must be given prior notice that property intended to be sold is subject to a chattel mortgage, held that that portion of the section does not make the *intent* with which the act is done an element of the offense. Also in *People v. Phillips*, 30 Cal. App. 31, 34, 157 P. 1003, 1005, the court again expressed the opinion that intent was not a necessary element of a violation of Section 538 of the Penal Code. These decisions give some weight to the argument which is here urged by respondent that the mortgagor has a full right to sell without

permission provided he gives the notice prescribed by the statute, which we believe overlooks the fundamental nature of the mortgagor-mortgagee relationship.

A fair and inartificial reading of the provision of Penal Code Section 538 leads us to the conclusion that the holdings in the cases of *People v. Phillips*, 27 Cal.App. 409, 150 P. 75, and *People v. Phillips*, 30 Cal. App. 31, 157 P. 1003, 1005, are in error in their interpretation of the plain meaning of the code section. A full and fair reading of the section seems to us to indicate that it was the legislative object that the crime therein defined must contain the element of intent in all of its aspects, not only in those contained in the earlier portion of the section.

To hold otherwise makes the failure to perform a mere formality a crime. Furthermore, since the section contains the provision that an offense thereunder shall be treated as larceny, it would seem to be unduly artificial to eliminate the element of intent from the corpus of the crime therein set forth. It is also interesting to note that, in their original form, the two diverse offenses which are defined in Section 538 of the Penal Code, that is, the removal of mortgaged property from the state and the sale of mortgaged property without the requisite notice, were contained in separate sections which were subsequently reenacted as one section by the legislature. To state that by such revision of the code the legislature did not intend that all of the provisions of the new section should apply to all of the offenses therein defined is not, it seems to us, fair statutory construction.

We think that the evidence offered as to intent should have been admitted, and that the jury should have been instructed in accordance with appellant's submitted instruction. It, therefore, becomes unnecessary to consider the other errors urged by appellant in this matter as this in itself was prejudicial error.

The judgment appealed from is reversed.

VAN DYKE, P. J., and PEEK, J., concur.

130 Cal.App.2d 626

Kenneth D. HOLLAND et al., Plaintiffs
and Appellants,

v.

Robert L. BRAUN et al., Defendants,

Robert L. Braun et al., Respondents.
Civ. 21231.

District Court of Appeal, Second District,
Division 1, California.

March 1, 1956.

Hearing Denied April 25, 1956.

Action to force non-contributing abutting property owners, who were co-owners along with plaintiffs of private easement over and along which a dirt road had existed, to pay their proportionate share in cost of improving such road. The Superior Court, Los Angeles County, Edward R. Brand, J., entered judgment adverse to plaintiffs, and plaintiffs appealed. The District Court of Appeal, White, P. J., held that some of owners of private easement over and along a dirt road did not have right, without consent of all abutting property owners, who were co-owners in the easement, to cut trees, install culverts, regrade, widen, and pave the road and enforce contribution from the dissenting owners toward cost of such improvements.

Judgment affirmed.

1. Easements ⚡53

Under Civil Code provision, that, if easement in nature of private right of way is owned by more than one person, "cost of maintaining it in repair" should be shared by each owner, paving of dirt road, which ran along a private easement, was not "maintaining it in repair". West's Ann.Civ. Code, § 845.

See publication Words and Phrases, for other judicial constructions and definitions of "Maintaining It In Repair".

2. Easements ⚡53

Some of owners of private easement over and along a dirt road did not have right, without consent of all abutting property owners, who were co-owners in the easement, to cut trees, install culverts, regrade, widen, and pave the road and en-

force contribution from the dissenting owners toward cost of such improvements. West's Ann.Civ.Code, § 845.

Kenneth D. Holland, Monrovia, for appellants.

Leonard Wilson, Los Angeles, for respondent Calori.

David C. Marcus, Los Angeles, for respondent Spaulding.

W. L. Engelhardt, Los Angeles, for respondents Swartz.

Mitchell, Silberberg & Knupp, George Benedict, Jr., Los Angeles, for respondents Girard.

Binford, Binford & McNabb, Los Angeles, for respondents Braun, McFarland, and Colburn.

Roger Arnebergh, City Atty., Bourke Jones, Asst. City Atty., Weldon L. Weber, Deputy City Atty., Los Angeles, amici curiæ.

WHITE, Presiding Justice.

By deed dated August 31, 1949, and recorded September 2, 1949, Title Insurance & Trust Company conveyed a 40-foot non-exclusive easement for road purposes to the record owners of the North Half of Section Two "abutting upon the easement hereby conveyed, in severalty, by the same tenure as they now hold said property of record". The deeds listed in said conveyance as showing the record owners are:

August 27, 1927, Instrument No. 382, to Otto J. Monson and Mary Monson, husband and wife, as joint tenants: "Also subject to 40 foot right of way along the bridle trail as now built".

August 3, 1934, Instrument No. 902, to Leland P. Reeder, a married man;

August 3, 1934, Instrument No. 453, to R. M. Norvell, T. H. Ramsay, G. B. Wilcox, L. L. McCoy, and F. A. Ellenwood, as Trustees;

August 3, 1934, Instrument No. 915, to T. H. Pickford, a widower, and Alma T. Gordon, a married woman, each an undivided one-half interest.

August 3, 1934, Instrument No. 925, to Helen Maynard Salisbury, a single woman;

Each of the above mentioned deeds of August 3, 1934, "Reserving a 40 foot right of way over and along the bridle path as now built connecting Benedict Canyon and Franklin Canyon, which said right of way is for use as a road by the owners of adjoining land and the public in general".

At the time of the trial, plaintiffs and defendants were the owners of the various parcels comprising said North Half of Section Two. The easement was surveyed in 1947 in accordance with the description contained in the deed from Title Insurance & Trust Company dated August 31, 1949, above referred to.

In 1946, some of the then owners voluntarily had the road graded to a width of 15 to 25 feet and oiled it, and in 1947 it was oiled again, at a total cost of \$2,240.75. From 1947 to 1952, those property owners occasionally repaired the worst portions of the road by filling up holes and ruts.

In 1950, appellants purchased a home site on the easement, which will hereafter be referred to as "Oak Pass Road", and prepared plans and specifications for building a home there, but they did not then apply for a building permit.

In May, 1951, the Los Angeles Municipal Code was amended by adding to Chapter One thereof, Article 8—Private Street Regulations—which provides, in part, as follows:

Section 18.00—"Purpose—The purpose of this Article is to prescribe rules and regulations governing the platting and division of lands as lots or building sites which are contiguous or adjacent to private streets; to provide for the filing and approval of 'Private Street Maps'; to require that lots or building sites which are contiguous or adjacent to private streets conform to the minimum requirements of Article 8 of Chapter 1 of this Code before permits shall be issued * * *."

Section 18.03—"Private Street Map—

"(A) * * * every person applying for a building permit for a lot or building site contiguous or adjacent to a private street or

private road easement * * * shall file with the commission * * * a 'Private Street Map' * * *."

Section 18.10—"Building Permits—

"No building permits shall be issued for the erection of buildings on lots or building sites which are contiguous or adjacent to private streets unless the following requirements have been met:

"(A) That the Commission shall have approved the 'Private Street Map' and have made its written findings as to the conditions of approval thereof.

"(B) That the Director of the Department of City Planning shall certify to the Department of Building and Safety that the conditions, if any, required by the written findings of the Commission have been fulfilled in a satisfactory manner and that a permit may be issued."

In 1952, plaintiffs and some of the defendants (calling themselves "Oak Pass Property Owners Association") prepared and filed with the Planning Commission of the City of Los Angeles "Private Street Map No. 91". The Planning Commission approved the map subject to conditions that the road be widened and paved with rock and oil and that rolled curbs and culverts be constructed. November 3, 1952, plaintiff Kenneth D. Holland, for the Oak Pass Property Owners Association, executed a contract for the road work. At the commencement of this action the work (except storm drains) had been completed; and before the trial all the work had been completed, inspected and officially approved by the Planning Commission. As stated in Appellants' Opening Brief, "* * * The area is now eligible for building permits, and four have since been granted". The total cost of the work was \$15,568.92. Certain defendants contributed \$9,020 and the Department of Water and Power \$1,500, leaving \$5,113.42 still due the contractor.

Appellants and certain defendants who answered and joined in the prayer of the complaint sought by the instant action to force the non-contributing owners of lands contiguous to Oak Pass Road to pay their proportionate shares of the cost of such

road work under Section 845 of the Civil Code, which, so far as pertinent, reads as follows:

"The owner of any easement in the nature of a private right of way, or of any land to which any such easement is attached, shall maintain it in repair.

"If the easement is owned by more than one person, or is attached to parcels of land under different ownership, the cost of maintaining it in repair shall be shared by each owner of the easement or the owners of the parcels of land, as the case may be, pursuant to the terms of any agreement entered into by the parties for that purpose. In the absence of an agreement, the cost shall be shared proportionately to the use made of the easement by each owner.

"In the absence of an agreement, any owner of the easement, or any owner of land to which the easement is attached, may apply to the superior court where the right of way is located for the appointment of an impartial arbitrator to apportion such cost. If the arbitration award is not accepted by all of the owners, the court may determine the proportionate liability of the owners, and its order shall have the effect of a judgment.

"If any one of the owners of the easement or parcels of land fails, after demand in writing, to pay his proportion of the expense, an action may be brought against him in a court of competent jurisdiction by the other owners, either jointly or severally, for contribution."

In addition to the facts hereinbefore stated, the court found as to the ownership of the various parcels of land and of Oak Pass Road; that all of the defendants except Frank and Jane Girard "are required to use the improved portion of Oak Pass Road for ingress and egress; that Oak Pass Road was first constructed in 1917 as a bridle path, and about 1935 it was graded and widened to a roadway; that defendants McFarland built their home on said Oak Pass Road in 1937 and have lived there ever

since; that between 1937 and the commencement of this action in 1953 homes were built thereon and occupied by defendants Ralph L. and Mildred B. Warner, Paul W. and Helen L. Colburn, William R. and Grace E. Brockbank, and Harold P. Calori.

The court further found: "It is true that from 1947 until and including through October, 1952, the condition of said roadway had deteriorated, was neither surfaced nor graded, was marred by numerous ruts, holes and ridges, narrow stretches and sharp turns, and during said times, in inclement weather, certain portions were passable but the road, as a whole, was impassable to vehicular traffic. As a result of said condition, said roadway was in great need of repair."

That certain named defendants "agreed, among themselves, to undertake a major improvement of said existing roadway consisting of grading, asphalt surfacing, widening, straightening and the installation of storm drains, and to defray the cost thereof by themselves and by contributions, *if obtainable*, from other property owners who use said road." (Emphasis added.)

That certain named defendants "have not contributed or paid any portion of the cost of said improvement".

From those and other facts, the court concluded "that the work performed on Oak Pass Road was a major improvement and did not constitute a repairing of said road, and that, therefore, the defendants * * * are not required to contribute to the cost thereof under the provisions of Section 845 of the Civil Code of the State of California, or under any other law or statute of the said State of California".

The City Attorney of Los Angeles, in his brief as amici curiae in support of appellants, urges that if the judgment "that the improvements made constitute new construction and not maintenance and repair is allowed to stand", a substantial portion of the inhabitants of Los Angeles and other cities will be adversely affected. Their purpose in filing the brief is stated to be "to insure that the many private streets permitted within its (Los Angeles') boundaries will be maintained in such state of repair

that new homes may be built thereon and the inhabitants thereof may receive police and fire protection as well as such city services as rubbish and garbage collection".

It is the contention of the city that the degree of repair required by its ordinance is the same as that required by Section 845 of the Civil Code. That both the ordinance and the statute "were designed to prevent the creation of substandard communities and to encourage healthy growth of cities and towns. Yet under the judgment, if it is permitted to stand, a private street may be reduced to such state of disrepair that no new or additional building thereon will be permitted, city services will be withheld, and adequate police and fire protection to the area will be denied. This is true because the record shows that the property owners did neglect Oak Pass Road until it was at times well nigh impassable as far as vehicular traffic is concerned."

The evidence relied upon and referred to in support of the above statement in the City's brief is that during heavy rains certain portions of the road could not be traversed by automobiles; and on a few occasions through the years some of the residents of the area had to leave their automobiles and walk to their homes. There is no showing that Oak Pass Road had become either dangerous or impractical for the regular use of those who resided on it, or that the existing dirt road could not have been repaired at a lesser cost to its owners.

There is testimony that in front of the home of defendant Calori a tree was removed and the road was widened and paved making his home less pleasant to live in; that other trees were removed, the grade of the road was changed by cutting and filling, and that such work probably detracted from the values of the properties fronting upon those portions of the road. In their brief, respondents Frank and Jane W. Girard state: "The area is and always has been a high class residential area and perhaps may deteriorate rather than benefit from appellants' so-called improvements and any proposed subdividing. Respondents Girard purchased this property because they loved the rustic neighborhood. The so-called improvements, to them, are harm-

ful and imposed against their will and desire." However, no question concerning such detriment is raised on the instant appeal.

Upon stipulation of the parties, the court viewed the property and traversed the entire length of Oak Pass Road. The court's view of the premises, though not in the record on appeal, lends some support to his findings as to the character of the work done.

Oak Pass Road had been maintained as a dirt road sufficient for ingress and egress for the previous 15 years at a total cost of less than \$3,000. The expenditure contracted by plaintiffs and certain defendants, for which contribution is now sought, was in excess of \$15,000, and expert testimony introduced by plaintiffs was that the "present" road "should have a life of five to fifteen years, depending upon a number of items which we can't foresee".

No rights under the city ordinance are involved in this action. The city, as a prerequisite to its approval of "Private Street Map No. 91", recommended the oiling of the roadway 20 feet wide, and approved in lieu of the 20 feet of oil a pavement of rock and oil hot mix 16 feet wide proposed by plaintiff Holland.

The question for decision is whether some of the owners of a private easement over and along a dirt road have the right (without the consent of all of the owners of abutting property who are co-owners of said easement) to cut trees, install culverts, regrade, widen and pave it, and enforce contribution from the dissenting owners.

Respondent urged and the court below held that the contributions sought by the instant action are not to the cost of "maintaining in repair", but to the cost of constructing a new and different road over the easement.

In the instant action, as in *Santa Cruz Rock Pavement Co. v. Broderick*, 113 Cal. 628, 45 P. 863, 865, the written contract is not for "repairs" but "Re: Improvement of Oak Pass Road". Oak Pass Road was theretofore a "dirt road", which had been twice oiled and never paved. In the Santa Cruz case the street had been accepted by

the city 15 years before, but it was not shown "that the street in question had ever been paved with bituminous rock", and the court said, 113 Cal. at page 633, 45 P. at page 865: "It would be in violation of a proper construction of the term 'repair' to hold that it included an original improvement of the street, or work of a different character from that previously done thereon".

Mr. Justice Spence, speaking for the Supreme Court in *Whalen v. Ruiz*, 40 Cal.2d 294, 300, 253 P.2d 457, 460, said:

"* * * The word 'repair' in its ordinary sense relates to the preservation of property in its original condition, and does not carry the connotation that a new thing should be made or a distinct entity created. 76 C.J.S. p. 1169. As was said in *Realty & Rebuilding Co. v. Rea*, 184 Cal. 565, at page 576, 194 P. 1024, at page 1029: 'To repair means to mend an old thing, not to make a new thing; to restore to a sound state something which has become partially dilapidated, not to create something which has no existence.' See, also, *Santa Cruz Rock Pavement Co. v. Broderick*, 113 Cal. 628, 633, 45 P. 863. Appellant cites *Bosqui v. City of San Bernardino*, 2 Cal.2d 747, 43 P.2d 547, 552, where the railroad's duty to 'keep in repair' was likened to the 'duty to maintain'. But under the facts there involved, no broader definition was thereby contemplated. There the duty 'related to the structure itself', a viaduct, including the 'duty to repair or replace weakened or worn portions' thereof, and the railroad was held liable when the viaduct was allowed to 'fail or decline' and injury was sustained as the result of certain splinters projecting from its worn and dilapidated wooden curbs. 2 Cal.2d at page 758, 43 P. [at page] 2d 552. There the failure to repair was a failure to keep the curbs in their original condition. Consistent with such definition of the word 'repair,' respondent had the duty to keep the overhead structure at the 'standard of efficiency' it had according

to the design and plan under which it was originally constructed, but not to make structural changes to meet developing exigencies of traffic over the years. See *In re Morris Ave. Bridge*, 105 Misc. 659, 174 N.Y.S. 682, 683."

[1,2] Section 845 of the Civil Code applies only to "the cost of maintaining [the road] in repair". Paving the dirt road was not "maintaining it in repair".

The judgment is affirmed.

DORAN and FOURT, JJ., concur.



139 Cal.App.2d 718

Katherine A. ETTER, Katherine A. Etter,
as Executrix of the Last Will and Testa-
ment of **Albert F. Etter, Deceased,** and
August A. Etter, Plaintiffs and Respond-
ents,

v.

Albert M. VOLLMER and Jeannetta
Vollmer, Defendants and
Appellants.
Civ. 8748.

District Court of Appeal, Third District,
California.

March 6, 1956.

Action to compel a reconveyance of realty allegedly fraudulently obtained. From an order denying a motion for change of venue to the county of defendants' residence, in the Superior Court, Humboldt County, Carl L. Christensen, Jr., J., the defendants appealed. The District Court of Appeal, Van Dyke, P. J., held that the action was properly brought in the county where the realty was situated where the ordering of the restoration of any benefits conferred upon the plaintiffs by the conveyance, would merely be incidental to the principal relief sought.

Order affirmed.

1. Venue ⇨5(3)

An action seeking to have a deed and contract of sale to realty declared void and to require defendants to deliver to plaintiff a deed to the realty on ground of alleged fraud of defendant in securing conveyance from decedent and plaintiffs was properly brought in the county where the realty was situated since the objective sought was the "recovery of real property" situate in that county. West's Ann.Code Civ.Proc. § 392(1) (a).

See publication Words and Phrases, for other judicial constructions and definitions of "Recovery of Real Property".

2. Venue ⇨5(3)

The local nature of an action for the recovery of realty is not changed by the fact that the granting of relief prayed for would make appropriate a cancellation of the contract of sale of the realty as well as the deed conveying the property nor is it rendered transitory because it may require a determination of the amount of benefits received by the plaintiffs. West's Ann. Code Civ.Proc. § 392(1) (a).

3. Venue ⇨5(3)

Where main purpose of an action was to compel a reconveyance of realty allegedly fraudulently obtained the action was properly brought in the county where the realty was situated, and where the ordering of the restoration of any benefits conferred upon the plaintiffs by the conveyance would merely be incidental to the principal relief sought, since such was insufficient to change the nature of the action. West's Ann.Code Civ.Proc. § 392(1) (a).

Marcel E. Cerf, Robinson & Leland, San Francisco, for appellants.

Blaine McGowan, Eureka, for respondents.

VAN DYKE, Presiding Justice.

This is an appeal from an order denying a motion for a change of venue to the county of defendants' residence.

The complaint alleges that the deceased, Albert Etter, devoted practically all of his time for fifty years in horticultural and bo-

tanical experiments conducted in the main upon certain real property situated in the County of Humboldt which he and the plaintiffs owned but which was subject to a mortgage in the amount of \$2,659.33. It is further alleged that Mr. Etter was under the erroneous impression that said mortgage would be foreclosed and that the property and the results of his work thereon would be lost; that the appellant Dr. Vollmer, in order to obtain title to the property, which had valuable timber standing thereon, fraudulently led Mr. Etter to believe that he was experienced in the field of horticulture and that if Mr. Etter would sell the property to him he would continue Etter's experiments and preserve the fruits of his scientific work; that as a result of such fraud Mr. Etter and plaintiffs were induced to enter into an agreement to sell and thereafter to execute a deed to said property, reserving, however, a life estate therein in themselves. It is further alleged that the appellant Dr. Vollmer discharged the outstanding mortgage indebtedness, but failed to perform his promise to preserve and perpetuate Mr. Etter's experimental work, which promise it is alleged appellant Dr. Vollmer had never intended to keep. The complaint further alleged that at the time of the signing of the contract the appellants paid the mortgage debt in the amount of \$2,659.33 for the use and benefit of respondents, which sum, together with interest thereon, respondent Katherine Etter has offered to return upon delivery of a deed to the property; that said tender has been refused. Respondents pray that the deed and contract of sale be declared null and void and that appellants be ordered to execute and deliver to respondent a deed to the realty.

To the complaint the appellants filed a demurrer and a notice of motion for a change of venue to the county of their residence. From the order denying the motion this appeal was taken.

[1-3] The action was properly brought in the County of Humboldt since the objective sought is "the recovery of real property" situate in that county. Code Civ. Proc. sec. 392(1) (a); Eckstrand v. Wilshusen, 217 Cal. 380, 382-383, 18 P.2d 931.

The local nature of the action is not changed by reason of the fact that the granting of the relief prayed for would make appropriate a cancellation of the contract of sale, as well as the deed. Neither is it rendered transitory because it may require the determination of the amount of benefits received by respondents. *Kopke v. Carlson*, 98 Cal.App. 155, 157-158, 276 P. 606; *Heffernan v. Bennett & Armour*, 63 Cal.App.2d 178, 184-186, 146 P.2d 482. The main purpose of the action is to compel a reconveyance of the real property alleged to have been fraudulently obtained. The ordering of the restoration of any benefits conferred upon respondents would be merely incidental to the principal relief sought. The trial court correctly held that this was insufficient to change the nature of the action. The motion for change of venue was, therefore, properly denied.

The order is affirmed.

SCHOTTKY and PEEK, JJ., concur.



139 Cal.App.2d 766

**A. L. HAMILTON, Plaintiff and
Respondent,**

v.

**KYLE & COMPANY, a corporation,
Defendant and Appellant.**

Civ. 8771.

**District Court of Appeal, Third District,
California.**

March 9, 1956.

Salesman, who was a resident of El Dorado County, brought action in Sacramento County against corporation, which had its principal place of business in Fresno County, to recover sums allegedly due under an oral contract of employment as a salesman and for damages for alleged breach of such contract, or, in the alterna-

tive, for the reasonable value of such services. The Superior Court of Sacramento County, James H. Oakley, J., entered an order denying the corporation's motion for change of venue, and the corporation appealed. The District Court of Appeal, Peek, J., held that evidence sustained conclusion of Superior Court.

Order affirmed.

1. Corporations ⇨503(2)

Where breach complained of is failure of corporation to pay money due, place where payment is to be made is the decisive factor in determining venue under constitutional provision that a corporation may be sued in county where contract is made, where it is to be performed, where obligation or liability arises, where breach occurs, or where corporation has its principal place of business. West's Ann.Const. art. 12, § 16.

2. Payment ⇨6

In absence of agreement or stipulation to the contrary, place of performance in payment of debt is place where creditor resides or has his place of business. West's Ann.Civ.Code, §§ 1488, 1489.

3. Corporations ⇨503(2)

In action by salesman, who was a resident of El Dorado County, against corporation, which had its principal place of business in Fresno County, in Sacramento County to recover sums alleged due under oral contract of employment and for damages for alleged breach of contract, or, in the alternative, for reasonable value of such services, evidence sustained finding of Superior Court of Sacramento County that venue was in Sacramento County. West's Ann.Const. art. 12, § 16; West's Ann.Civ. Code, §§ 1488, 1489.

4. Appeal and Error ⇨1024(3)

Conclusion of trial court denying defendant corporation's motion for change of venue could not be disturbed on appeal, where it could not be said that evidence in support of plaintiff's contention that venue was in the trial court was not substantial. West's Ann.Const. art. 12, § 16.

Claude L. Rowe, Fresno, for appellant.

Wilke, Fleury & Sapunor, Sacramento, for respondent.

PEEK, Justice.

Plaintiff sought to recover sums alleged to be due under an oral contract of employment as a salesman of defendant's products and for damages for the alleged breach of such contract, or in the alternative for the reasonable value of such services. Additionally he alleged that defendant corporation had its principal place of business in Fresno County; that the oral contract was made in Los Angeles County; and that his sales territory was all of Northern California north of the city of Lodi. The complaint contained no allegation regarding the place where the money was to become due or to be paid. Defendant demurred and moved for a change of venue. It now appeals from the order denying that motion.

In support of the motion defendant filed affidavits by its secretary-treasurer wherein it was averred that the corporation's principal place of business was Fresno County; that plaintiff was a resident of Placerville, El Dorado County; that the agreement between plaintiff and defendant was that plaintiff's salary and expenses were to be paid by the corporation mailing him a check from Fresno to his residence in Placerville; that plaintiff had requested delivery of one check in Stockton and one in Fresno; and that the proper county for trial would be either Fresno or Los Angeles. Plaintiff's affidavits in opposition acknowledged his residence in El Dorado County; denied that there was any agreement by him to be paid there, and on the contrary averred that he was to be paid through defendant's Sacramento office; that he conducted all of his business for defendant corporation out of its Sacramento office; that he used this address on his business cards; that all of defendant's communications with him came through that office; that he received four checks from defendant in Sacramento; that because of difficulty in obtaining payment for his services, he was compelled to go to Stockton and to Fresno to receive

the same; and that there was at no time any understanding that he was to or did in fact work out of Placerville.

Under the provisions of Article XII, section 16, of the Constitution of this state, a corporation may be sued in the county (1) where the contract is made, (2) where it is to be performed, (3) where the obligation or liability arises, (4) where the breach occurs, or (5) where the corporation has its principal place of business.

[1,2] Whether or not Sacramento County, under the circumstances disclosed by the verified complaint and the affidavits of the parties, was one of the counties designated in the constitutional provision was a factual question for determination by the trial court. It is the rule that under said constitutional provision, insofar as venue is concerned, where the breach complained of is failure to pay money due, the decisive factor is the place where payment is to be made, *Hale v. Bohannon*, 38 Cal.2d 458, 466, 241 P.2d 4, and a determination of this question is one of fact to be resolved by the trial court. *Gallo v. Boyle Manufacturing Co., Inc.*, 35 Cal.App.2d 168, 169, 94 P.2d 1010. It is the further rule that in the absence of agreement or stipulation to the contrary, the place of performance in the payment of a debt is the place where the creditor resides or has his place of business. 38 Cal.2d 458, 467, 241 P.2d 4; Civil Code, secs. 1488 and 1489.

Viewing plaintiff's affidavits in light of the abovementioned rules, it appears that he conducted all of his business for defendant through the Sacramento office; that he was to be paid by check through that office; that he used that address on his business cards, received all communications from defendant to him through that office; and that except for the two instances which he explained, he in fact received all checks from defendant through that same office.

[3,4] Necessarily, therefore, since the question before the trial court was one of fact, and since it cannot be said that the evidence in support of plaintiff's contention was not substantial, the conclusion of the

trial court denying defendant's motion cannot be disturbed. *Hale v. Bohannon*, supra; *Gallo v. Boyle Manufacturing Co., Inc.*, supra.

The order is affirmed.

SCHOTTKY, J., and McMURRAY, Justice pro tem., concur.



139 Cal.App.2d 756

Atral A. ROSS, James Clinton Ross, a minor, and Clara Yvonne Ross, a minor, by Atral A. Ross, their guardian ad litem, Plaintiffs, Cross-Defendants and Appellants,

v.

Howard Newton LIGHTNER, Defendant, Cross-Complainant and Respondent.

Civ. 8777.

District Court of Appeal, Third District,
California.

March 8, 1956.

Rehearing Denied April 4, 1956.

Action for death sustained in an automobile collision at an intersection. Judgment for defendants in the Superior Court, Stanislaus County, H. L. Chamberlain, J., and the plaintiffs and the cross-defendants appealed. The District Court of Appeal, Van Dyke, P. J., held that the instructions were not erroneous, that argument of respondent's counsel was not prejudicial and that the plaintiffs were not denied a fair trial because the foreman of the jury was a part time insurance salesman.

Judgment affirmed.

1. Trial ⇐244(5)

In action for death sustained in an automobile collision, where officer while viewing the scene of the accident had formed and expressed an opinion as to the point of collision and manner of impact and working thereafter from photographs taken by

others materially changed his opinion, instruction on officer's testimony and his report was not erroneous as singling out the officer's testimony unduly and as a special cautionary instruction directed at his credibility.

2. Appeal and Error ⇐638(2)

Where counsel's argument was not made a part of the record, any alleged errors committed in course of unreported argument could not be considered in the appellate court.

3. Appeal and Error ⇐1060(1)

In action for death sustained in an automobile collision, observation in argument as to changed conditions respecting stop signs which was merely irrelevant was not prejudicial.

4. Appeal and Error ⇐1170(6)

In action for death sustained in an automobile collision, charge in argument respecting "a lot of shenanigans" had been going on, was not sufficient to justify a reversal especially in view of the admonition by the trial court. *West's Ann.Const.* art. 6, § 4½.

5. Trial ⇐244(4)

In action for death sustained in an automobile collision at an intersection, instructions on the right-of-way were not erroneous as directed at the conduct of the deceased in emphasizing his alleged contributory negligence.

6. New Trial ⇐20

In action for death sustained in an automobile collision, plaintiffs were not denied a fair trial because a foreman of the jury was a part time insurance salesman, where there was no evidence that he wilfully concealed that fact about which he was not interrogated.

7. Appeal and Error ⇐528(4)

Affidavits in support of a motion for new trial which upon motion were stricken, were not before the appellate court.

Cardozo, Trimbur & Nickerson, Modesto,
for appellants.

Vernon F. Gant, Modesto, for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment entered upon a jury's verdict in favor of the defendant in a wrongful death action.

Appellants are the surviving wife and two minor children of James Ross who died of injuries sustained in an accident occurring at the intersection of Sycamore and Eucalyptus Avenues near Patterson. The deceased, James Ross, was driving a Chevrolet sedan east on Sycamore. The respondent was traveling north on Eucalyptus in a Ford sedan. Each was alone and there was no other traffic. It was daylight and the weather was dry and clear.

Respondent testified that when he first saw the deceased, they were each traveling at a speed of between 40 and 45 miles per hour and were at an equal distance of from 50 to 60 feet from the point of impact. Respondent claimed that he immediately applied his brakes but that the deceased's automobile, which did not lay down any skid marks, maintained its speed of from 40 to 45 miles per hour. The vehicles came together with such force that respondent's car veered and hit a power pole splitting it in two. The deceased's automobile came to rest on its side about 60 feet north of the center of the intersection. Respondent placed the point of impact at approximately the center of the intersection. A highway patrolman who investigated, but did not witness, the accident testified that the point of impact was within the east half of the intersection, approximately $2\frac{1}{2}$ to 3 feet north of its southern boundary and that the deceased's automobile had traveled approximately 17 or 18 feet across the intersection when it was struck by respondent's car. His filed report made at the scene read in part as follows: "Point of impact was just a few inches east of the center line of Sycamore Avenue and approximately in line with center of Eucalyptus Avenue." The officer's report, therefore, as to the point of collision agreed with the testimony of respondent and conflicted with the officer's oral testimony. He explained on cross-examination that he changed his opinion after examining photographs of the scene of the accident.

The trial court instructed the jury as follows:

"Mr. A. A. Hansen, a member of the California Highway Patrol, was called as a witness in this case and was permitted to express his opinion with respect to the point of impact, the speed of the two vehicles and other matters. You are instructed that you are entitled to give the opinion or opinions expressed by Mr. Hansen, such credit or weight as you in your independent judgment feel that they are entitled to receive. You are not bound to accept his opinion or opinions as so expressed and may totally disregard his opinions in favor of your own opinion, based on the facts adduced by the evidence, if you feel that the reasons given by Mr. Hansen were insufficient. In other words, the opinion of an expert is no better than the reasons given for such opinion. You are to carefully weigh the reasons given by the witness and decide for yourself whether or not the opinion so expressed is supported by the reasons given."

Appellants argue that, in view of the record, the giving of the quoted instruction was erroneous and prejudicial. It appears that upon cross-examination, and also in the course of argument, counsel for the respondent vigorously sought to discredit and belittle officer Hansen, upon whose testimony the appellants' case mainly rested. Much emphasis was put upon the conflict between his written report and his testimony at the trial in respect to the location of the point of impact and upon his forming an opinion thereon from photographs. He was asked if he had not "made only a cursory examination," if he had prepared a "false and untrue" report and if he had not formed his final opinion when he was "out of perspective." Counsel remarked that he knew there had "been a lot of shenanigans going on" and that the officer "had been sold a bill of goods."

[1] Undoubtedly, the attack based upon the conflict between the officer's testimony and his report was vigorous and at times scathing. But we do not think that

it rendered erroneous the giving of the quoted instruction. Appellants contend that it singled out the officer's testimony unduly, and amounted to a special cautionary instruction directed at his credibility. The court had given one general instruction on the subject of expert testimony. It is true that in the instruction directed at the testimony of officer Hansen the court told the jury they were to "carefully" weigh the reasons given by the officer for his opinion. Considered abstractly this was not error. The task of a jury requires careful consideration by them in weighing evidence. Considered in context we have this situation. While viewing the scene of the accident, when the cars were still where they had come to rest and marks on the cars and on the road were fresh, the officer, in the regular performance of his duty, had formed and expressed an expert's opinion as to the point of collision and the manner of impact. The same expert, working thereafter, so he said, from photographs taken by others, materially changed his opinion. We think this unusual situation merited the comment contained in the instruction, and justified any singling out of the officer's testimony.

[2, 3] Appellants' assignments of error based on several instances of alleged prejudicial misconduct on the part of opposing counsel do not merit extended discussion. Appellants maintain that in the course of the final argument to the jury respondent's attorney stated that officer Hansen "had been sold a bill of goods." However, the counsel's argument has not been made a part of the record. Therefore, any alleged errors committed in the course of such unreported argument cannot be here considered. We fail to see how or in what manner prejudice ensued, as claimed, from the remark: "Perhaps you will concede that there are stop signs along Sycamore now." It was admitted that there were no stop signs at the time of the accident and the observation as to the changed condition was merely irrelevant and not prejudicial. Appellants complain that respondent's counsel persisted in offering inadmissible evidence and in the course of so

doing made a highly prejudicial remark. The incident complained of arose after strenuous cross-examination of officer Hansen. He had been questioned at length as to his written report, part of which had been read into the record. The report was then offered in evidence and appellants interposed a general objection which was sustained. Respondent's counsel then asked if he could not impeach the witness. The following then occurred:

"Mr. Cardozo: Mr. Gant knows better than that.

"Mr. Gant: Let me address the court, I have a right to.

"Mr. Cardozo: Well, let me make my objection. You have been practicing law long enough to know that you can't do that.

"Mr. Gant: Let's leave the personalities out of this, who has been practicing and who hasn't been practicing law, I have been practicing law long enough to know *there has been a lot of shenanigans going on around here.*" (Emphasis added.)

Appellants assigned this remark as prejudicial misconduct and requested that the jury be instructed to disregard the italicized portion of Mr. Gant's statement. This the court refused specifically to do, but remarked:

"It may be expected at times there will be little differences between counsel, and the officer and counsel and perhaps others, like this, and I know the jury will disregard surely and certainly these differences, and let's take the evidence as it comes and let's try to get along here in as easy a manner as possible."

[4] It is obvious that appellants' charge that respondent "persisted" in offering the report in evidence is unfounded. Although the statement that "a lot of shenanigans" had been going on would have been better left unsaid, we do not deem it of sufficient moment to have caused a miscarriage of justice, and it cannot, therefore, serve as a basis for reversal of the judgment. California Const., Art. VI, sec. 4½. Additionally, the court's remarks to the effect he

knew the jury would disregard the differences that arose between counsel and witnesses and between counsel and opposing counsel amounted in substance to the requested admonition.

[5] We find no merit in appellants' contention that certain of the instructions on right of way were directed at the conduct of the deceased and emphasized his alleged contributory negligence. One of the instructions specifically named the respondent, as well as the decedent, and advised the jury that it was for them to determine which, if either, had the right of way and whether or not either or both had used ordinary care. Another merely declared that a "driver" must be vigilant and keep his vehicle under such control as to enable him to avoid an accident. Its general terms were equally applicable to respondent and to decedent. Another stated: "Even where a driver enters an intersection first, it may be negligence as a matter of fact to proceed in the face of another car which is very close and coming fast." Even if the jury believed, as contended by appellants, that such instruction was directed at the conduct of the deceased, they were not thereby prejudiced. It correctly stated the law, and after reading the instructions as a whole, we do not believe that the evidence pointing to the alleged contributory negligence of the deceased was unduly emphasized.

[6] Finally, we do not believe that appellants were denied a fair trial by reason of the fact that the foreman of the jury was a part time insurance salesman. Upon the voir dire examination of Mr. Utter, appellants' counsel asked him:

"I understand you are retired now, Mr. Utter, from the answer you gave to his Honor yesterday?

"A. That's correct."

Upon cross-examination by respondent's counsel, Mr. Utter was asked if he had not been connected with the city schools but was now inactive. To which he replied: "So far as the schools is concerned, yes." He was asked no further questions in respect to his occupation.

[7] In support of the motion for a new trial, affidavits were filed which set forth that Mr. Utter was an insurance salesman. Upon motion the affidavits were stricken so they are not before us. Assuming, however, that Mr. Utter is acting as an insurance salesman, his failure to volunteer that information does not establish that he was biased. There is no evidence that he willfully concealed that fact about which he was not interrogated.

The judgment is affirmed.

SCHOTTKY, J., and McMURRAY,
Justice pro tem., concur.



139 Cal.App.2d 619

**Charles CAREY and Ruth Carey, Plaintiffs,
Cross-Defendants and Appellants,**

v.

Mal COOMBS, Red Mountain Timber Company, a corporation, Durable Plywood Company, a corporation, and Durable Fir Lumber Company, a corporation, Defendants, Cross-Complainants and Respondents.

Civ. 8742.

**District Court of Appeal, Third District,
California.**

March 1, 1956.

Suit for injunction and other relief. The Superior Court, Mendocino County, Hale McCowen, J., rendered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Peek, J., held that where sellers knew that third party's proposed purchase of buyer's successor's interest under written contract of sale of timber depended upon sellers' agreeing to an extension of time sufficient to enable third party to harvest timber, and third party, in reliance upon sellers' oral promise to grant such extension, paid buyer's successor for its interest, sellers would be estopped from

invoking statute of frauds when third party set up oral extension as defense to sellers' action.

Affirmed.

1. Appeal and Error ⇨931(1)

On plaintiffs' appeal, evidence must be viewed in light most favorable to defendants.

2. Frauds, Statute of ⇨144

Where sellers knew that third party's proposed purchase of buyer's successor's interest under written contract of sale of timber depended upon sellers' agreeing to an extension of time sufficient to enable third party to harvest timber, and third party, in reliance upon sellers' oral promise to grant such extension, paid buyer's successor for its interest, sellers were estopped from invoking statute of frauds when third party set up oral extension as defense to sellers' suit for injunction and damages.

Mahan & Harland, by Collis P. Mahan, Fortuna, for appellants.

Preston, Falk & Johnson, by Harry W. Falk, Jr., Ukiah, for respondents.

PEEK, Justice.

Plaintiffs appeal from a judgment that certain real property owned by them was subject to a written contract of sale of all fir timber and an oral extension thereof in favor of the defendant Coombs.

The record shows that plaintiffs contracted with the defendant Red Mountain Timber Company to sell to it all of the fir timber located on lands owned by them; that the contract further provided that title to the timber would pass upon payment of the purchase price in the sum of \$4,500; and that purchasers would have three years, or until February 8, 1954, to harvest the timber, at which time all timber remaining on the property would revert to the sellers. By various assignments the defendant Durable Plywood Company succeeded to the original

purchaser's interest under the contract. During November, 1953, Coombs and Charles Carey discussed the possibility of extending the term of the contract. Coombs testified that he informed Carey he was interested in purchasing the contract from Durable Plywood provided Carey would give him an extension of time for the contract; that Carey accepted his offer of \$600 for the extension; that he thereupon and in reliance upon such oral agreement gave Durable Plywood a check for \$1,000 and a promissory note in the sum of \$5,500 as consideration for the assignment to him of said contract; that on the same day he sent Carey a check for \$600, went into possession and began falling timber. Carey admitted the offer but denied his acceptance. He returned the check and shortly thereafter instituted the present action for an injunction and damages.

Plaintiffs' attack upon the judgment appears to be that even if testimony relative to the oral extension of the written contract was admissible, it was insufficient to estop them from setting up the bar of the statute of frauds.

[1, 2] Viewing the evidence as we must in the light most favorable to defendants, it appears that Carey knew that Coombs' proposed purchase of Durable Plywood's interest under the written contract depended upon his (Carey's) agreeing to an extension of time sufficient to enable Coombs to harvest the timber; that Coombs, in reliance upon Carey's oral promise to grant such extension, paid the Durable Plywood Company \$6,500; and that within two or three days after consummation of that transaction Coombs restated to Carey the basis of the agreement which they had made. Such evidence was sufficient to estop plaintiffs from setting up the bar of the statute of frauds. *Seymour v. Oclrichs*, 156 Cal. 782, 106 P. 88.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

139 Cal.App.2d 751

W. P. SMIDT, Plaintiff, Cross-Defendant
and Respondent,

v.

A. E. OVERHOLTZER, Defendant, Cross-
Complainant and Appellant.

Civ. 8723.

District Court of Appeal, Third District,
California.

March 8, 1956.

Rehearing Denied April 2, 1956.

Hearing Denied May 2, 1956.

Action was brought for alleged conversion of certain machinery and for compensatory and exemplary damages, and defendant filed a cross complaint for conversion and for compensatory and exemplary damages. The Superior Court of Sonoma County, Hilliard Comstock, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Peek, J., held that evidence sustained finding that defendant converted the machinery.

Judgment affirmed.

1. Trover and Conversion §40(4)

Evidence sustained trial court's finding that defendant converted certain machinery of plaintiff.

2. Fixtures §35(2)

In action for conversion of certain machinery and compensatory and exemplary damages, evidence sustained finding that written disclaimer and waiver by defendant of plaintiff's rights to machinery was not obtained by plaintiff by duress and undue influence.

3. Fixtures §35(2)

In action for alleged conversion of certain machinery and compensatory and exemplary damages, evidence sustained finding that it was the understanding of all parties concerned that when machinery was installed by plaintiff on defendant's realty for defendant's tenant, it should remain personalty and continue to be the property of the plaintiff.

Dilley & Eymann, Santa Rosa, for respondent.

PEEK, Justice.

By his complaint plaintiff sought recovery for the alleged conversion of certain machinery and compensatory as well as exemplary damages. Defendant, by his cross-complaint, also claimed conversion of the same equipment as well as one additional item, and likewise claimed both compensatory and exemplary damages. Further damages were sought for injuries to electrical wiring on defendant's property. The court found in favor of plaintiff, and defendant appeals. It is his contention that there was no proof of conversion, and he further contends that the written disclaimer and waiver of any rights to the property in question was obtained by duress and undue influence and that the machinery was affixed to and hence a part of his real property. We find no merit in such contentions and conclude that the judgment must be sustained.

The record shows that the defendant was the owner of certain real property upon which was constructed a lumber remanufacturing plant in which certain machinery had been installed for such operation. The corporation to which he had leased the property had plaintiff install the machinery here in question. Plaintiff's original ownership was admitted by defendant when, in answer to a question addressed to him by the court, he stated that he knew the corporation was leasing the same from the plaintiff. The corporation went into bankruptcy shortly after it took possession, and the plant was shut down. During that proceeding both of the parties herein claimed the particular machinery as their own. Defendant was represented by his present counsel and the plaintiff by Mr. Golis. During a hearing in the bankruptcy proceeding the defendant told attorney Golis that he did not "claim ownership of this planer but he did so on the advice of his counsel," and at the conclusion thereof he informed plaintiff that he did not want the machinery in question left on the property. But when plaintiff went to the premises to take the machinery following the conclu-

Howard B. Crittenden, Jr., San Francisco, for appellant.

sion of the bankruptcy proceeding, he was informed by defendant he did not want him trespassing on his property. However, that same afternoon, defendant requested attorney Golis to prepare for his signature a disclaimer of interest in the machinery. By the terms of that agreement, defendant disclaimed any interest in the machinery in question; granted plaintiff, as the owner thereof, permission to go upon the premises and remove his property; granted plaintiff the right to allow the same to remain on those premises for the consideration of \$5 per month rental; and gave plaintiff seven days after notice to remove the same. At the time the agreement was executed defendant stated that he had no interest in the machinery and did not want to have any trouble regarding the same. Both of the parties testified that a few days thereafter defendant telephoned plaintiff requesting him to remove the property from defendant's premises, and that a few days later when defendant saw plaintiff at the plant, he asked him why he had not complied with the request. Somewhat later plaintiff moved some of the equipment out of defendant's building and into the open, but still on defendant's property. At the time such equipment was moved, the electrical connections to one item had been broken by persons unknown and it was only necessary to remove one bolt holding it in place. Defendant was present at the time workmen were so removing equipment from the plant and made no assertion of ownership. Approximately a week thereafter defendant moved some of the machinery back into the plant, and while endeavoring to move a heavy motor, he caused it to be damaged. While defendant was moving the equipment back into the plant, he informed a witness that he was doing so because plaintiff "was owing him something and he was taking the motor for it." Some time prior to the trial plaintiff had come to defendant's premises and removed some of the machinery and had possession of the same at that time.

[1] We are in complete agreement with the trial court that from the evidence there can be no doubt as to the conversion of the two motors by defendant. He knew the corporation was leasing them from plaintiff. He waived all right to them. He recognized plaintiff's ownership when he ordered him to remove them and then he changed his position entirely and claimed them as his own. *Gruber v. Pacific States Sav. & Loan Co.*, 13 Cal.2d 144, 88 P.2d 137. At the time of trial one motor was still in defendant's possession, the larger one having been recovered by plaintiff but in a damaged condition, and hence he would be considered, as the trial court held, to have received the same "in mitigation of damages."

[2] As to the second point raised by the defendant, that the written disclaimer and waiver of rights by him was obtained by duress and undue influence, we again refer to the comment of the trial court in its memorandum opinion which finds substantial support in the evidence, that the defendant himself sought out attorney Golis and requested the instrument to be drawn; that the treatment of the defendant by both Golis and the plaintiff at all pertinent times affecting the execution of the document, was eminently fair and in no way amounted to any form of overreaching.

[3] Defendant's final contention is equally unfounded. The record amply supports the conclusion that it was the understanding of all parties concerned that when the machinery was installed it should remain personalty and continue to be the property of plaintiff. Furthermore the subsequent disclaimer by defendant confirmed the original intention of the parties. *Nead v. Specimen Hill Min. Co.*, 52 Cal.App.2d 475, 481, 126 P.2d 450.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J.,
concur.

139 Cal.App.2d 723

William P. STRATTON, Ford I. Beebe, Beebe Mining Company, a copartnership, consisting of William P. Stratton and Ford I. Beebe, Plaintiffs and Respondents,

v.

Don L. HANNING, Defendant and Appellant.

Civ. 4966.

District Court of Appeal, Fourth District,
California.

March 6, 1956.

Action was brought for money had and received. The Superior Court of Kern County, Norman F. Main, J., entered judgment for plaintiffs, and defendant appealed. The District Court of Appeal, Barnard, P. J., held that where defendant leased land, which belonged to third person, to plaintiffs, and plaintiffs paid rental to defendant, and, when mistake was thereafter discovered, plaintiffs paid third person rental for the use of the land, plaintiffs were entitled to recover from defendant amount of rental paid to defendant.

Judgment affirmed.

1. Money Received ⇨1

No contract is necessary to support an action for money had and received other than the implied contract which results by operation of law where one person receives money, which belongs to another, and which he has no right, conscientiously, to retain, and under such circumstances the law will imply a promise to return the money.

2. Money Received ⇨1

An action for money had and received is in the nature of an equitable one and is based on the fact that defendant has money which, in equity and good conscience, he ought to pay to the plaintiff.

3. Money Received ⇨6(4, 8), 8

An action for money had and received will lie where money is paid under a void agreement, where it is obtained by fraud, or where it was paid by mistake of fact.

4. Landlord and Tenant ⇨63(6)

Where plaintiffs were not in possession of land when action was filed for money had and received by defendant, who had leased land owned by third person to plaintiffs, rule that a tenant is estopped to deny his landlord's title was not applicable.

5. Landlord and Tenant ⇨62(1)

Rule that a tenant is estopped to deny his landlord's title does not apply where a lease is executed either through fraud or through misapprehension as to the actual title.

6. Landlord and Tenant ⇨63(6)

Rule that tenant is estopped to deny landlord's title is not applicable where tenancy has ended.

7. Limitation of Actions ⇨13

Where defendant misrepresented facts as to his ability to repay money had and received, induced plaintiffs to give him time to make payment, and agreed to make payment out of specific fund when received, and defendant misled plaintiffs until limitations had run, and plaintiffs acted promptly in bringing action when they discovered that defendant had received fund, defendant was estopped from relying on defense that action was barred by limitations. West's Ann.Code Civ.Proc. §§ 339, 360.5.

8. Money Received ⇨6(8)

Where defendant leased land, which belonged to third person, to plaintiffs, and plaintiffs paid rental to defendant, and, when mistake was thereafter discovered, plaintiffs paid third person rental for use of the land, plaintiffs were entitled to recover from defendant amount of rental paid to defendant.

Mack, Bianco & King, Bakersfield, for appellant.

Vincent P. DiGiorgio, Bakersfield, Frye & Yudelson, Collman E. Yudelson, North Hollywood, for respondents.

BARNARD, Presiding Justice.

The defendant leased to the plaintiffs an acre of land described as that portion of the

defendant's ranch near Isabella, "which lies between the barn and the nearby bend in the river." The lease was for five years from September 10, 1943, at \$300 rental per year, with the privilege of renewing for another five years. In June, 1948, the United States Government brought proceedings in the federal court to condemn the defendant's property and some adjoining property belonging to a Mrs. Wolfe, in connection with the construction of a dam. The land was surveyed by the government and it was discovered that the leased premises belonged to Mrs. Wolfe and was not owned by the defendant. The plaintiffs had paid the defendant \$1,500 up to that time and had continuously used the leased premises in connection with mining operations, having installed thereon certain buildings and machinery. The plaintiffs were served with a court order to vacate the property, and Mrs. Wolfe demanded that they pay her \$2,050 as rent for the preceding five years. The plaintiffs agreed to do this and made an assignment of that amount to be paid to Mrs. Wolfe by the government, out of the damages which should be awarded to the plaintiffs. The plaintiffs then took the matter up with the defendant and he agreed to return to them the \$1,500 he had received from them, when he received payment from the government for the land it was taking from him. He later refused to pay this amount and this action was brought.

The complaint alleged a first cause of action for money had and received, and a second cause of action setting forth an account stated. A third cause of action, in brief, alleged the making of the lease; the use of the premises and the payment of \$1,500 for rent; the taking by the government and the discovery that the defendant did not own the leased property, or have the right to lease it; Mrs. Wolfe's ownership and right to lease and her demand for the rent; that the plaintiffs then informed the defendant of these facts which he admitted; and that the defendant then stated that he had no funds but that he would repay the \$1,500 if the plaintiffs would wait until he received the funds which the government was to pay him for his own property. It was further alleged that the plaintiffs paid

Mrs. Wolfe in reliance on the defendant's promise to return the \$1,500; that the defendant repeatedly and over a long period promised to pay the \$1,500 when he received his money from the government; that finally, in April, 1951, he informed the plaintiffs that he did not intend to pay the claim; that the plaintiffs relied on the defendant's representation repeatedly made that he would pay when he received his money from the government; that these representations were false and made by the defendant with the intention that the plaintiffs should rely thereon, and for the purpose of permitting the statute of limitations to expire before this action was brought; and that plaintiffs did not know that these representations were false, relied on them, and did not know that the defendant had received his money from the government until April 13, 1951, about two months before this suit was brought. The defendant admitted the execution of the lease and the receipt of the \$1,500, but denied the other allegations of the complaint, and as affirmative defenses set up the running of various statutes of limitation. The court found that all of the allegations of the complaint are true, and that all of the allegations of the answer inconsistent therewith are untrue, and as a conclusion of law found that the action was not barred by the statutes of limitation. It also found that the defendant was entitled to a credit of \$100 on account of another matter not material here, and entered judgment in favor of the plaintiffs for \$1,400.

On this appeal from the judgment the defendant contends that the finding that the plaintiffs paid Mrs. Wolfe in reliance on defendant's promise to repay the \$1,500, is not supported by the evidence; that there was no consideration for the defendant's promise to pay the plaintiffs the \$1,500 since that promise was made after the plaintiffs had agreed to pay Mrs. Wolfe; that a tenant is estopped to deny his landlord's title; and that this action was barred by the statute of limitations since the two-year statute applies, and the action was not brought until three years after the plaintiffs discovered the facts with respect to the ownership of the property. It is argued that the

plaintiffs had use of the property for the full five years and suffered no injury; that the first and second causes of action are based on the third cause of action wherein the facts are specifically pleaded; and that the plaintiffs did not rely on the promise to repay made to them as alleged in the third cause of action, since before the defendant made that promise the plaintiffs had already agreed to pay the rent to Mrs. Wolfe.

The evidence shows and the defendant admitted that he repeatedly promised to pay this \$1,500 when he received his money from the government. It also shows that the plaintiffs agreed to pay Mrs. Wolfe before the defendant made that promise to them; and that the money was actually paid to Mrs. Wolfe after the defendant's promise was made, although it was thus paid under an assignment made by the plaintiffs prior to the time the defendant's promise was made. The finding that the plaintiffs paid the money to Mrs. Wolfe in reliance of the defendant's promise to pay the \$1,500 is not supported by the evidence, since they had agreed to do so before that promise was made, but that fact is not controlling on this appeal. It clearly appears that the defendant did not own the leased property and had no right to lease it, and that he received \$1,500 to which he was not entitled. The first cause of action was for money had and received, and the findings on that cause of action are not rendered ineffective by the fact that one of the findings, on the third cause of action, is not in all respects supported by the evidence.

[1-6] It is well settled that no contract is necessary to support an action for money had and received other than the implied contract which results by operation of law where one person receives the money of another which he has no right, conscientiously, to retain. Under such circumstances the law will imply a promise to return the money. The action is in the nature of an equitable one and is based on the fact that the defendant has money which, in equity and good conscience, he ought to pay to the plaintiffs. Such an action will lie where the money is paid under a void agreement, where it is obtained by fraud or where it was paid by a mistake of fact.

(17 Cal.Jur., Secs. 1, 2, 9 and 12.) The court's findings in this regard are fully supported by the evidence, and there is no lack of consideration in the sense contended for by the defendant. Moreover, the plaintiffs were not estopped to deny the defendant's title under these circumstances. They were not in possession when the action was filed and the usual rule does not apply where a lease is executed either through fraud or through a misapprehension as to the actual title. *Kearney Inv. Co. v. Golden Gate Ferry Co.*, 198 Cal. 560, 246 P. 322; *Yuba River Sand Co. v. Marysville*, 78 Cal. App.2d 421, 177 P.2d 642. After the tenancy has ended the reason for the rule has ceased to exist. *Tewksbury v. Magraff*, 33 Cal. 237.

[7, 8] With respect to the statute of limitations it is argued that the third cause of action is allegedly the result of a broken oral promise made by the defendant; that it does not state a cause of action for fraud; that the two-year statute of limitations set forth in Section 339 of the Code of Civil Procedure had run during the year 1950 and this action was not begun until June, 1951; and that there was no written acknowledgment or waiver such as required by section 360.5 of that code. The court found, as a conclusion of law, that the action was not barred by the statute of limitations. While it is argued that this conclusion is not supported by the evidence, no contention is made that the basic facts upon which that conclusion rests are not sufficiently supported. It was alleged and found, in effect, that the defendant misrepresented the facts as to his ability to pay at that time; that by his representations, which were relied on by the plaintiffs, he induced them to give him time in which to make the payment; that he agreed to make such payment out of a specific fund when he received that fund; that he misled them until the statute had run; and that they acted promptly when they discovered that he had received the fund. While there was no written waiver with respect to the statute, the facts found were sufficient to constitute an estoppel which would prevent the defendant from relying on that defense under the circumstances which here appear.

The findings, as a whole and as supported by the evidence, are sufficient to sustain the judgment. The defendant admittedly received this money to which he was not entitled, the plaintiffs were obliged to pay rent to the real owner for the same period, and the defendant is not entitled in equity and good conscience to retain this money which was paid to him under a mistake of fact.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



Marcos GONZALES, Petitioner and
Respondent,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, an unincorporated association; Thomas E. McShane, and A. C. McGraw, as International Representatives thereof; International Association of Machinists, Local Lodge No. 68, an unincorporated association; Robert Roller, as President of said Local Lodge; Reese Conte, as Secretary of said Local Lodge; Edward Peck, as Treasurer of said Local Lodge, Respondents and Appellants.

Civ. 16536.

District Court of Appeal, First District,
Division 1, California.

Feb. 16, 1956.

Action by former union member against union and others to obtain reinstatement of former member as a union member and to recover for loss of wages and mental distress. The Superior Court, City and County of San Francisco, John B. Molinari, J., granted relief sought, and union and others appealed. The District Court of Appeal, Bray, J., held that, where union improperly expelled union member from membership in union, withholding from union member of required card to obtain employment and refusal of union's

dispatcher to send member out on job constituted "unfair labor practices" and, therefore, exclusive jurisdiction of issue of damages arising therefrom was in the National Labor Relations Board, and award of damages in action by expelled member against union and others was beyond trial court's jurisdiction.

Judgment affirmed in part and reversed in part.

1. Labor Relations §115

Union's international president had power to decide wrongly as well as rightly, and president's finding that there had been a two-thirds vote in favor of union member's expulsion from union could not alone, even if erroneous, justify member's non-compliance with appeal rules of the union.

2. Labor Relations §113

Where parent union constitution provided that international president should decide all constitutional questions subject to right of appeal and constitutional provision which union member was charged with violating provided a penalty of a fine or expulsion or both, and local union constitution provided that membership could substitute another punishment for that recommended by trial committee, international president, in event he affirmed action of local union in finding member guilty but felt that penalty imposed was too great, could reverse the penalty, but determination of new penalty would be for local union.

3. Labor Relations §115

Where union's rules provided penalty of fine or expulsion or both for conduct with which union member was charged, and penalty of expulsion was imposed upon union member by union, international president's reduction of penalty to a \$500 fine and an appropriate apology constituted a violation of union's rules for appellate procedure, made it futile for union member to invoke further appellate rules of union, and gave member right to appeal to courts for relief without further exhausting his administrative remedy under union rules.

4. Labor Relations §141

Where local union's constitution provided that rules of order governing parlia-

mentary procedure should be printed in copies of parent union's constitution and that no other rules should apply, and parent union's constitution made Robert's Rules of Order the parliamentary law of both parent and local union except in cases otherwise provided for by parent union's constitution, if there were any conflict between Robert's Rules and provisions of either constitution, such constitutional provision would necessarily prevail.

5. Labor Relations ⇨108

Where there was no provision in either parent or local union's constitution for rescinding action of membership in voting on recommendations of a trial committee, and parent union's constitution made Robert's Rules of Order the parliamentary law of both parent and local union, except in cases otherwise provided for by such constitutions, attempting to rescind, by a standing vote, an action which was required to be taken by a secret vote constituted a violation of the constitution and the rules and, therefore, was void.

6. Labor Relations ⇨111

Union's procedure in expelling member would have to be such as would afford accused member substantial justice, and requirements of fair trial would be imposed even though union rules fail to provide therefor, and union action in expelling member without notice and in his absence on August 2, after member had had notice of proceedings up to July 19 action exonerating him, violated those rudimentary rights which would give union member a reasonable opportunity to defend against the charges made.

7. Labor Relations ⇨108

Where union rules required two-thirds vote of those voting on question of expulsion, and there were 29 yes votes, 14 noes, and 1 blank, or a total of 44 votes, casting of the blank ballot constituted voting, and 30 votes would have been necessary to achieve the required two-thirds votes, and, therefore, the 29 affirmative votes were not sufficient to sustain the attempted expulsion.

8. Labor Relations ⇨90

A clearly erroneous administrative construction of a definite and unambiguous provision of union constitution could not operate to change its meaning.

9. Labor Relations ⇨114

Improper expulsion by union of union members does not constitute an "unfair labor practice" which, under the National Labor Relations Act, takes jurisdiction away from the courts. National Labor Relations Act, § 8 as amended by Labor Management Relations Act, 1947, § 101, 29 U.S.C.A. § 158.

See publication Words and Phrases, for other judicial constructions and definitions of "Unfair Labor Practice".

10. Labor Relations ⇨395, 505

Illegal expulsion of union member from union does not constitute an "unfair labor practice" as such, and, therefore, National Labor Relations Board cannot restore union membership because its power to direct affirmative action is dependent upon its finding of an unfair labor practice, and it is the causing or attempting to cause the employer to discriminate against an employee that brings board's power into play. National Labor Relations Act, § 8 as amended by Labor Management Relations Act, 1947, § 101, 29 U.S.C.A. § 158.

11. Labor Relations ⇨395, 510

Where union improperly expelled union member from membership in union, withholding from union member of required card to obtain employment and refusal of union's dispatcher to send member out on job constituted "unfair labor practices", and, therefore, exclusive jurisdiction of issue of damages arising therefrom was in the National Labor Relations Board, and award of damages in action by expelled member against union and others was beyond trial court's jurisdiction. Labor Management Relations Act, 1947, § 1 et seq., 29 U.S.C.A. § 141 et seq.; National Labor Relations Act, § 8 as amended by Labor Management Relations Act, 1947, § 101, 29 U.S.C.A. § 158.

Phoenix & Kennedy, Redwood City, for appellants.

McMurray, Brotsky, Walker, Bancroft & Tepper, by Lloyd E. McMurray, San Francisco, for respondent.

BRAY, Justice.

The superior court rendered judgment reinstating petitioner in the International Association of Machinists and awarding him \$6,800 damages for loss of wages and \$2,500 for mental distress. All respondents¹ in the lower court are appellants here.

Questions Presented.

1. Was petitioner excused from exhausting his administrative remedies?
2. Did the lodge violate the constitutions of the organization?
3. Are the International President's interpretations binding on the courts?
4. Damages: Does the Labor Management Relations Act, 1947, 29 U.S.C.A. § 141 et seq., Taft-Hartley Act, apply?

Facts.

This proceeding grew out of the recommendation in 1948 by petitioner, as a member of the investigating committee of the lodge, that one Nelson be denied admission to membership. Thereafter petitioner was physically assaulted by Nelson. Petitioner, believing that the assault was instigated by Charles Truax, who was the International Representative, filed suit in the superior court against both Nelson and Truax for damages for injuries received in the as-

sault. A nonsuit was granted in favor of Truax and a judgment in favor of petitioner against Nelson for \$10,000. July 7, 1950, petitioner was tried by the trial committee of the lodge for violation of article XXV, section 1, Grand Lodge Constitution.² July 19th, the trial committee at the regular bi-monthly meeting submitted to the lodge its verdict—"guilty as charged," and its recommendation that petitioner be expelled from the association. Thereupon pursuant to article K, section 7 of the constitution, the membership present voted on the action of the committee.³ The vote was 43-31 against sustaining the verdict.⁴ August 2, 1950, at a regular meeting a motion was made to rescind the action of July 19th rejecting the verdict of the trial committee. A standing vote showed 38 yes, 4 no. Thereupon a secret ballot vote was taken on a motion to sustain the "guilty" verdict of the committee. This resulted in 31 yes, 12 no, 2 blank ballots. A secret ballot vote was then taken on a motion to expel petitioner from the association as recommended by the committee. This resulted in 29 yes, 14 no, 1 blank. August 2nd petitioner appealed to the International President from this action of the lodge, claiming among other things that the action of the lodge on August 2nd, after his vindication on July 19th, was a violation of the constitution, and also that the vote for his expulsion was not the required "two-thirds (2/3) vote of those voting." November 13th, the International President sent a letter to the president and secretary of the lodge, in which he made formal find-

officer of the Grand Lodge * * *." The charges were preferred by Truax and were based upon the allegations in petitioner's complaint in the civil action that Truax directed and ordered Nelson to perpetrate the assault and battery on petitioner.

1. They are the International Association of Machinists, an unincorporated association, Thomas E. McShane, and A. C. McGraw, as International Representatives thereof; International Association of Machinists, Local Lodge No. 68, an unincorporated association, Robert Roller, as President of said Local Lodge, Reese Conte, as Secretary of said Local Lodge, Edward Peek, as Treasurer of said Local Lodge.
2. " * * * any member * * * circulating or causing in any manner to be circulated any false or malicious statement * * * falsely or maliciously attacking the character, impugning the motives or questioning the integrity of any

3. This provides that the recommendation of the committee may be amended, rejected, or another punishment substituted by a majority vote of those voting. To expel, however, the required vote is two-thirds of those voting.
4. July 28, 1950, Truax appealed to the Grand Lodge from this action of the lodge. August 22nd, he withdrew his appeal.

ings, conclusions and decision. He upheld the conviction of petitioner, but decided that expulsion was too severe a penalty and then modified the penalty to a fine of \$500 to be paid the lodge, and a "complete and appropriate apology" in writing from petitioner to Truax, copy thereof to be sent to the president. January 30, 1951, petitioner received a letter from the General Secretary-Treasurer of the International to the effect that on his appeal of the decision of the International President to the Executive Council that body had unanimously sustained the decision. "Accordingly, President Hayes' decision of November 13, fining you \$500.00, becomes the decision of the Executive Council, and our records have been so indicated." February 23, 1951, in reply to a letter from petitioner, asking the course to be followed in appealing the decision of the Executive Council, the General Secretary-Treasurer wrote petitioner calling attention to section 6, article XXV, of the constitution⁵ which provides for appeals to a convention of the Grand Lodge and stated that his appeal could not be sent to the convention nor considered by it "until you have carried out the decision of the Executive Council, which means you must pay the fine of \$500.00 before you can appeal to the convention." February 11, 1952, the lodge's financial secretary notified petitioner that the lodge would no longer accept dues from him until he had complied with the president's decision by paying the \$500 fine and making a complete and appropriate apology to Truax. February 20th, petitioner formally refused to pay the fine or make apology. December 3, 1952, petitioner filed his application for a writ of mandate in the superior court.

Whatever confusion there may have been in this state as to the right of a trade union member to appeal to the courts for redress from his union's action,

without first exhausting all remedies provided by its constitution and by-laws, such confusion has been resolved and a definite rule established in the recently decided *Holderby v. International Union, etc., Engrs.*, 45 Cal.2d 843, 291 P.2d 463. There the plaintiff was expelled from the union in complete violation of the union's constitution. In holding that he could not appeal to the courts without first availing himself of the remedies provided in the constitution for a review by the general board of the action taken against him, the court refused to follow cases like *Weber v. Marine Cooks' & Stewards' Ass'n*, 93 Cal.App.2d 327, at page 338, 208 P.2d 1009, at page 1016, which had held that "where an organization has violated its own laws and arbitrarily violated a member's property rights the rule of exhaustion of remedies by appeal to a higher body within the organization need not be adhered to before direct resort to a judicial tribunal." It then ruled that the union member must exhaust the union remedies before he may appeal to the courts, no matter what the initial violation of union rules may have been, and that the only exception to the general rule is if there has been a violation of the rules on appeal. "It is only when the organization violates its rules for appellate review or upon a showing that it would be futile to invoke them that the further pursuit of internal relief is excused. The violation of its own rules which inflicts the initial wrong furnishes no right for direct resort to the courts." 45 Cal.2d at page 847, 291 P.2d at page 466. Therefore we are limited to a determination of whether the union rules on appeal were violated in any respect or whether further pursuit of internal relief is excused.

1. Administrative Remedy.

Petitioner followed his administrative remedy through an appeal to the Interna-

5. Before any appeal can be taken to the convention or to the membership, at large by referendum, "all orders of the Executive Council in relation thereto, must be fully complied with * * * and in no case shall * * * any * * * member * * * appeal to the civil courts for redress until after having exhausted

all rights of appeal under the provisions of this Constitution." Section 10, article K, constitution, likewise requires that a member of a local lodge must exhaust all rights of appeal under the constitution of both the Grand Lodge and the local lodge before appealing to the courts.

tional President and then from his decision to the Executive Council. He did not proceed with an appeal either to the convention of the Grand Lodge or to the membership at large. He was barred from so doing by the requirement that he first fully comply with the orders of the Executive Council.

[1-3] Petitioner contends that the International President and the Executive Council violated the union rules on appeal in deciding that the required two-thirds vote had expelled him and in changing the penalty from expulsion to a fine and apology. As to the finding of the president that there was a two-thirds vote in favor of expulsion, such finding, if erroneous, could not alone justify noncompliance by petitioner with the appeal rules of the organization. Just as a court has the power to decide wrongly as well as rightly, the president on appeal likewise has such power and a wrong decision is not the violation of the organization's rules on appeal which under the Holderby case justifies the member in refusing to further follow the union's rules on appeal. The constitution provides, art. V, § 1, that the president shall decide all constitutional questions subject, however, to the right of appeal.⁶ However, the imposition of an apology requirement would appear to be in a different category. Article XXV, section 1, the section which petitioner was charged with violating, provides a penalty of fine or expulsion, or both. That section is in the Grand Lodge Constitution. In the local lodge constitution, art. K, § 7, it is provided that the membership may substitute another punishment for that recommended by the trial committee. It is questionable whether this gives the membership the right to substitute any penalty other than that included in the phrase "fine or expulsion or both" in the penalty section of the Grand

Lodge Constitution. However, we can find no authorization to the president, upon appeal, to change the penalty voted by the lodge. It would appear that his authority is either to affirm or reject the action of the lodge, and in the event he affirms its action in finding a member guilty but, as here, feels that the penalty is too great, he may reverse the penalty but the determination of the new penalty is for the lodge and not for him. It may be that had the president merely reduced the penalty to a \$500 fine, petitioner could not complain of a departure from the rules so obviously in his favor, as a fine is included in the penalties provided by the constitution. But the requirement of an apology is an entirely different matter. Nowhere is there a provision for such a penalty and it is completely outside the penalties prescribed. This action then constituted not only a violation of the organization's rules for appellate procedure but it brings the case under the second situation stated in the Holderby case, namely, "that it would be futile to invoke" the further appellate rules. They provide that to go further with his appeal petitioner must comply with all orders of the Executive Council. Thus to gain redress petitioner must pay a fine which the president and the Executive Council had no right to impose and to make an apology which neither had the right to require. While the fine money could be refunded if the convention were to reverse the Executive Council's decision, there is no way in which the apology could be wiped out. The effect of these requirements was to prevent petitioner from proceeding further and gave him the right to appeal to the courts for relief.

Appellants contend that the action of the Executive Council, in effect, eliminated the president's requirement of an apology. The General Secretary-Treasurer on Jan-

6. Nor do we think that the president violated any rules in prescribing a fine *prior to approval* thereof by the Executive Council. Section 8, article K, provides that no fine in excess of \$50 "shall be imposed upon any member * * * unless the same is first approved by the Executive Council." Having in mind

that under the appellate procedure an appeal is first to the president and thereafter to the Executive Council, and that this provision is in the constitution of the lodge and not in that of the Grand Lodge, it is obvious that it does not apply to a decision on appeal.

uary 30, 1951, notified petitioner: "Inasmuch as you failed to supplement your letter of November 16, the Executive Council, at its recent meeting, carefully appraised all of the facts as presented in the correspondence dealing with your case and, after due deliberation, *by unanimous action, voted to sustain the International President's decision.* Accordingly, President Hayes' decision of November 13, fining you \$500.00, becomes the decision of the Executive Council * * *." (Emphasis added.) On February 23rd he notified petitioner that an appeal to the convention, if made, could not be "processed" "until you have carried out the decision of the Executive Council, which means you must pay the fine of \$500.00 before you can appeal to the convention." On February 11, 1952, the financial secretary of the lodge notified petitioner that the lodge could not accept dues from him until he paid the \$500 fine *and made a complete and appropriate apology*, sending copy to the International President. "This is in accordance with the decision" of the president "and sustained by the Executive Council * * *." It is difficult to understand how the Executive Council "voted to sustain the International President's decision" if it deleted therefrom the apology requirement. Certainly the lodge interpreted the action of the Executive Council as requiring the apology as well as the fine. At the trial counsel for appellants stated: "* * * it is true that in order to comply with the decision of the International President that the Plaintiff would have to pay \$500 and that we don't dispute that at all, and *it also appears that he would have to make an apology.*" (Emphasis added.) In any event, as a result of the appeal brought by petitioner, he finds himself ousted from his union because of nonpayment of dues, which he would pay but it will not receive, and denied his right of further appeal because he will not do something which the appellate bodies had no right to require him to do. It should be remembered that being ousted or expelled from a union is a matter of much greater

consequence than expulsion from a fraternal organization. In the former case, in most instances it means a loss of a member's job, and therefore, his means of making a living. Especially is this so when employers of the type of labor provided by members of this organization only hire through the union hiring hall. At the very least, his no longer belonging to the union would be a serious handicap in the labor market.

The facts bring this case under the exception to the general rule of exhaustion of administrative remedy. We are therefore required to consider whether the acts of the lodge violated the constitution of either the Grand Lodge or the local lodge.

2. Lodge Violations.

[4,5] There is no provision in either constitution for rescinding the action of the membership in voting on the recommendations of a trial committee.⁷ Appellants support such action, however, by contending that the procedure was in accordance with Robert's Rules of Order and that the constitutions make those rules applicable. Article G, section 2 of the local lodge constitution provides: "The Rules of Order governing parliamentary procedure shall be printed in the copies of the Constitution of the Grand Lodge, and no other rules shall apply". In these rules there is nothing upon the subject with which we are here concerned. Article II, section 11 of the Grand Lodge Constitution makes Robert's Rules of Order the parliamentary law of both the Grand Lodge and the local lodge, "except in cases otherwise provided for by this Constitution." If there is any conflict between Robert's Rules and the provisions of either constitution the latter must necessarily prevail. See *Harris v. National Union, etc., Cooks and Stewards*, 98 Cal.App.2d 733, 736, 221 P.2d 136. The lodge constitution requires that voting on the recommendations of the trial committee be by secret ballot. It would seem to conflict with this requirement to permit a vote to rescind such action to be taken in a less

7. Truax having appealed to the president from the action taken on July 19th, it is very doubtful if the membership under

any theory could modify or rescind the action which was then on appeal.

formal way. Here it was taken by a standing vote. At the very least this violated the spirit of the constitution. Moreover, Robert's Rules provide (§ 10, subd. 5, p. 50, Robert's Rules of Order Revised Seventy-fifth Anniversary Edition): "At any future session, the resolution, or other main motion, may be rescinded *in the same way if it had been adopted*; * * *." (Emphasis added.) The action taken here violated that provision. We hold that attempting to rescind an action required to be taken by a secret vote, by a standing vote, is a violation of the constitution and of the rules and was therefore void.

[6] The action of rescission was taken in petitioner's absence. *Ellis v. American Federation of Labor*, 48 Cal.App.2d 440, at pages 443-444, 120 P.2d 79, at page 80, holds: "It is settled, however, in this state and elsewhere that a member of an unincorporated association may not be suspended or expelled, nor a subordinate body suspended or its charter revoked, without charges, notice and a hearing, even though the rules of the association make no provision therefor." While petitioner had notice of the proceedings up to the action exonerating him on July 19th, the action purported to be taken on August 2nd was taken without notice and in his absence. The above mentioned rule would apply to such action. Such action violated "those rudimentary rights which will give him a reasonable opportunity to defend against the charges made. * * * The union's procedure, however, must be such as will afford the accused member substantial justice, and the requirements of a fair trial will be imposed even though the rules of the union fail to provide therefor." *Cason v. Glass Bottle Blowers Ass'n*, 37 Cal.2d 134, 143, 231 P.2d 6, 11, 21 A.L.R.2d 1387.

[7] Moreover, the vote on the question of expulsion did not produce the required

"two thirds ($\frac{2}{3}$) vote of those voting." There were 29 yes votes, 14 noes and 1 blank, cast, or a total of 44 votes. The casting of a blank ballot is voting. To constitute a two-thirds vote of those voting it was necessary to get 30 votes. As only 29 affirmative votes were cast the measure failed and the attempted expulsion cannot stand.⁸

3. President's Interpretation.

[8] Appellants contend that the president's interpretation of the constitutions as giving him the power to impose the fine and apology, in holding the rescinding action of the lodge as proper, and in determining that the blank ballot should not be counted in determining the votes cast, is binding upon the courts. This contention is based upon the rule set forth in *DeMille v. American Fed. of Radio Artists*, 31 Cal.2d 139, 147, 187 P.2d 769, 775, 175 A.L.R. 382: "The practical and reasonable construction of the Constitution and by-laws of a voluntary organization by its governing board is binding on the membership and will be recognized by the courts." But the construction placed upon such actions by the president in this case cannot be held to be reasonable under the circumstances. "A clearly erroneous administrative construction of a definite and unambiguous provision of the constitution cannot operate to change its meaning." *Harris v. National Union, etc., Cooks & Stewards*, supra, 98 Cal.App.2d 733, 737, 221 P.2d 136, 139; see also *Mandraccio v. Bartenders Union, Local 41*, 41 Cal.2d 81, 85, 256 P.2d 927; *Riviello v. Journeyman Barbers, etc., Union*, 109 Cal. App.2d 123, 128-129, 240 P.2d 361.

We are not impressed by the fact that the president stated in effect that his conclusion would not have been different if he were considering Truax' appeal from the first action of the lodge rather than petitioner's appeal from its second action. It

8. While the trial court found that the action of petitioner in charging Truax in the civil action with directing and ordering Nelson to assault him violated article XXV, section 1, "falsely or maliciously attacking the character, impugning the motives or questioning the integrity of

any officer of the Grand Lodge" (Truax was such an officer) we deem it unnecessary to consider this finding for the reason that by the action of the membership on July 19th in rejecting the trial committee's finding, the matter has become academic.

is only the latter situation with which we have to deal.

4. Damages: Jurisdiction.

[9] The Taft-Hartley Act prescribes in part: "(b) It shall be an unfair labor practice for a labor organization or its agents— (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * **" 29 U.S.C.A. § 158; emphasis added. In construing this section the courts have held that the courts have jurisdiction to restore union membership to a member improperly deprived thereof by his union. As said in *Mahoney v. Sailors' Union of the Pacific*, 1954, 45 Wash.2d 453, 275 P.2d 440, 444, improper expulsion by the union does not constitute an "unfair labor practice" which under the act takes jurisdiction away from the courts. See also *Real v. Curran*, 285 App.Div. 552, 138 N.Y.S.2d 809. But a different situation results when the member seeks damages as a result of such expulsion. The courts hold that the act authorizes the Labor Relations Board to compensate the member for loss of earnings if lost through "the procedures followed by the union whereby employers were caused to discriminate against" such members (*idem*, 275 P.2d at page 444); such procedures constitute an unfair labor practice. There are many cases holding it to be an unfair labor practice for the union in any way to cause an employer to fail to employ the discharged member. Among others are *Born v. Laube*, 9 Cir., 213 F.2d 407, certiorari denied Oct. 18, 1954, 348 U. S. 855, 75 S.Ct. 80, 99 L.Ed. 674; *Radio Officers' Union, etc. v. National L. R. Bd.*, 347 U.S. 17, 74 S.Ct. 323, 98 L.Ed. 455; *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 75 S.Ct. 480, 99 L.Ed. 546. There are three cases, almost identical in this respect with the one at bar, in which the union after improperly expelling the member, took no active steps to notify the employer not to employ him, but, as here, merely re-

fused to issue the employee a hiring hall card or to dispatch him to the job. In each of those cases it was held that such action constituted an "attempt to cause 'an employer * * * to discriminate against' the employee, 29 U.S.C.A. § 158, and therefore was an unfair labor practice as to which Congress had given the Labor Relations Board exclusive jurisdiction. *Mahoney v. Sailors' Union of the Pacific*, supra, 275 P.2d 440; *Sterling v. Local 438, etc., Md.*, 1955, 113 A.2d 389; *Real v. Curran*, supra, 138 N.Y.S.2d 809. In the latter case the court said, at page 812: "If the union caused or attempted to cause plaintiff's discharge from his existing employment with the United States Lines, as is alleged—*either by hiring procedures, or by causing union members not to work with him—it has committed an unfair labor practice within the contemplation of the section, and the National Labor Relations Board can direct the union to cease and desist from such conduct.*" (Emphasis added.)

[10] As said in *Real v. Curran*, supra, 138 N.Y.S.2d 809, 813-814, the illegal expulsion of a member from the union does not constitute an unfair labor practice as such and therefore "the Board cannot restore plaintiff's union membership because its power to direct affirmative action is dependent upon its finding of an unfair labor practice. * * * It is the causing or attempting to cause the employer to discriminate against an employee * * * that brings the Board's power into play. * * * It is, therefore, concluded that the provisions of the Labor Management Relations Act, 1947, do not exclude the State courts from their traditional jurisdiction to restore to membership a wrongfully expelled member of the union."

[11] Because the withholding from petitioner of the required card to obtain employment and the refusal of the union's dispatcher to send petitioner out on a job constituted unfair labor practices, and consequently the exclusive jurisdiction of the damages issue is in the Labor Relations Board, we are forced to hold that the award of damages by the trial court was beyond

the jurisdiction of the court and must be reversed.

Those portions of the judgment awarding petitioner damages are reversed. In all other respects the judgment is affirmed. Petitioner will recover costs.

PETERS, P. J., and FRED B. WOOD, J., concur.



139 Cal.App.2d 388

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Arnold E. VANDERSEE, Defendant and
Appellant.

Cr. 5488.

District Court of Appeal, Second District,
Division 1, California.

Feb. 23, 1956.

Hearing Denied March 21, 1956.

Defendant pleaded guilty to violations of statute requiring employers to hold in trust any property put up by an employee or applicant as a bond. The Superior Court, Los Angeles County, Thomas J. Ambrose, J., denied his motion to vacate pleas of guilty and defendant appealed or purported to appeal from the judgment and sentence and from the order denying his motion. The District Court of Appeal, White, P. J., held that the relevant sections of the Labor Code are not violative of the due process clause of the Fourteenth Amendment of the Federal Constitution or of the state constitutional provision declaring the right of acquiring and possessing property, nor do the sections unconstitutionally impinge upon the right of freedom of contract.

Judgment affirmed; purported appeals from sentence and from order denying motion to vacate pleas of guilty dismissed.

1. Constitutional Law ⇨89(1)

Validity of legislation impinging upon right of contract is to be judged from its tendency to promote the general good.

2. Labor Relations ⇨8

Legislation enacted to promote welfare of large classes of workers whose personal services constitute their means of livelihood is of direct and vital concern to every community and calculated to confer direct or indirect benefits upon people as a whole, and comes within proper exercise of police power. West's Ann.Labor Code, §§ 405, 406.

3. Labor Relations ⇨7

Design and purpose of statutes providing that property put up by employee or applicant as a bond should be held in trust by employer and that any property put up by employee or applicant as part of contract of employment should be deemed put up as a bond was to forestall a very real danger of fraud and embezzlement as well as danger of misappropriation of funds of an employee deposited in trust with employer. West's Ann.Labor Code, §§ 405, 406.

4. Labor Relations ⇨7

Purpose of statutes providing that any property put up by an employee or applicant as bond should be held in trust by employer and that any property put up by employee or applicant as part of contract of employment should be deemed put up as a bond is to protect that larger portion of public who are employees and who in many instances are forced through economic necessity to find employment by meeting whatever requirements are set by prospective employer. West's Ann.Labor Code, §§ 405, 406.

5. Constitutional Law ⇨87, 89(4), 275(2)

Labor Relations ⇨8

Sections of labor code respectively relating to cash bond furnished by employee or applicant, requiring that any property put up by employee or applicant as bond be held in trust by employer, and requiring that property put up by employee or applicant as part of contract of employment be deemed put up as a bond, are not violative of state constitutional provision declaring

right of acquiring and possessing property, and do not deny due process or freedom of contract. West's Ann.Labor Code, §§ 402-406; West's Ann.Const. art. 1, § 1; U.S. C.A.Const. Amend. 14.

6. Criminal Law ⇐1023(10)

An appeal from sentence was not authorized by law and purported appeal from same would be dismissed.

7. Criminal Law ⇐1023(3)

Where order denying motion to vacate pleas of guilty was made prior to entry of judgment, it was an intermediate order reviewable on appeal from judgment, and purported appeal from such order would be dismissed.

Matthews & Hill, John J. Hamilton, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information containing six counts, filed by the District Attorney of Los Angeles County, defendant was accused in Counts I, III, V and VI with violations of section 405 of the Labor Code of California, while Counts II and IV charged the crime of grand theft.

Following the entry of not guilty pleas to all counts charged in the information, trial by jury was duly waived and it was stipulated that the cause be submitted on the transcript of testimony adduced at the preliminary examination. Exhibits were admitted into evidence and filed and the trial continued to July 22, 1954. After several continuances the trial was finally set for March 16, 1955, upon which date defendant moved to withdraw his plea of not guilty to Counts I and VI (violations of section 405 of the State Labor Code). As to these counts, pursuant to stipulation, a mistrial was declared and the previous order of submission upon the preliminary examination transcript was vacated. Defendant thereupon pleaded guilty to Counts I and VI and the matter was referred to the probation department for report and rec-

ommendation. When the cause was again called on June 28, 1955, defendant made a motion to withdraw his pleas of guilty theretofore entered as to Counts I and VI. The motion was denied and defendant sentenced to State Prison. The remaining four counts were dismissed.

From the "Judgment and sentence on Counts one and six", and from the order denying his "motion to vacate pleas of guilty", defendant prosecutes this appeal.

In urging a reversal appellant relies solely upon his challenge to the constitutionality of sections 405 and 406 of the Labor Code, to the violation of which he pleaded guilty. He grounds this attack upon the claim that these sections "interfere with and violate the right of persons to contract and is not a proper subject matter under the police power of the legislature affecting all classes of persons."

It is appellant's contention that the aforesaid Labor Code sections being unconstitutional the judgment is void, and should be reversed with directions to the court below to dismiss the information.

Section 405 of the Labor Code provides as follows: "Any property put up by any employee or applicant as a bond shall not be used for any purpose other than liquidating accounts between the employer and employee or for return to the employee or applicant and shall be held in trust for this purpose and not mingled with the property of the employer. No contract between the employer and employee or applicant shall abrogate the provisions of this section. Any employer or prospective employer, or agent or officer thereof, who misappropriates any such property, mingles it with his own, or uses it for any other purpose than that herein set forth is guilty of theft and shall be punished in accordance with the provisions of the Penal Code relating to theft."

Section 406 of the same code reads: "Any property put up by an employee, or applicant as a part of the contract of employment, directly or indirectly, shall be deemed to be put up as a bond and is subject to the provisions of this article whether the property is put up on a note or as a loan

or an investment and regardless of the wording of the agreement under which it is put up."

[1,2] Appellant's basic objection to the foregoing statutes is that they constitute an invalid invasion of freedom of contract. However, the validity of legislation impinging upon the right of contract is to be judged from its tendency to promote the general good. And legislation which is enacted with the object of promoting the welfare of large classes of workers whose personal services constitute their means of livelihood must certainly be regarded as of direct and vital concern to every community and as calculated to confer direct or indirect benefits upon the people as a whole, thereby coming within the proper exercise of the police power, seeking as it does to promote the welfare of a large class against a real and existing danger. *De Haviland v. Warner Bros. Pictures*, 67 Cal.App.2d 225, 235-237, 153 P.2d 983.

[3,4] The very design and purpose of the statutes here in question was to forestall a very real danger of fraud, and embezzlement, as well as danger of misappropriation of the funds of an employee deposited with an employer in trust. The self-evident purpose of the legislation here under consideration is to protect that larger portion of the public who are employees and who, in many instances, are forced through economic necessity to find employment by meeting whatever requirements are set by a prospective employer. Under such conditions, employer and employee do not deal on an equal footing, and the force of economic conditions opens the way for fraudulent practices which the legislation here under attack seeks to abate.

[5] Furthermore, an attack upon the constitutionality of the aforesaid Labor Code provisions, an attack analogous to the one here urged by appellant, was made in *People v. Pond*, 44 Cal.2d 665, 675-676, 284 P.2d 793, 799, wherein the Supreme Court declared the sections constitutional. In so holding, the court noted, "Defendant urges that sections 402 through 406 of the Labor Code violate the due process clause of the Fourteenth Amendment of the federal Con-

stitution and the provision of section 1 of article I of our state Constitution that 'all men * * * have certain inalienable rights, among which are those of * * * acquiring, possessing, and protecting property * * *,' and that these Labor Code sections cannot be justified under the police power.

"As defendant says, the sections limit the right of contract between employer and employee. However, we agree with the following reasoning of Presiding Judge Shaw, speaking for the Appellate Department of the Superior Court in *People v. McEntyre*, 1938, 32 Cal.App.2d Supp. 752, 755-756, 84 P.2d 560, where the constitutionality of the legislation was upheld against an argument such as that presented by defendant here: 'The right of contract is subject to regulation and limitation in many of its phases; and there is special need for such regulation in regard to the relations between employer and employee. The prospective employer and the applicant for employment, who is usually dependent on his own earnings for the support of himself and his family, do not deal on an equal footing. Especially is this true in times of depression and widespread unemployment. Experience has shown, to the extent that it may be regarded as a matter of common knowledge, that there is great opportunity for fraudulent practices, embezzlements and other forms of cheating by employers in the common custom of requiring employees to deposit so-called "cash bonds" with their employers. * * * The usual applicant for employment, in spite of his supposed freedom of contract, is in no position to dictate the terms of his contract of employment, or to insist that it protect him against these possibilities of loss. The legislature has therefore deemed it necessary to provide such protection for him, and to that end has enacted that all deposits put up by him as part of the contract of employment be deemed bonds and that all such deposits be held intact as trust funds, and has prohibited any contract to the contrary. Considering such facts regarding the matter as are matters of general knowledge, this legislative conclusion is obviously one to which reasonable minds might come. It

is equally obvious that the legislation enacted in pursuance of that conclusion has a reasonable tendency to abate the evil at which it is aimed. The question whether it should have been adopted is therefore purely one of legislative discretion, not of power, and we may not, if we would, interfere with that exercise of discretion.’”

In concluding its discussion on the constitutionality of the aforesaid sections, the Supreme Court further stated at page 676 of 44 Cal.2d, at page 800 of 284 P.2d:

“Defendant urges that the legislation is unconstitutionally vague because it does not define ‘property put up by an employee or applicant as a bond’ and ‘liquidating accounts’ as used in section 405 of the Labor Code. He relies upon *Winters v. [People of State of] New York* (1948), 333 U.S. 507, 518, 68 S.Ct. 665, 92 L.Ed. 840, where it is said, ‘The standards of certainty in statutes punishing for offenses is (sic) higher than in those depending primarily upon civil sanction for enforcement. * * There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment.’ The meaning of the expressions challenged by defendant, in their context, is clear to persons of ordinary intelligence, and explicit statutory definition thereof is not necessary.”

Appellant urges that in the decision just cited the reversal was based upon the fact that the accused therein was not charged in Counts I and II with a violation of section 405 of the Labor Code, and that as to the remaining two counts it was impossible in the state of the record to determine whether such convictions were based upon a permissible review of the evidence or upon a confusion which led the jury to believe that the alleged offenses against the complainant were violations of the Labor Code. That, therefore, the language with reference to the constitutionality of the Labor Code sections was merely *obiter dictum*. However, a reading of the case does not bear out appellant’s contention. One of the issues squarely presented in the Pond case was the claim that sections 402 through 406 of the Labor Code violate the due

process clause of the Fourteenth Amendment of the Federal Constitution and the provision of section 1 of article I of our state Constitution that, “All men * * * have certain inalienable rights, among which are those of * * * acquiring, possessing, and protecting property * *,” and that the Labor Code sections here in question cannot be justified under the police power. A decision upon the constitutionality of the herein pertinent Labor Code provisions was therefore necessary to a decision in the Pond case.

Appellant relies upon the cases of *People v. Holder*, 53 Cal.App. 45, 199 P. 832, and the later case of *People v. Bullock*, 92 Cal. App. 785, 268 P. 1059. However, these cases are not analogous to the one now before us. In the cited cases the testimony showed that the property alleged to have been embezzled was paid to the accused under and by virtue of a building contract entered into between the defendant and the complainant, and that the money received by defendant was not received in trust, but as and for his own money under the building contract. The holding was that the section there under attack was unconstitutional because it provided that notwithstanding the title to the money paid to the accused under his contract was vested in him he could be found guilty of embezzlement because he breached his agreement to use the money to pay certain of his bills. The legislation with which we are here confronted, as heretofore pointed out, seeks to afford protection for a large class of workers by declaring that all deposits put up by the employee as part of his contract of employment be deemed bonds; that all such deposits be held intact *as trust funds* and prohibits any contract to the contrary. The reasons why such legislation does not impinge upon the freedom of contract are clearly and concisely set forth in *People v. Pond*, supra.

[6, 7] An appeal from “the sentence” is not authorized by law, and since the order denying the “motion to vacate pleas of guilty” was made prior to entry of judgment it is an intermediate order reviewable on appeal from the judgment and an appeal from such order will be dismissed.

For the foregoing reasons, the purported appeals from the sentence and from the order denying defendant's motion to vacate his pleas of guilty are and each is dismissed. The judgment is affirmed.

DORAN and FOURT, JJ., concur.



139 Cal.App.2d 762

PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Ray WILSON, Defendant and Appellant.
Cr. 899.

District Court of Appeal, Fourth District,
California.

March 8, 1956.

Defendant was convicted of first degree robbery. The Superior Court, Kings County, Clark Clement, J., entered judgment, and defendant appealed. The District Court of Appeal, Barnard, P. J., held that evidence was sufficient to sustain conviction.

Judgment affirmed.

1. Robbery ☞24(1)

Evidence was sufficient to sustain conviction for first-degree robbery.

2. Criminal Law ☞119(4)

Defendant would not be heard to contend, on appeal, that his attorney had not exerted his best effort to present defendant's case because attorney had failed to get in touch with defendant's father-in-law in Oklahoma with respect to purported telephone call and had not called one witness, in view of fact that no complaint was made to trial court, that record or briefs did not indicate further action would have been helpful to defendant, and that attorney was shown to have ably represented defendant throughout trial.

3. Criminal Law ☞114(1)

Where district attorney presented an unusually strong case against defendant in criminal proceeding, defendant would not be heard to contend on appeal that district attorney knew that he did not have case against defendant or defendant's wife but was afraid to drop prosecution because of his fear that defendant would sue him for false arrest.

Ray Wilson, in pro. per.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The appellant and his wife were charged with armed robbery, alleged to have been committed on July 13, 1953. They pleaded not guilty, and were represented by counsel of their own choosing. A jury found each of them guilty of first degree robbery, and they were sentenced to prison. Mr. Wilson alone has appealed from the judgment, filing his own notice of appeal.

It appears from the evidence that on the evening of July 13, 1953, a Mr. Walworth went into a bar in Avenal and cashed a check, receiving \$15 which he put in his wallet. The appellant and his wife watched him write out the check and cash it, and then engaged him in conversation. A little later the three of them proceeded to another bar three blocks away. When they left that bar the appellant produced a pistol and compelled Walworth to go with them in their automobile, a 1949 Chevrolet. They took him to a dark spot where Mrs. Wilson held a gun on him while Mr. Wilson, after a scuffle, took the wallet and the money. Shortly thereafter Walworth reported the matter to the officers and a description of the car and the robbers was broadcast over the radio. By mistake the broadcast described the woman as having red hair whereas Walworth had described it as brown with a reddish tint.

About 11:30 that night a highway patrol officer, who had received the broadcast, saw Mr. and Mrs. Wilson leaving a restaurant in Huron and followed them to a gas station, where they stopped. While they

and the car otherwise fitted the description given he let them go, because he thought Mrs. Wilson did not have red hair, although he took their address in Coalinga. On the same night an officer went to the scene of the robbery and found some papers there with Walworth's name on them. On July 15, an officer went to the appellant's home in Coalinga and asked where he was, but Mrs. Wilson said she did not know. The officer asked her to have her husband come to the police station when he returned. About 9:00 o'clock that night an officer saw Mrs. Wilson at a service station in Coalinga. Since another officer had asked him to stop Mrs. Wilson, he asked her to wait there. She said she would, but said she wanted to go to the rest room. He called the other officer and when he arrived a few minutes later they found that she had gone, leaving the car. They found three fully packed suitcases in the car, and also found two pistols in appellant's home. It appears that the appellant and his wife had become alarmed when the officer came there that afternoon, and decided to leave. Mrs. Wilson had gone to the station for gasoline and when the officer asked her to wait she went toward the rest room but proceeded on to her home, and she and her husband then walked to a nearby highway and hitchhiked to Fresno, abandoning their luggage and the car. They had purchased the car five days before that. The next day they bought an old Ford and drove to Oregon and Washington, where they stayed several months, using a different name. A year or so later they were arrested in Arizona and returned here for trial, having waived extradition.

[1] They were positively identified by Walworth and by the two bartenders at the bars in Avenal, where they had spent some time on the night of the 13th. The appellant and Mrs. Wilson told different stories at different times to the officers, as to where they had been that night, as to whether they had had any pistols, and as to why they had abandoned the car and left Coalinga. They denied that they had been in Avenal on July 13th or on any day near that time, and they told conflicting

stories as to where they had gone and what they had done on that evening up to the time they were seen by the officer at the gas station in Huron. They first said they had not left Coalinga together on the night of July 15. Mrs. Wilson said that after the officer asked her to wait at the service station she went home and her husband was not there; that she caught a ride to Five Points; and that she found him there. The appellant said he had decided to leave his wife; that he hitchhiked to Fresno, and then to Oregon; that a month later his wife arrived at Medford, where he was working; and that he didn't know how she was able to find him. Later they admitted that they had left together, and gave varying and conflicting reasons for having left when they did. Their testimony on the stand was also conflicting in many respects and on several occasions they changed their testimony when they discovered that the true facts were known. The evidence was not only sufficient to support the verdict and judgment, but it was unusually convincing.

[2] The appellant first contends that his attorney did not exert his best effort to present his case because he failed to get in touch with appellant's father-in-law in Oklahoma with respect to a purported telephone call, in not looking into another fact, and in not calling one witness. No complaint was made to the court concerning the way in which his counsel was conducting the case, and there is nothing in the record or in the briefs to indicate that further action in any of these matters would have been helpful to the appellant. The record clearly shows that appellant's attorney ably represented him throughout the trial and did a thoroughly competent job throughout the entire case, including the cross-examination of the prosecution witnesses. There is nothing to indicate that this attorney did not thoroughly investigate the matters in question and determine that nothing would be accomplished by producing further evidence in connection therewith.

It is next contended that the evidence is inconsistent in that the officer who inter-

viewed the appellant and his wife at the service station in Huron on the night of July 13, did not then hold them as the parties wanted for this robbery; and in that Mr. Walworth did not recognize Mrs. Wilson as the woman in question on July 15, although he positively identified her at the time of the trial. The failure of the officer to hold them on that night was explained in that the broadcast description he had received had described the woman as having red hair. Mr. Walworth was with the officer when he called at the Wilson home on July 15. He stayed in the car in front of the house. At that time Mrs. Wilson had her hair in curlers and had on some sort of short trousers. As they were leaving the place Walworth told the officer that she looked like the woman but that he was unable to make a positive identification. He identified her at the trial and described the dress she had on on the night of July 13, as did the two bartenders, and that dress was found in the suitcases left in their car. Nothing more than a conflict appears in this connection and the identification of the appellant was complete, positive, and in no way shaken.

The contention that the appellant and his wife left Coalinga because of fear of Mrs. Wilson's former husband who lived in Oklahoma, and not because of anything connected with this robbery, rests entirely on a question of fact. This contention was thoroughly explored at the trial and the evidence rather conclusively indicated that the real reason for their abrupt departure was their sense of guilt and the knowledge that the officers were getting close to the facts. The entire matter was merely cumulative evidence strengthening other evidence in the case, and neither error nor prejudice appears in this connection.

[3] Finally, it is contended that the district attorney knew that he did not have a case against the appellant or his wife, but was afraid to drop the prosecution because of his fear that the appellant would sue him for false arrest. This contention is entirely unsupported by anything in the record, and the district attorney had and presented an unusually strong case against the appellant.

There was no motion for a new trial and the purported appeal from an order denying a new trial is dismissed. The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



139 Cal.App.2d 536

**James E. COE et al., Plaintiffs and
Respondents,**

v.

**N. A. KESSLER et al., Defendants,
N. A. Kessler, Appellant.**

Civ. 4961.

District Court of Appeal, Fourth District,
California.

Feb. 28, 1956.

Proceedings on motion for change of venue. The Superior Court, Kern County, W. L. Bradshaw, J., entered judgment denying motion and defendant appealed. The District Court of Appeal, Mussell, J., held that an action to cancel, on account of fraud, an agreement whereby partnership property was transferred to managing partner and to require managing partner to account for property with income and profits therefrom and to require partner to reconvey real property conveyed to him pursuant to agreement and other relief, was principally based on fraud with proper place of trial in county of managing partner's residence.

Reversed.

1. Venue ☞ 16½

When local and transitory actions are joined in same complaint, action is regarded as transitory so far as right of defendant to place of trial is concerned, and any ambiguity must be resolved against pleader in favor of defendant's right.

2. Partnership §113

Action to cancel, on account of fraud, agreement whereby partnership property was transferred to managing partner, to require managing partner to account for property with income and profits therefrom, to require partner to reconvey real property conveyed to him pursuant to agreement and other relief, was primarily based on fraud with proper place of trial in county of managing partner's residence. West's Ann.Code Civ.Proc. §§ 392(1)(a), 395.

Mitchell, Silberberg & Knuff, Los Angeles, and George M. Dell, Beverly Hills, for appellants.

Siemon & Siemon, Bakersfield, for respondents.

MUSSELL, Justice.

This action was filed in the county of Kern. Defendant Kessler, who was then a resident of the county of Los Angeles, filed a motion for change of the place of trial to the county of his residence. He appeals from the order denying his motion

[1] In order to determine whether the action is local or transitory it is necessary to ascertain the true character of the action as disclosed by the complaint and the character of the judgment which might be rendered upon a default thereto. When local and transitory actions are joined in the same complaint, the action is regarded as transitory so far as the right of the defendant to the place of trial is concerned, and any ambiguity must be resolved against the pleader and in favor of the defendant's right. *Eckstrand v. Wilshusen*, 217 Cal. 380, 381-382, 18 P.2d 931; *Hayutin v. Rudnick*, 115 Cal.App.2d 138, 141, 251 P.2d 707.

The following facts, among others, are alleged in the complaint. On November 29, 1951, plaintiffs James E. Coe and B. Blonder and defendants D. G. Chessman, M. T. Sugarman and N. A. Kessler entered into a written agreement for a limited partnership in the name of Atlas Tungsten Mines. The articles of limited partnership provided in part that the character of the business of said partnership is primarily the leasing,

operation and owning of mines and mills for the purpose of obtaining valuable minerals therefrom, particularly tungsten. The principal place of business of the partnership was in the county of Kern and the principal office in the city of Los Angeles. Blonder and Chessman were general partners and the others were limited partners and each partner contributed \$1,000. Blonder and Coe were the owners of certain real and personal property of the value of \$83,000. This property is described in exhibit "A", attached to the complaint and consisted of a number of lode mining claims situated in the county of Kern, together with a lease between Kern Mines, Inc. and James E. Coe, and all of the assets of a partnership known as Kavila Mining Company in which Blonder and Coe were two of the principals. The articles of partnership further provide that Blonder and Coe shall cause all assets described in said exhibit "A" to be transferred to the partnership and that upon completion of such transfers it shall then be deemed that Blonder has loaned the sum of \$55,250 to the partnership and that Coe has loaned \$17,750 to it. It is further alleged in the complaint that the total contribution of the partners to the partnership amounted to the sum of \$154,804.71.

Defendant Kessler took over the management and control of the partnership business and on or about August 1, 1952, the limited partners became dissatisfied with the management of the enterprise and it became evident that it could not be operated at a profit. Kessler then proposed that he take over the partnership and its properties and in consideration of the transfer to him of the assets of the partnership, he agreed to advance up to \$100,000 in an attempt to make possible a profitable operation of the business. In consideration of the promises made by Kessler, the parties entered into an agreement in writing on August 1, 1952. This agreement is denominated "Agreement of Sale" and a copy of it is attached to the complaint and marked exhibit "C". This agreement between the limited partners and Kessler provides for the sale of certain personal property to Kessler for the sum of \$5,000 and

for the sale to him of all the assets described in said exhibit "A", including the mining claims listed therein. The agreement further provides that it is the intention of Kessler upon the successful close of the escrow of sale to expend substantial moneys in an attempt to make possible a successful and profitable operation of the assets conveyed and sold to him. Blonder and Coe were given a right to purchase a percentage interest in said assets under certain terms and on condition that such right to purchase be exercised within a certain time specified in the agreement. Sugarman and Chessman were also given option rights, to be exercised on or before February 1, 1953. The agreement further provided that if the options were exercised, a new limited partnership would be formed giving Kessler the right of management and control thereof.

It is further alleged in the complaint that the transfers of the said assets to Kessler were not intended to be absolute and unconditional and were made to allow Kessler to have absolute freedom and control and that such conveyances were intended to be unconditional and absolute only as to such of the individual partners as should fail or refuse to exercise their said options; that Kessler, in order to induce the partners to enter into said agreement (Exhibit "C"), represented and promised plaintiffs that he would expend up to \$100,000 from his personal funds in an effort to operate the mill and mining properties at a profit and would manage the operation with such object and attempt to accomplish the same within approximately 90 days; that Kessler did not expend his personal funds or perform the work promised; that he abandoned the mill without having put it in condition for operation; that he purposely delayed performance of his part of the agreement until after the time provided for the exercise of the said options; that by reason of such delay, Kessler was able to keep the enterprise in a condition of apparent insolvency and to avoid accumulating profits sufficient to repay himself or to enable the partnership to repay him within the option period; that since the expiration of said option period Kessler has taken out and stockpiled a large

quantity of high grade ores which are of an aggregate value greatly in excess of all sums advanced by him; that defendant Kessler is unwilling to extend the time within which his partners may exercise their options and is seeking to claim and assert a forfeiture of the rights of plaintiffs in said mining claims; that if defendant Kessler is permitted to retain said properties free and clear of the claims of the other parties to the partnership, he will have acquired them under a contract providing for a forfeiture of their rights without substantially performing the contract himself; that plaintiffs have no plain, speedy or adequate remedy at law; that damages for the fraud of defendant Kessler as alleged are so uncertain and difficult to estimate plaintiffs cannot be adequately compensated by damages and that a cancelation of said agreement referred to as exhibit "C" is essential to the protection of the rights of the parties to said partnership.

The prayer of the complaint is that the agreement of August 1, 1952, be canceled, rescinded and annulled by reason of the fraud of defendant Kessler; that he be required to account for all of said property, together with all of the income and profits therefrom, and that he be required to reconvey said properties and all of the same to Atlas Tungsten Mines, a limited partnership; that in the event this relief be denied, it be decreed that the transfer of the assets of Atlas Tungsten Mines to defendant Kessler was a security or mortgage; that the defendant Kessler be required to set forth and account for the property conveyed to him, together with the amount of money which he has expended in the development of the same, the amount of ore which he has obtained from the mining properties and sold, if any, with the proceeds therefrom, and for all other receipts and expenditures legitimately made by him as mortgagee and for such other and further relief as may be meet and equitable.

In *Postin v. Griggs*, 66 Cal.App.2d 147, at pages 149-150, 151 P.2d 887, at page 888, in an action brought by one partner against another to set aside a sale of plaintiff's interest in a limited mining partnership on the

ground of fraud and for an accounting, the court said:

"In so far as an accounting is requested, the action is essentially personal, triable in the county of the residence of the defendant. *Bardwell v. Turner*, 219 Cal. 228, 25 P.2d 978. An action, the gravamen of which is fraud, is triable in the county of the residence of the defendant, and the mere fact that incidentally rights in real property may be involved does not change the rule. *Brown v. Happy Valley Fruit Growers*, 206 Cal. 515, 274 P. 977. It has likewise been held that an action to cancel a promissory note on the ground of fraud is triable in the county of the residence of defendant (*Howe v. Tucker*, 219 Cal. 193, 25 P.2d 832), as is an action for cancellation of a contract for the purchase and sale of realty and for a money judgment based upon alleged fraud. *Terry v. Rivergarden Farms Co.*, 29 Cal.App. 59, 154 P. 476. In *Nason v. Feldhusen*, 34 Cal.App. 789, 168 P. 1162, it was held that an action for the rescission of a contract, for an accounting and an injunction based upon fraud, is a personal action which the defendants are entitled to have tried in the county of their residence. In *Reid v. Kerr*, 64 Cal.App. 117, 220 P. 688, it was held that an action to cancel a deed was transitory and not local. See, also, *Averill v. Lincoln*, 52 Cal. App.2d 398, 126 P.2d 398."

In *Neet v. Holmes*, 19 Cal.2d 605, 611, 122 P.2d 557, 560, the court said:

"The principal relief sought by the plaintiffs is an accounting of operations in the leased property and in the additional twenty mines located by the defendants, and a judgment based on the fruits thereof including title to the additional mines, of which the plaintiffs have been deprived by the alleged fraud of the defendants. Such an action is a proceeding in equity and is essentially a personal action." (Citing cases.)

Section 392, subdivision (1)(a) of the Code of Civil Procedure, provides that the proper place of trial of an action for the

recovery of real property, or of an estate or interest therein, or for the determination in any form, of such right or interest, and for injuries to real property is the county in which the real property or some part thereof is situated. And section 395 of said code provides that in all other cases the action must be tried in the county in which the defendants or some of them reside. In discussing these sections, the court said in *Turlock Theatre Co. v. Laws*, 12 Cal.2d 573, 576, 577, 86 P.2d 345, 347, 120 A.L.R. 786:

"The rule of the cited cases is that section 392 is effective only when the real property or the title thereto is the exclusive subject-matter of the action. When a cause of action for relief *in personam* also is joined, the defendant is entitled to have the cause transferred to the county of his residence. * *

"The plaintiff cannot, by uniting in his complaint matters which form the subject of a personal action with matters which form the subject of a local action, compel the defendant to have both those matters tried in a county other than that in which he resides. It is only when real estate alone is the subject-matter of the action that the provisions of section 392 can be invoked against a defendant who resides in a county different from that in which the land is situated. If, in his complaint, the plaintiff join with such a cause of action another which is not embraced in its provisions, or if he also seeks a remedy against the defendant upon matters which are not embraced within the provisions of this section, his action becomes one of those "other cases" provided for in section 395, which the defendant is entitled to have tried in the county of his residence.'"

In *Hays v. Cowles*, 60 Cal.App.2d 514, 518, 141 P.2d 26, the court held that it is well settled that an action for an accounting is a proceeding in equity and is essentially a personal action; that the defendant has the right under section 395 of the Code of Civil Procedure to have such an action tried in the county of his residence; and that a plaintiff cannot deprive him of such right

by uniting in his complaint a demand that as a sequence of such litigation the defendant be required also to convey certain real property situate in the county other than the defendant's residence.

[2] It appears to us that the action herein is based on fraud; that the principal relief sought is a cancelation and rescission of the agreement entered into by the partners with defendant Kessler on August 1, 1952, and an accounting for all property, both real and personal, transferred to him by the partnership, together with the income and profits therefrom. Under the rules stated in the foregoing decisions and under the circumstances shown by the record we conclude that the proper place of trial of the instant action is the county of the defendant Kessler's residence.

Respondents argue that the principal and main purpose of this action is for the recovery of real property or an estate or interest therein; that whatever right there may be to require the defendant to account for the mines and/or the proceeds thereof, requires the determination of some right or interest in real property; that the right to an accounting for the properties or proceeds would depend upon proof of title and that such relief is merely incidental to the main purpose of the action. In support of these contentions respondents cite *Rice v. Schubert*, 101 Cal.App.2d 638, 226 P.2d 50; *Eckstrand v. Wilshusen*, 217 Cal. 380, 18 P.2d 931; *Grocers' Fruit Growing Union v. Kern County Land Co.*, 150 Cal. 466, 89 P. 120, and *State v. Royal Consolidated Min. Co.*, 187 Cal. 343, 202 P. 133.

Rice v. Schubert was an action to set aside a conveyance of real property as being in fraud of creditors. There the only relief which could be granted in the event of the default of the defendant would have been a judgment setting aside the conveyance under attack. In the instant case an accounting was involved as well as the invalidity of the transfer of personal property, the invalidity of partnership termination and status of respondents in the mining partnership.

The *Grocers' Union* case, as the court therein stated, was simply an action for the

specific performance of a contract for the sale of land under an allegation that the purchase price had been paid and that the right to account, if sufficiently pleaded, was but an incident in the transaction.

In the *Eckstrand* case it also appeared that the only relief which could have been granted if the defendant had defaulted was a cancelation of the deed on the ground of fraud.

State v. Royal Consolidated Min. Co. was discussed in *Turlock Theatre Co. v. Laws*, 12 Cal.2d 573, at page 578, 86 P.2d 345, at page 347, 120 A.L.R. 786, supra, and the court there said:

"In the case of *State v. Royal Consolidated Min. Co.*, supra, it was held that the action, in so far as it related to rents, issues and profits, was essentially one to quiet title, for the reason that the right thereto depended upon the issue of title, and an adjudication of the right to rents was necessarily determinative of the right to the land itself. The question there did not arise out of proceedings for a change of venue, but was concerned with the question whether the court in Sacramento county had power pursuant to section 3773 of the Political Code to entertain jurisdiction of an action involving title and possession of real property situated in another county. The correctness of the holding that the relief there sought in the nature of rents, issues and profits was merely incidental to the primary object of the action, that is, to recover the title and possession of the mining properties, need not be questioned."

These cases cited by the respondents are not controlling where as here the action is based on fraud and the principal relief sought is an accounting between the parties, the adjudication of their rights as partners, and a cancelation of the agreement of August 1, 1952.

The order denying the motion for change of the place of trial is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

139 Cal.App.2d 607

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Walter GROSS, Defendant and Appellant.
Civ. 21225.

District Court of Appeal, Second District,
Division 2, California.

Feb. 29, 1956.

Rehearing Denied March 27, 1956.

Hearing Denied April 25, 1956.

Proceeding on an application for redetermination of accused's condition under the sexual psychopath laws. The Superior Court, Los Angeles County, Elmer D. Doyle, J., entered an order returning accused to a state mental hospital, and accused appealed. The District Court of Appeals, Moore, P. J., held that no substantial right of accused, who had been adjudged to be sexual psychopath in 1948, had been violated by rearrangement of code sections after his commitment and before he was sentenced for his crime, and court had jurisdiction to redetermine his condition under sexual psychopath laws as they stood at time he applied for redetermination, notwithstanding that such laws had been changed in material respects since his commitment.

Affirmed.

1. Courts ⇨90(4)

Where subsequent changes in sexual psychopath law had altered statute in material respects, 1948 decision that statute required accused's return for trial on original criminal charge was no longer a precedent. Welfare and Institutions Code, §§ 5517 and subds. (a, b), 5518, 5519.

2. Mental Health ⇨448

No substantial right of accused, adjudged to be sexual psychopath in 1948, was violated by rearrangement of code sections after his commitment and before he was sentenced for his crime, and court had jurisdiction to redetermine his condition under sexual psychopath laws as they stood at time he applied for redetermination, notwithstanding that such laws had been

changed in material respects since his commitment. Welfare and Institutions Code, §§ 5517 and subds. (a, b), 5518, 5519.

3. Mental Health ⇨433

Welfare and Institutions Code section affording committed sexual psychopath opportunity to have his condition reinvestigated and readjudicated prescribes a reasonable method of dealing with sexual psychopaths, and is valid. Welfare and Institutions Code, § 5519.

4. Mental Health ⇨448

Having intelligently rejected all courtesies of court, and having submitted his cause, accused had no rational cause to complain of order recommitting him as sexual psychopath.

5. Mental Health ⇨443

In proceeding under sexual psychopath laws for redetermination of condition, entry in clerk's minutes, reflecting court's decision to hold hearing and have accused produced before court, was not required to set forth jurisdictional facts or state a "cause of action." Welfare and Institutions Code, § 5519.

6. Mental Health ⇨448

Accused seeking redetermination of his condition, under sexual psychopath laws, was not entitled to be furnished with code sections other than those under which proceedings to ascertain condition of his sexual psychopathy, would have to be conducted. Welfare and Institutions Code, §§ 5504-5511, 5519.

7. Mental Health ⇨449

Accused, having expressed his satisfaction and asked leave to submit his cause, could not complain on appeal from order recommitting him as a sexual psychopath that court had not afforded him a reasonable opportunity to produce witnesses. Welfare and Institutions Code, § 5519.

8. Mental Health ⇨ 443

Penal code provisions with respect to arraignment and judgment do not apply to sexual psychopathy hearing. West's Ann. Pen.Code, § 1200; Welfare and Institutions Code, § 5519.

9. Mental Health 444

A sexual psychopathy hearing is a civil proceeding, collateral to criminal case under which accused was first arraigned. Welfare and Institutions Code, § 5519.

10. Mental Health 449

Burden was upon accused, appealing from order recommitting him under sexual psychopath laws, to show that material part of record was incorrect, in order to obtain correction thereof. Welfare and Institutions Code, § 5519; West's Ann.Rules on Appeal, rule 12.

Walter Gross, in pro. per.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Appellant was adjudged a sexual psychopath in 1948. He was committed to the State Hospital at Camarillo from which he escaped only to be returned to the State Hospital in Mendocino County. Pursuant

to his application for a redetermination of his condition, under section 5519 of the Welfare and Institutions Code,¹ on December 15, 1952, the court found that he was still a sexual psychopath and ordered him returned to a state mental hospital. Such order is now before this court for review.

At the hearing the court had for consideration the report from the Superintendent of the state hospital in which appellant was an inmate pursuant to said section 5519.² Also, it had the report and findings of two physicians appointed by the court pursuant to code section 5504. Appellant specifically waived personal appearance and testimony of said physicians. The court's offer to appoint counsel for appellant at the trial having been rejected by him, it found appellant to be still a sexual psychopath and a menace to the health and safety of others, and ordered him committed to the Department of Mental Hygiene at Terminal Island. As a result of proceedings after he had filed notice of appeal from that order, as to whether appellant had taken an appeal therefrom, it was concluded that his

1. The only code references in this opinion are to the Welfare and Institutions Code.

2. § 5519. "After a person has been committed for an indeterminate period to the department for placement in a state hospital as a sexual psychopath and has been confined for a period of not less than six months from the date of the order of commitment, the committing court may upon its own motion or on motion by or on behalf of the person committed, require the superintendent of the state hospital to which the person was committed to forward to the committing court, within 30 days, his opinion under (a), (b), or (c) of Section 5517, including therein a report, diagnosis and recommendation concerning the person's future care, supervision, or treatment. After receipt of the report, the committing court may order the return of the person to the court for a hearing as to whether the person is still a sexual psychopath within the meaning of this chapter.

"The hearing shall be conducted substantially in accordance with Sections 5504 to 5511, inclusive. If, after the hearing, the judge finds that the person has not recovered from his sexual psychopathy and is still a menace to the

health and safety of others, he shall order the person returned to the Department of Mental Hygiene under the prior order of commitment for an indeterminate period, or, if the opinion of the superintendent of the state hospital was under (c) of Section 5517, he may make and sign an order recommitting the person for an indeterminate period to the Department of Mental Hygiene for placement in a state institution or institutional unit for the care and treatment of such sexual psychopaths designated by the court and provided pursuant to Section 5518. A subsequent hearing may not be held under this section until the person has been confined for an additional period of six months from the date of his return to the department. If the court finds that the person has recovered from his sexual psychopathy to such an extent that he is no longer a menace to the health and safety of others, or that he will not benefit by further care and treatment in the hospital and is not a menace to the health and safety of others, the committing court shall thereafter cause the person to be returned to the court in which the criminal charge was tried to await further action with reference to such criminal charge."

appeal had been duly taken and that the order was appealable. *Gross v. Superior Court*, 42 Cal.2d 816, 818, 270 P.2d 1025. There appears to have been in December, 1952, no difference among medical experts and officials as to the necessity for holding that appellant was still a sexual psychopath and that there was little hope for recovery. (Ibid.)

On this appeal, appellant contends that (1) the Superior Court did not have jurisdiction to redetermine his psychopathy and (2) he challenges the order denying his motion to correct the clerk's transcript.

Jurisdiction

[1,2] Appellant contends that he should not have been recommitted to a State Hospital but that instead the court should have disposed of the criminal charges for which he had been apprehended. He cites *In re Stone*, 87 Cal.App.2d 777, 197 P.2d 847. It is not pertinent for the reason that it was decided in October 1948, prior to the reenactment of section 5502.5 in 1949 as section 5517, and prior to the enactment of sections 5518 and 5519. Such statutes altered 5502.5 in such material respects that *In re Stone* no longer is a precedent. Now, appellant contends that the proceedings of December 15, 1952, were invalid for the reason that the new statutes were applied retroactively as to him; that he was subjected to ex post facto enforcement of the statutes. He is not correct in such contention. Section 5502.5 at the time appellant's crime was committed, required the superintendent of a state hospital to certify his opinion to the court that committed the psychopath whether the latter had so recovered that he was no longer a menace to others and that if such court had not ordered the defendant returned to await action on the criminal charge he might be paroled for a period not less than five years. Also, it provided that if the superintendent was of the opinion that the psychopath had not recovered and would not benefit from further hospitalization, then he should return the patient to the court for further disposition of the case. Section 5517, the new edition of 5502.5, provides that (a) when, in the superintendent's opinion, the

prisoner has recovered to the extent that he is no longer a menace to others or (b) has received as much benefit as possible from treatment and is not a menace to others, or (c) has not recovered and is still a menace to others, such opinion is to be certified to the committing court. Thereupon, the court shall order the prisoner returned to the court if the opinion is certified under (a) or (b) for further action on the criminal charge and the court may grant probation for not less than five years.

But section 5519 provides that (1) after a sex psychopath has been confined in a state hospital for at least six months, the committing court may require the superintendent of the State Hospital to certify under (a), (b) or (c) of 5517; (2) that thereupon the court may hold a hearing to determine whether such prisoner is still a psychopath; (3) that if the judge finds that the prisoner has not recovered from his psychopathy and is still a menace to others, he shall order the prisoner returned to the Department of Mental Hygiene for an indeterminate period under the prior order of commitment; but in the event the opinion of the superintendent shall be under (c) of section 5517, the judge may recommit the prisoner for an indeterminate period to the Department for placement in a state institution pursuant to section 5518.

An analogous situation obtained in *In re Cowen*, 27 Cal.2d 637, 166 P.2d 279, in which certiorari was denied by the Federal Supreme Court, *Cowen v. Heinze*, 329 U.S. 742, 67 S.Ct. 43, 91 L.Ed. 640. After Cowen had been convicted of robbery, rape and attempted robbery, his term of imprisonment was redetermined by the Adult Authority. The court held that he had no vested right to have his sentences fixed at any period less than the maximum provided by law. Likewise, appellant herein has no vested right to have the committing court disregard the necessity for deriving a careful diagnosis and a sound recommendation to such court. *People v. Albin*, 111 Cal.App.2d 800, 805, 245 P.2d 660. Every person convicted of sexual psychopathy should understand that the period of his confinement might be no less than the

maximum time prescribed for sex offenders plus time spent in mental hospitals. *People v. Gross*, 115 Cal.App.2d 502, 505, 252 P.2d 416. The reenactment of section 5502.5 as section 5517 and the passage of 5518 and 5519 did not alter the statutes, Pen.Code, §§ 288 and 286, which made his acts criminal. They made no substantial change in section 5502.5 as it stood at the time of appellant's crime. For an offender to be returned to court for "further disposition of his case" as the statute originally read, clearly implied that the court should deal with him, on return, as the merits of his cause might justify. Section 5519 merely goes into detail for the purpose of enabling the courts to enforce the law uniformly. Certainly, no substantial right of appellant was violated by the rearrangement of the code sections after his conviction and before he has been sentenced for his crime. His several proceedings to resist the merciful treatment administered to save him from his weakness do not exhibit an understanding of a State that endeavors to save men for citizenship and away from penal servitude.

Proceedings Valid

[3,4] Appellant contends that the proceedings whereby his commitment, December 15, 1952, was adjudged under section 5519 are unconstitutional. The court took extra precautions to protect his rights, even offered to appoint counsel to aid him. But inherently that section is valid in that it prescribes a reasonable method of dealing with a sexual psychopath. *People v. Albin*, supra, 111 Cal.App.2d 800, 803, 245 P.2d 660; *In re Keddy*, 105 Cal.App.2d 215, 217, 233 P.2d 159; *People v. Hector*, 104 Cal. App.2d 392, 393-395, 231 P.2d 916. Also, the United States Supreme Court upheld Minnesota's sexual psychopathy law [M.S. A. §§ 526.09 to 526.11] which is similar to sections 5517, 5518 and 5519. In the *Albin* case it was held that section 5502.5, made 5517 in 1949, is purely procedural and is constitutional; that it is neither vague, indefinite nor uncertain. In truth, section 5519 merely augments the basic law by affording a sufferer of sexual psychopathy an opportunity to have his condition reinvesti-

gated and readjudicated. He may, after having been confined in a state hospital, move the court for such inquiry. If his motion is granted, proceedings must be had substantially as outlined in sections 5504-5511 which require the examination of witnesses, the presence of the prisoner and the appointment of counsel if he is unable to employ an attorney. *People v. Martinez*, 130 Cal.App.2d 239, 243, 278 P.2d 727. Appellant asked the court to have his condition redetermined. The motion was granted; the superintendent of the hospital of which he was an inmate was asked to certify his opinion as provided by the section. Such opinion disclosed that appellant was still a sexual psychopath and still a menace to the health and safety of others. A hearing day was fixed when, on appellant's motion, a continuance was granted. When the day of trial arrived, the court appointed two physicians, pursuant to section 5504, to examine appellant and to report their findings to the court. But as above stated, he waived their appearance. Their report was that appellant was still a sexual psychopath and still a menace to society. When appellant was offered the assistance of counsel, he declined and submitted the matter. Basing his decision upon the medical reports and on that of the Superintendent of the hospital, the court committed appellant to the Department of Mental Hygiene for replacement at Terminal Island. Having intelligently rejected all courtesies of the court, and having submitted his cause, appellant has no rational cause to complain of the court's order. *People v. Dessauer*, 38 Cal.2d 547, 552, 241 P.2d 238, certiorari denied 344 U.S. 858, 73 S.Ct. 96, 97 L.Ed. 666. No prejudice is shown.

Assignments of Error

[5] Appellant mistakenly assigns as error an "affidavit by the court" purporting to certify appellant for hearing to determine whether the latter was still a sexual psychopath in that the "affidavit" did not allege jurisdictional facts or sufficient facts to constitute a cause of action. What appellant meant to say was that an entry appears in the clerk's minutes to the effect that the court had received a report from the su-

perintendent of the State Hospital and that a hearing, as suggested by section 5519, was to be set and it ordered the sheriff to produce appellant before the court November 5, 1952. It had nothing to do with a cause of action except to bring it on for trial as provided by section 5519. The entry was the result of appellant's own motion for a hearing to redetermine the status of his psychopathy.

[6] Appellant contends that he was not furnished with a copy of the written charges and with certain sections of the code, other than sections 5504 to 5511 inclusive. His alleged request for the other code sections would have been similar to a man's request for a glass of cool water after he has already on hand a ton of ice and a living spring. Section 5519 requires that a proceeding to ascertain the condition of a prisoner's sexual psychopathy must be conducted in accordance with sections 5504 to 5511 inclusive. *People v. Martinez*, supra, 130 Cal.App.2d 239, 243, 278 P.2d 727. His brief appears to contain all pertinent sections of the Code.

[7] Appellant's contention that the court did not inform him of his rights or afford him a reasonable opportunity to produce witnesses is contrary to the facts that (1) the hearing throughout was in conformance with law and (2) appellant expressed his satisfaction and asked leave to submit his cause. Appellant now declares that no evidence was introduced at the hearing to support the order of December 15, 1952. On the contrary, expert proof was received in addition to the report of the superintendent of the hospital, all of which were considered by the court. The hearing was in conformance with the doctrine of due process of law.

[8, 9] Appellant asserts that the court did not follow the steps set forth in section 1200 of the Penal Code with respect to arraignment and judgment. Such provisions do not apply to a sexual psychopathy hearing which is a civil proceeding, collateral to the criminal case under which appellant

was first arraigned. *Gross v. Superior Court*, 42 Cal.2d 816, 820, 270 P.2d 1025.

Appellant misses the point in his complaint that the judgment and commitment for sexual psychopathy does not contain the finding that appellant is still a sexual psychopath or that he has been convicted of a crime. The fact is that the judgment declares that the court finds appellant is a sexual psychopath, and it follows section 5519 which does not require the judgment to recite that appellant has been convicted of a crime.

Appellant complains now of the court's denial of his motion of July 23, 1952. That denial was appealed at that time and the appellate court dismissed the appeal, holding that the proceeding under 5519 in the superior court had been requested by appellant after his judgment of conviction of sexual psychopathy had been appealed. *People v. Gross*, 115 Cal.App.2d 502, 504, 252 P.2d 416. The fact that the superior court could have proceeded on its own motion does not mar the significance of appellant's act in requesting that court to act. *People v. Martinez*, supra, 130 Cal.App.2d 239, 242, 278 P.2d 727. Appellant's sexual psychopathy was found again by the superior court in accordance with section 5519. There is no substantial basis for appellant's attack upon the order.

Clerk's Transcript

[10] For the second time³ appellant complains that the clerk's transcript is inaccurate; that he had moved for augmentation; that the recitals on page 109 of such transcript do not accord with the reporter's transcript of December 15, 1952. A comparison discloses that the latter contains the judgment and commitment for his psychopathy. Appellant contends that he has been deprived of an opportunity to present the matter on appeal. Rule 12 of Rules on Appeal provides that "if any material part of the record is incorrect in any respect * * * the reviewing court, on suggestion of any party or on its own motion, may direct that it be corrected." Now, it was

3. He moved to correct the transcript in the trial court and appealed from the denial of his motion. Such order was not

appealable. *People v. Gross*, 44 Cal.2d 859, 285 P.2d 630.

appellant's task to show that a *material* part of the record was incorrect in order to obtain a correction thereof. On his failure to make such showing, neither this court nor the superior court abused its discretion in denying the order. *People v. Lang*, 114 Cal.App.2d 14, 17, 249 P.2d 343.

Order affirmed.

FOX and ASHBURN, JJ., concur.



139 Cal.App.2d 633

G. C. BREIDERT COMPANY, a California corporation, Plaintiff and Appellant,
v.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, an unincorporated association affiliated with the American Federation of Labor, et al., Defendants and Respondents.

Civ. 21337.

District Court of Appeal, Second District,
Division 1, California.

March 1, 1956.

Rehearing Denied March 26, 1956.

Hearing Denied April 30, 1956.

Action for an injunction and damages by an employer engaged in interstate commerce against a union under the California Jurisdictional Strike Act. From an order of the Superior Court of Los Angeles County, Arnold Praeger, J., denying the injunction the plaintiff appeals. The District Court of Appeal, White, P. J., held that the State Court was without power to enjoin the picketing and that the federal board was clothed with jurisdiction to determine in the first instance any charge of unfair labor practices under the Federal Act in connection with the employer's business.

Order affirmed.

1. Courts ⇨97(6)

In action by employer against union for injunction under the California Jurisdictional

Strike Act where employer was engaged in interstate commerce, regardless of State Supreme Court decision, trial court was bound by the more recent controlling decisions of the United States Supreme Court, if there was so exact a parallel between the instant case and the controlling decisions of such court that no reasonable distinction between them could be made. *West's Ann.Labor Code*, §§ 1115-1120.

2. Labor Relations ⇨510

State action is permissible to enjoin union activity against an employer engaged in interstate commerce which threatens a probable breach of the State's peace or calls for extraordinary police measures, such as recurrent unannounced work stoppages and other matters where such conduct is not subject to regulation by the federal board either by prohibition or by protection. National Labor Relations Act, § 2(7) as amended by Labor Management Relations Act of 1947, 29 U.S.C.A., § 152(7).

3. Labor Relations ⇨291, 298, 301

Under the National Labor Relations Act protecting "concerted activities" of employees, quoted phrase includes the right to strike, peacefully picket, and boycott for purposes and methods not prohibited by Section 8. National Labor Relations Act, §§ 7, 8 as amended by Labor Management Relations Act, 1947, 29 U.S.C.A. §§ 157, 158.

See publication *Words and Phrases*, for other judicial constructions and definitions of "Concerted Activities".

4. Labor Relations ⇨510

In action by an employer engaged in interstate commerce for injunction against a labor union under the California Jurisdictional Strike Act, where the employer sought relief against primary picketing, primary boycotting, secondary boycotting, recognition strikes, jurisdictional strikes and causing the employer to coerce its employees in their designation of a bargaining representative, State Court was without jurisdiction in that the federal board was clothed with such jurisdiction to determine in the first instance any charge of unfair labor practices under the Federal Act in connection with the employer's business.

National Labor Relations Act, §§ 7, 8 as amended by Labor Management Relations Act, 1947, 29 U.S.C.A. §§ 157, 158.

Hill, Farrer & Burrill, Ray L. Johnson, Jr., Los Angeles, for appellant.

Gilbert, Nissen & Irvin, John C. Stevenson, Robert W. Gilbert, Los Angeles, for respondents.

WHITE, Presiding Justice.

This is an action for injunction and damages brought by G. C. Breidert Company, a California corporation (hereinafter referred to as "the employer"), against Sheet Metal Workers Union and Teamsters Unions (hereinafter referred to as "the unions"), under the California Jurisdictional Strike Act, Labor Code, sections 1115-1120.

The complaint alleges that for some time prior to the filing of the complaint, the unions requested the exclusive right to bargain collectively with the employer on behalf of the latter's employees with respect to wages, hours and working conditions and have requested that the unions have the exclusive right to have their members perform work for the employer; that Air-X-Hauster Workers Association is a labor organization which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, hours of employment or conditions of work; that Air-X-Hauster Workers Association represents the majority of the employees and has made demand upon employer to be recognized as the exclusive bargaining agent of the latter's employees and has made a request of the employer to negotiate a written contract relating to wages, hours and working conditions and has demanded the exclusive right to have its members perform work for the employer; that the Air-X-Hauster Workers Association has not been financed, in whole or in part, interfered with, dominated or controlled by employer, or any representative of the latter; that the unions are engaged in concerted interference with the operation of employer's business for the purpose of compelling the latter to refuse to recognize Air-X-Hauster Workers Association as exclusive bargain-

ing representative of employer's employees and for the purpose of forcing and compelling employer to bargain collectively with the unions on behalf of employer's employees and to compel the former to employ only members of the unions in connection with employer's business; that the unions' concerted interference with employer's business arises out of a controversy between said unions and Air-X-Hauster Workers Association as to which of said unions has, or should have, the exclusive right to bargain collectively with employer on behalf of its employees, or any of them, and as to which of said unions has, or should have, the exclusive right to have its members perform work for employer; that the concerted interference with the business of employer by the unions consists of a primary picket line which causes customers and suppliers of employer to refuse to do business with it, and a consumer secondary boycott wherein the unions threatened officials and supervisors of companies with whom employer does business, with picketing and boycotting if said companies do not cease doing business with the latter; that, as a consequence of said threats, companies with whom employer has in the past done business have ceased doing business with it; that the unions carry picket signs which proclaim to the public that employer is "unfair to organized labor"; that the unions characterize employer as "unfair to organized labor", only because employer has failed and refused to recognize the unions as the exclusive representative for the employees of employer. Based upon its verified complaint and supporting affidavits, employer sought a preliminary injunction restraining the unions from:

(a) "Picketing * * * at or near, around or in front of the entrances to plaintiff's place of business * * *"

(b) "Persuading, inducing, or causing by any means or manner whatsoever any person, customer or supplier, to refrain from doing business with plaintiff."

(c) "Representing to any person that plaintiff is unfair to organized labor or to the American Federation of Labor, or to any one associated therewith."

(d) "Persuading, inducing or causing plaintiff to cease recognizing the Air-X-Hauster Workers Association as the exclusive bargaining agency for plaintiff's employees by concerted interference with plaintiff's business in any manner whatsoever."

(e) "Causing plaintiff to interfere with or coerce its employees in their designation of a collective bargaining representative."

The unions, by their verified answers, denied the allegations relating to such asserted jurisdictional controversy and offered two affirmative defenses; the first such defense being that the State court was without jurisdiction to enjoin the conduct complained of because such jurisdiction had been preempted by the authority vested in the National Labor Relations Board under federal law.

Upon the hearing of the application for a preliminary injunction, it was stipulated in open court that the employer was a corporation engaged in interstate commerce within the meaning of Section 2(7) of the National Labor Relations Act, as amended, popularly known as the Taft-Hartley Act.

In its order, "denying preliminary injunction", the trial court concluded that, "it does not have jurisdiction in this matter to issue a preliminary injunction", because "While the Supreme Court of California held in *Sommer v. Metal Trades Council*, 40 Cal.2d 392, 254 P.2d 559, that the state court had jurisdiction under the facts in that case to issue an injunction, subsequent decisions of the Supreme Court of the United States indicate that in labor matters where the employer is engaged in interstate commerce state courts do not have jurisdiction to issue injunctions except in the exercise of the police power of the state. The question is a federal question and this court deems itself bound by decisions of the Supreme Court of the United States." From such order, plaintiff employer prosecutes this appeal.

[1] It is first contended by appellant that the trial court had no power to act in the instant case except in accordance with the latest decision of the Supreme Court of California in *Sommer v. Metal Trades*

Council, 40 Cal.2d 392, at page 401, 254 P.2d 559, at page 565, wherein the court held under the facts therein presented, "there is involved a possible area of activity which is neither protected nor condemned under the federal act, and pursuant to the foregoing decisions", *International Union, U. A. W. A. F. of L., Local 232 v. Wisconsin Employment Relations Board*, decided February, 1949, 336 U.S. 245, 69 S.Ct. 516, 93 L.Ed. 651; *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board*, decided March, 1949, 336 U.S. 301, 69 S.Ct. 584, 93 L.Ed. 691; *Plankinton Packing Co. v. Wisconsin Employment Relations Board*, decided February, 1950, 338 U.S. 953, 70 S.Ct. 491, 94 L.Ed. 588; *International Union, etc. v. O'Brien*, decided May, 1950, 339 U.S. 454, 70 S.Ct. 781, 94 L.Ed. 978, and *Amalgamated Association, etc. v. Wisconsin Employment Relations Board*, decided February, 1951, 340 U.S. 383, 71 S.Ct. 359, 95 L.Ed. 364, "is subject to state action under the anti-jurisdictional strike provisions of the Labor Code". While conceding that state authority and action must fall where it is in conflict with federal legislation, *Hill v. State of Florida*, 1944, 325 U.S. 538, 65 S.Ct. 1373, 89 L.Ed. 1782; *Bethlehem Steel Co. v. New York L. R. B.*, 1949, 330 U.S. 767, 67 S.Ct. 1026, 91 L.Ed. 1243; *Amalgamated Ass'n, etc. v. Wisconsin Employment R. B.*, 1951, 340 U.S. 383, 71 S.Ct. 359, 95 L.Ed. 364; *International Union, etc. v. O'Brien*, 1950, 339 U.S. 454, 70 S.Ct. 781, 94 L.Ed. 978; *Garner v. Teamsters, etc.*, 346 U.S. 485, 74 S.Ct. 161, 98 L.Ed. 228; *Capital Service v. N. L. R. B.*, 347 U.S. 501, 74 S.Ct. 699, 98 L.Ed. 887; and *Weber v. Anheuser-Busch*, 348 U.S. 468, 75 S.Ct. 480, 99 L.Ed. 546, appellant earnestly insists that the instant case is identical factually in all respects with the *Sommer* case, *supra*, and that it is therefore, the bounden duty of any court in this state subordinate to the Supreme Court, not to announce changes in what has hitherto been treated within this state as the settled law with respect to the constitutionality or legality of a state statute, unless there be so exact a parallel between a particular case presented and a controlling decision of a federal court, that no reasonable distinction between them can

be made. *Birkhofer v. Krumm*, 27 Cal.App. 2d 513, 536-537, 81 P.2d 609. Appellant does not, however, contend that a state court has jurisdiction to grant relief against concerted labor activities which are either forbidden or protected by the amended Federal Labor Relations Act, *International Union, etc. v. O'Brien*, 339 U.S. 454, 70 S. Ct. 781, 94 L.Ed. 978, or that the application of the federal statutes to determine whether the area of regulation of concerted labor activities is open or closed to state regulation presents a federal question, upon which the Supreme Court of the United States is the ultimate authority, 21 C.J.S., Courts, § 206, pp. 365, 366, 377 and cases therein cited; 7 Cal.Jur., Courts, paragraph 48, at p. 646 and cases cited therein. The Supreme Court of California has frequently recognized that an Act of Congress, such as the Taft-Hartley Act, is the "supreme Law of the Land" under Article VI, Clause 2 of the Federal Constitution and supersedes state statutes to the extent that they are inconsistent with its purpose. *Lovett v. Bell*, 30 Cal.2d 8, 14, 180 P.2d 335; *Miller v. Municipal Court*, 22 Cal.2d 818, 851, 142 P.2d 297. See *In re De Silva*, 33 Cal.2d 76, 199 P.2d 6; *Gerry of California v. Superior Court*, 32 Cal.2d 119, 194 P.2d 689. It must therefore be admitted, and appellant inferentially so concedes, that regardless of the decision in the Sommer case, supra, the trial court was bound by the more recent controlling decisions of the Supreme Court of the United States if there was "so exact a parallel" between the case now engaging our attention and "the controlling decisions of the Federal Supreme Court" that "no reasonable distinction between them can be made".

Let us therefore examine the controlling decisions of the United States Supreme Court to determine whether "the facts of the instant case" fall within "the area of activities, neither protected nor prohibited that the state may regulate".

[2] There can be no doubt that state action is permissible to enjoin activity which threatens "a probable breach of the State's peace" or calls for "extraordinary police measures", such as recurrent unan-

nounced work stoppages, *International Union U. A. W. A. F. of L., Local 232 v. Wisconsin Employment Relations Board*, 336 U.S. 245, 69 S.Ct. 516, 93 L.Ed. 651; mass picketing, threats of bodily injury and property damage to employees, obstruction of streets and public roads, blocking of entrance to and egress from a factory and picketing of employees' homes, *Allen-Bradley Local, etc. v. Wisconsin Employment Relations Board*, 315 U.S. 740, 62 S.Ct. 820, 86 L.Ed. 1154, because such conduct is not subject to regulation by the federal board either by prohibition or by protection. However, in the case at bar there is no suggestion or contention that the activities complained of were anything except peaceful and orderly. Appellant employer herein sought injunctive relief against: (a) primary picketing; (b) primary boycotting; (c) secondary boycotting; (d) recognition strikes; (e) jurisdictional strikes; (f) causing the employer to interfere with or coerce its employees in their designation of a collective bargaining representative.

As pointed out by respondent, "Section 7 of the National Labor Relations Act, as amended, by the Labor Management Relations Act provides that 'Employees shall have the right * * * to engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *'

[3] "These 'concerted activities' protected by Section 7 of the Federal Act clearly include the right to strike, peacefully picket, and boycott for purposes and by methods not prohibited by Section 8. (*International Union [etc.] v. O'Brien*, 339 U.S. 454 [70 S.Ct. 781, 94 L.Ed. 978]; *Amalgamated Association [etc.] v. Wisconsin Employment Relations Board*, 340 U.S. 383 [71 S.Ct. 359, 95 L.Ed. 364]; and *Garner v. Teamsters Union [etc.]*, 346 U.S. 485 [74 S.Ct. 161, 98 L.Ed. 228].)

"Section 8(b) (4), in turn, prohibits a labor organization or its agents from engaging in certain specified types of picketing, secondary boycotting, recognition strikes, and jurisdictional strikes. (*Garner v. Teamsters Union [etc.]*, 346 U.S. 485 [74 S.Ct. 161, 98 L.Ed. 228]; *Capital Serv-*

ice, Inc., v. National Labor Relations Board, 347 U.S. 501 [74 S.Ct. 699, 98 L.Ed. 887].)

"Other provisions of the Federal Act provide appropriate machinery for dealing with controversies between labor organizations with respect to exclusive collective bargaining representative (Sec. 9) and exclusive work jurisdiction (Sec. 10(k)); for securing limited injunctions against prohibited picketing, striking, and boycotting (Sec. 10(l)), and for securing judicial decrees against this and other proscribed conduct of a labor organization or its agents (Sec. 10(c)). Such other prohibited conduct includes restraining or coercing employees in the exercise of their right to choose their collective bargaining representative (Sec. 8(b) (1) (A)), and causing an employer to discriminate against his employees in order to influence their choice of a bargaining representative (Sec. 8(b) (2))."

[4] Since it is conceded that appellant employer was engaged in interstate commerce, we are persuaded from a reading of the cases of *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 75 S.Ct. 480, 99 L.Ed. 546, and *Capital Service, Inc. v. N. L. R. B.*, 347 U.S. 501, 74 S.Ct. 699, 98 L.Ed. 887, that while it is not easy for a state court to decide, merely on the basis of a complaint, supporting affidavits and an answer, whether the subject matter is the concern exclusively of the federal board and withdrawn from the state, nevertheless, in the instant proceeding the trial court correctly concluded that a state court had no power to enjoin the picketing in that the federal board was clothed with jurisdiction to consider and determine in the first instance any charge of unfair labor practices under the federal act in connection with appellant employer's business. In the annotation on "National Labor Relations Act as excluding state actions" appearing in 99 L.Ed. 560, 561, the holding in *Weber v. Anheuser-Busch, Inc.*, supra, is thus epitomized: "It was held that the federal act precludes a state court from enjoining, as a violation of the state's restraint of trade statute, a labor union's picketing an employer's plant for the pur-

pose of compelling him to insert into a contemplated collective labor contract a clause obligating him to employ, for repair or replacement of machinery, only contractors who have collective labor agreements with the union. The decision seems to rest on the ground that the union conduct involved was either an unfair labor practice under the federal act or, if not, was protected by that act. It was pointed out that even though the federal Board, upon a charge of an unfair labor practice under a specified section of the Labor Management Relations Act, had held that this section was not violated, the Board had not ruled that no unfair labor practice was involved in the union conduct of which the employer complained. The court's conclusion was that even though the rulings of the federal Board are not wholly consistent on the meaning of the sections of the federal act outlawing 'unfair labor practices,' and on the area of 'concerted activities' protected by the federal act, a state court must decline jurisdiction, in deference to the federal Board, where the moving party itself alleges unfair labor practices, where the facts reasonably bring the controversy within the sections of the federal act prohibiting these practices, and where the conduct, if not prohibited by the federal act, may be reasonably deemed to come within the protection afforded by that act.

"A state court has no jurisdiction to enjoin, at the instance of an employer engaged in interstate commerce, the picketing of the employer's premises, delaying the construction of an oil terminal, where the picketing was conducted for one of following purposes: coercing the employer to sign closed shop contracts with the defendant unions; coercing the employees to become members of these unions, even though the employees voted, in an election conducted by the federal Board, against joining the unions involved; inducing the employees of another employer (not involved in the litigation) to engage in a concerted refusal to perform services in the course of their employment at the plaintiff employer's oil terminal for the purpose of forcing again other employers (likewise not involved in

the present litigation) to recognize the defendant unions as the representatives of their employees, even though such unions had not been so certified by the federal Board. *Pocahontas Terminal Corp. v. Portland Bldg. & Constr. Trade Council, D.C. Me.* 1950, 93 F.Supp. 217. The court pointed out that the facts stated above would constitute violations of unfair labor practice provisions of the federal act."

The order appealed from is affirmed.

DORAN and FOURT, JJ., concur.

Hearing denied; SHENK and SPENCE, JJ., dissenting.



139 Cal.App.2d 696

A. L. AYLMER and A. W. Aylmer, Plaintiffs, Cross-Defendants, Appellants and Respondents,

v.

Alice F. AYLMER, Defendant, Cross-Complainant, Respondent and Appellant.

Civ. 5226.

District Court of Appeal, Fourth District,
California.

March 5, 1956.

Hearing Denied May 2, 1956.

Action to reform a lot description to quiet title and to remove cloud on title, and for an accounting. The defendant filed a cross complaint seeking to cancel a purported deed and for damages for slander of the defendant's title. From a judgment of the Superior Court of Riverside County and from an order denying new trial, John G. Gabbert, J., both parties appealed. The District Court of Appeal, Griffin, J., held that where motion for new trial had been automatically denied by operation of law, the trial court had no jurisdiction to act at that time, and it was an abuse of discretion not to grant a motion for new trial on the ground that no phonographic report of the trial was obtainable due to the death of the reporter.

Judgment and order denying a new trial reversed.

1. Judgment ⇐326(1)

New Trial ⇐155

Where on October 15 a judgment was signed in favor of defendant and notice of entry thereof was served October 21 and on November 2, plaintiff filed a notice of intention to move for an order vacating the judgment and granting new trial and by a signed order on December 22 and filed December 23, the court ordered that the matter be reopened for further proceedings and December 21 was the last day allowed by law to rule on the motion, motion for new trial had been automatically denied by operation of law and the court had no jurisdiction to act at that time. *West's Ann.Code Civ.Proc.* §§ 657, 660.

2. New Trial ⇐163(1)

Trial court after entry of an order granting a motion for new trial on statutory grounds had the power to make, on its own motion, a nunc pro tunc order correcting its former order by showing that the motion for new trial was granted as prayed for, and particularly on ground of insufficiency of evidence to justify the verdict. *West's Ann.Code Civ.Proc.* §§ 657, 660.

3. New Trial ⇐93

The statute which was added to the Code for the purpose of changing the rule that a new trial could not be granted on account of the death of a court reporter confers no absolute right to a new trial and each case must stand upon its own merits. *West's Ann.Code Civ.Proc.* § 953e.

4. New Trial ⇐93

Where it appeared that evidence taken at the first hearing was necessary to a proper determination of the claims of plaintiffs and that the reporter's notes could not be read because of his death and there was no unnecessary delay and no adequate ground to hold that the plaintiffs waived their right to move for a new trial under the statute on ground that no phonographic report of the trial was obtainable due to death of reporter, it was an abuse of discretion not to grant the motion for new trial on that ground. *West's Ann.Code Civ.Proc.* §§ 657, 953e.

A. L. Aylmer, Compton, and A. W. Aylmer, in pro. per., and L. S. B. Ritchie, Los Angeles, for plaintiffs and appellants.

Hennigan & Ryneal, Riverside, for defendant and appellant.

GRIFFIN, Justice.

Plaintiffs A. L. Aylmer and A. W. Aylmer, brothers, and both attorneys at law, brought this action against defendant Alice F. Aylmer, their sister, seeking to reform the lot description in a certain deed signed by their mother in September, 1930, whereby it is claimed she conveyed to the three children, in equal shares, certain ranch property in Riverside County (92 acres) and the home property in Los Angeles county (a house and lot). This deed was not recorded by plaintiffs until after the death of the mother on July 16, 1947. In a second cause of action plaintiffs seek to quiet title against defendant to their respective claimed one-third interests in said property. In a third and fourth cause of action plaintiffs seek to remove a cloud on their title by reason of the recordation, in August, 1938, of a deed to defendant by their mother, of the home property, dated February 25, 1938, and a similar deed of the ranch property dated October 9, 1935, and recorded December 24, 1935, as well as a grant deed of the ranch property executed by their mother and father in defendant's favor in September, 1928, which was not recorded until December 24, 1935. The claim is that said deeds were obtained by defendant by undue influence and that her mother had already conveyed title thereto to the three of them by the 1930 deed. An accounting is also sought.

Defendant answered, denied generally the allegations of the complaint, but claims she was the owner in fee of such property by virtue of the deeds above mentioned and claims the deed of 1930, to the three of them, was never delivered or was delivered conditionally, and was obtained by plaintiffs by fraud in that they represented to their mother that she could dispose of that property during her lifetime; that defendant had been in open and notorious possession of the property and received the rents therefrom and paid taxes thereon since

1928, and that plaintiffs claimed no right and title to the property until after their mother's death and until this action was commenced in 1950. By a cross-complaint she sought to cancel the purported deed to the property to the three of them and sought damages for claimed slander of defendant's title in the sum of \$6,000.

[1] The case, which was reported, was tried upon the issues thus presented. It lasted three days and concluded on July 1, 1953. Depositions and a large amount of documentary evidence were received. On September 29th the court filed a memorandum decision. On October 15th a judgment was signed in favor of defendant and she was allowed \$2,500 recovery on her cross-complaint. Notice of entry of judgment was served on *October 21, 1953*. On November 2nd, plaintiffs filed a notice of intention to move for an order vacating and setting aside the judgment and granting a new trial on the statutory grounds specified in sec. 657 of the Code of Civil Procedure, including insufficiency of the evidence. By signed order dated December 22, 1953, and filed December 23, 1953, the 63rd day after notice of entry of judgment, the court ordered, pursuant to section 662 of the Code of Civil Procedure, in lieu of granting a new trial, that the findings and judgment entered be vacated and set aside and ordered that the matter be reopened for further proceedings and the introduction of further and additional evidence. The clerk's minutes of December 23rd contained the same order. There were no minute orders nor written orders entered on December 21st, which concededly was the last day allowed by law to rule on the motion. It appears upon the face of this record that the motion for new trial had been automatically denied by operation of law, and the court had no jurisdiction to act at that time. Sec. 660, Code Civ.Proc.; *Dempsey v. Market Street R. Co.*, 23 Cal. 2d 110, 142 P.2d 929; *Millsap v. Hooper*, 34 Cal.2d 192, 208 P.2d 982.

Thereafter, defendant moved to strike the above order from the files on the same ground. Affidavits were filed, including one by the trial judge and clerk of the court, wherein they recited that the motion

for new trial was submitted for decision on December 3, 1953, and at 4 p. m. on December 21st, they were reminded that the last day to rule on the motion was that day, and at 4 p. m. the judge made a verbal order that in lieu of granting a new trial he would enter an order under section 662 of the Code of Civil Procedure vacating and setting aside the findings and judgment, ordered the matter reopened for further proceedings and the introduction of further and additional evidence, and delivered a written memorandum to the clerk directing him to enter such an order in the minutes; that the clerk did not do so but on the next day, December 22nd, he prepared a formal order to this effect and the judge signed it and directed the clerk to enter it; that the order was inadvertently dated December 22nd, instead of December 21st, and was entered in the clerk's minutes on December 22nd and was inadvertently not filed until December 23rd.

The trial judge then, on January 12, 1954, signed an order to the same effect, directing the clerk to enter it "nunc pro tunc" as of December 21, 1954. It is defendant's first claim that the trial court had no jurisdiction to make such an order and that it lost jurisdiction to rule upon the motion for new trial.

[2] In *Lauchere v. Lambert*, 210 Cal. 274, 291 P. 412, the Supreme Court held that the trial court, after the entry of an order granting a motion for new trial as prayed for (which motion was made on all the statutory grounds) had the power to make, on its own motion, a nunc pro tunc order correcting its former order by showing that the motion for new trial was granted as prayed for, and particularly on the ground of insufficiency of the evidence to justify the verdict. It recited that the clerk had inadvertently omitted from the former order the specification that the motion was granted on said ground. The order was sustained even though the nunc pro tunc order was made more than six months after the former order.

In *Roth v. Marston*, 110 Cal.App.2d 249, 242 P.2d 375, 379, the appellate court held that the trial judge had no authority to

correct a claimed error in an order granting a new trial on the ground of insufficiency of the evidence if not made within ten days after entry of the original order, and said, in connection with such an order:

"When the time within which the judicial act must be done is jurisdictional, the court cannot circumvent the clear mandate of the statute by filing an order *nunc pro tunc*. In such a circumstance, it is immaterial whether the default be that of the court or of the litigant * * *"; that in enacting section 657 of the Code of Civil Procedure, as amended in 1939, the purpose "was to set up, in effect, a *statute of limitation* on the time within which a trial court can, either by original action or by *nunc pro tunc* order, specify *insufficiency of the evidence* as a ground for an order granting a new trial."

This limitation applies to the granting of a new trial on the grounds of insufficiency of the evidence. Our attention has not been called to any statute otherwise fixing a limitation in which the record may be corrected to speak the truth in reference to clerical errors. Accordingly, it must be held that the order nunc pro tunc sufficiently gave the court jurisdiction to act on the motion. See, also, *Livesay v. Deibert*, 3 Cal.App.2d 140, 39 P.2d 466; *Carter v. J. W. Silver Trucking Co.*, 4 Cal.2d 198, 47 P.2d 733; *National Farmers Union Auto. & Cas. Co. v. Wood*, 10 Cir., 207 F. 2d 659.

On July 16, 1954, counsel for the respective parties received a letter from the trial judge informing them:

"This matter has been one of tangled situations and problems. To add to the complications, my court reporter * * * just passed away and with his death the problem of the record in the case becomes apparent.

"There is every likelihood of an eventual appeal in this case, in which event there would have to be an entire new trial by reason of the fact that there is no stenographic record. I have made inquiry, and there is no

possibility of having the reporter's notes transcribed, since he wrote his own manual shorthand.

"If I am correct in my surmise that there will, in all likelihood be an appeal, I am making this inquiry of counsel to get their reaction to see if it would not be better, instead of spending some time taking additional evidence, which would all have to be re-taken at a new trial, to try the case *de novo*?

"There are problems connected with this decision running both ways and having favorable and unfavorable overtones for both parties.

"I would be pleased to have counsel consult between themselves regarding this matter if they desire to do so, or to contact me by letter and give me their viewpoints."

It appears from the briefs that plaintiffs' counsel requested a trial *de novo*. After a pretrial conference, the trial judge signed a memorandum order on July 26, reciting that the parties might introduce further evidence on the cross-complaint and a limited amount of evidence in reference to the delivery of certain deeds, and allowed depositions to be taken for this purpose. At the limited trial, with another reporter, objection was made by plaintiffs to taking only the limited evidence ordered, and demand was made for a new trial *de novo*. The objection was overruled with the statement of the trial judge that "It is impossible to effect a stipulated settled statement of fact in which the court might make a ruling. I think the matter may come up on a motion for a complete record. I think we should proceed at this time."

Certain evidence was thereafter received and the court signed new findings in favor of defendant and ordered that she take nothing by her cross-complaint. On November 29, 1954, judgment was entered accordingly.

On December 10, 1954, plaintiffs moved for a new trial on the statutory grounds set forth in section 657 of the Code of Civil Procedure, including the further ground set forth in section 953e of the Code of

Civil Procedure, that no phonographic report of the first trial was obtainable due to the death of the reporter. After hearing thereon, the court, on February 9, 1955, denied the motion on all grounds and plaintiffs appeal from the judgment and order denying a new trial under section 953e, *supra*. Defendant appeals from the judgment denying her relief on her cross-complaint. The only reporter's transcript produced on appeal was comparatively short and consisted of the limited evidence taken after the first hearing.

[3] The main contention of plaintiffs is that the court prejudicially erred in denying plaintiffs a new trial under section 953e, *supra*, and they cite *Weisbecker v. Weisbecker*, 71 Cal.App.2d 41, 49, 161 P.2d 990, 995, where it is said, under somewhat similar circumstances:

"The remedial aspect of Code Civ. Proc., Section 953e, must not be lost sight of. This section was added to the Code in 1931 for the purpose of changing the rule announced in *Diamond v. Superior Court*, 189 Cal. 732, 210 P. 36 which had held that a new trial could not be granted on account of the death of a court reporter since this was not then one of the statutory grounds for new trial. * * * Obviously, Section 953e confers no absolute right to a new trial, and each case must stand upon its own merits. In the various cases cited by respondent where a new trial was held properly denied, there was either an unconscionable delay of many months or other facts quite divergent from those in the instant case, hence those cases cannot be considered authority governing the present decision. Where, as in the present case, an appellant has proceeded in the customary manner to perfect an appeal, has acted with reasonable promptness upon learning of the reporter's death, and the contentions of appellant are dependent upon voluminous evidence taken during a three day trial, the emergency situation contemplated by Section 953e seems to be present. Under these cir-

cumstances a denial of the new trial provided for in such section exceeds the bounds of judicial reason and therefore must amount to an abuse of discretion." The court there reversed the order denying a new trial.

Defendant sets forth at length her version of what the testimony was at the first trial, with which plaintiffs do not agree. They argue that this fact emphasizes the necessity of that evidence in support of their claims on appeal; and that it also destroys the argument of defendant's counsel that plaintiffs should have obtained a settled statement of facts, and since they submitted none to the court they waived the right to a reporter's transcript. Defendant contends that plaintiffs' failure to move for a new trial immediately after learning of the death of the court reporter and after the court indicated it did not intend to grant a complete new trial, also constituted a waiver of such right; that it would be unfair and inequitable to permit plaintiffs to accept the court's ruling denying them a new trial, knowing of the death of the court reporter, presumably in the hope that they would benefit by the further hearing, and to then make a motion regarding the death of the court reporter. We do not believe the evidence justifies these conclusions. *Fickett v. Rauch*, 31 Cal.2d 110, 137 P.2d 402.

[4] Since it affirmatively appears that the evidence taken at the first hearing is necessary to a proper determination of the claims of the plaintiffs on this appeal, that the reporter's notes could not be read; that there was no unnecessary delay in bringing to the court's attention the necessity of having a reporter's transcript prepared in case of an appeal (which view was apparently originally shared by the trial judge), and since there appears to be no adequate ground to hold that plaintiffs waived their right to move for a new trial under section 953e of the Code of Civil Procedure, we must conclude that it was an abuse of discretion not to grant the motion on that ground.

In the authorities relied upon by defendant, such as *Duarte v. Rivers*, 90 Cal.App.

2d 152, 202 P.2d 612; and *Caminetti v. Edward Brown & Sons*, 23 Cal.2d 511, 144 P.2d 570, lack of diligence and unreasonable and unnecessary delay were fully indicated, justifying the order denying a new trial.

Judgment and order denying a new trial reversed.

BARNARD, P. J., and MUSSELL, J.,
concur,



139 Cal.App.2d 502

In the Matter of the Agreed Case Between
the FAIRFIELD-SUISUN SEWER DISTRICT,
a Public Corporation, Petitioner,
v.

Colin C. HUTCHEON, as District Clerk,
Respondent.
Civ. 8999.

District Court of Appeal, Third District,
California.

Feb. 27, 1956.

Proceeding by special sewer district for writ of mandate to compel district clerk of Solano County to publish and mail notice of sale of certain bonds as provided in resolution of Board of Directors of the District, wherein purpose of proceeding was to obtain judgment establishing validity of district and its right to issue bonds. The District Court of Appeal, Schottky, J., held that, under provision of constitution prohibiting special laws where, *inter alia*, general law could be made applicable, there were no general laws preventing the special legislation creating the sewer district,

Writ issued.

I. Mandamus ☞ 103

Where board of directors of special sewer district sought to compel district clerk to publish and mail notice of sale of certain bonds as provided in resolution of

board, and purpose of proceeding was to obtain judgment establishing validity of district and its right to issue bonds, mandate was proper remedy. St.1951, pp. 553, 560, §§ 1 et seq., 97.

2. Municipal Corporations ⇐3

In special act of legislature creating sewer district, recitals of section stating purpose of act were determinations of fact as to conditions which required organization of a special sewer district, and such recitals, if not contrary to facts which were of common knowledge, would be deemed conclusive by courts. St.1951, p. 563, § 160.

3. Constitutional Law ⇐70(2)

Whether existing laws could have been made applicable to accomplish purpose of special act is judicial question, but declaration of legislature that purposes of act could not be accomplished under existing general laws is entitled to great weight. West's Ann.Const. art. 4, § 25, subd. 33.

4. Statutes ⇐76(2)

Under provision of constitution prohibiting special laws where, inter alia, general law could be made applicable, Municipal Sewer Districts Act of 1911 did not prevent special legislation creating Fairfield-Suisun Sewer District because Act of 1911 was permissive only, required two-thirds vote for approval of bonds while special legislation provided for approval by majority vote, and contained no provision comparable to provision of special legislation that as land was annexed to either city affected thereby, it became part of the sewer district created thereby. West's Ann.Const. art. 4, § 25, subd. 33; St.1951, p. 553, § 1 et seq.; West's Ann. Health and Safety Code, §§ 4600 et seq., 4636.8.

5. Statutes ⇐76(2)

Under provision of constitution prohibiting special legislation where, inter alia, general law could be made applicable, County Sanitation District Act did not prevent special legislation creating Fairfield-Suisun Sewer District because county sanitation district did not have power to provide for storm drainage facilities, and taxes

were levied against real property, while special legislation provided for levy of taxes against all taxable property. West's Ann.Const. art. 4, § 25, subd. 33; St.1951, pp. 553, 562, §§ 1 et seq., 122; West's Ann. Health and Safety Code, § 4700 et seq.

6. Statutes ⇐76(2)

Under provision of constitution prohibiting special laws where, inter alia, general law could be made applicable, Joint Municipal Sewage Disposal District Act did not prevent special legislation creating Fairfield-Suisun Sewer District because the Municipal Act did not provide for drainage facilities, and was not enacted at time special legislation became law. West's Ann. Const. art. 4, § 25, subd. 33; St.1951, p. 553, § 1 et seq.; West's Ann. Health and Safety Code, § 5700 et seq.

7. Statutes ⇐76(2)

Under provision of constitution prohibiting special laws where, inter alia, general law could be made applicable, Sanitary District Act of 1923 did not prevent special legislation creating Fairfield-Suisun Sewer District because sanitary district required two-thirds vote on bonds and had bond limit of 15 per cent of assessed valuation, while special legislation required only majority vote and had no limitation. West's Ann.Const. art. 4, § 25, subd. 33; St.1951, p. 553, § 1 et seq.; West's Ann. Health and Safety Code, § 6400 et seq.

8. Statutes ⇐76(2)

Under provision of constitution prohibiting special laws where, inter alia, general law could be made applicable, general laws pertaining to county water districts did not prevent special legislation creating Fairfield-Suisun Sewer District because, although county water district had power to construct and operate facilities for treatment and disposal of waste and storm water, formation was permissive and powers included storage and furnishing of water, which apparently was more than was needed in the Fairfield-Suisun District. West's Ann.Const. art. 4, § 25, subd. 33; St.1951, p. 553, § 1 et seq.; Water Code, § 31000 et seq.

9. Evidence ⇨65**Municipal Corporations** ⇨918(3)

In authorizing amount of bond issue for special sewer district, voters would be presumed to know that denominations of bonds would be in accordance with pertinent provision of special act creating the district, and where failure of notice of bond election to contain such denomination could not prejudice rights of anyone, statutory requirement was directory rather than mandatory, and failure to comply therewith did not render bond proceedings fatally defective. St.1951, p. 559, §§ 85, 90.

10. Statutes ⇨227

Statutory directions which are not of the essence of the thing to be done, and by failure to obey which the rights of those interested will not be prejudiced, are not to be regarded as "mandatory".

See publication Words and Phrases, for other judicial constructions and definitions of "Mandatory".

11. Municipal Corporations ⇨935

Even if requirement of statute creating special sewer district that notice of bond election contain denomination of proposed bonds was mandatory, bond proceedings thereunder which failed to comply with this requirement were validated by First, Second and Third Validating Acts of 1955, which was applicable to various categories of public bodies broad enough to include special sewer district in question. St.1951, p. 559, §§ 85, 90; St.1955, pp. 454, 2844, 2851, § 5.

12. Municipal Corporations ⇨918(2), 935

Fact that ballots for bond election pursuant to statute creating special sewer district contained words "Bond—Yes" and "Bond—No" instead of "Bonds—Yes" and "Bonds—No" was insufficient to render bond proceedings fatally defective, and any such error would be cured by First, Second and Third Validating Acts of 1955. St. 1951, p. 559, § 85; St.1955, pp. 454, 2844, 2851, § 5.

13. Elections ⇨257

Canvass of election returns is merely a ministerial and not in any sense a legislative act, and entry of statement of result

is of same ministerial nature. West's Ann. Election Code, §§ 7921, 10054.

14. Municipal Corporations ⇨918(4), 935

Where board of directors of special sewer district, in conducting bond election pursuant to statute creating the district, consolidated bond election with statewide election held the same day, and authorized canvass of the returns by board of supervisors who in turn authorized canvass to be made by county clerk, there was no such irregularity as to render election invalid on theory that ballots were not canvassed by board of directors of sewer district, and furthermore, any irregularity would be cured by First, Second and Third Validating Acts of 1955. St.1951, p. 553, § 1 et seq.; St.1955, pp. 454, 2844, 2851, § 5; West's Ann. Election Code, §§ 7921, 10054.

Kenneth I. Jones, and Burt D. Goodman, Fairfield, for petitioner.

Kirkbride, Wilson, Harzfeld & Wallace, San Mateo, for respondent.

SCHOTTKY, Justice.

The Fairfield-Suisun Sewer District seeks a writ of mandate to compel Colin C. Hutcheon, the district clerk, to publish and mail a notice of sale of certain bonds as provided in a resolution of the Board of Directors of the sewer district. The facts are set forth in an agreed statement. The application was filed with the Supreme Court and was transferred to this court.

The Fairfield-Suisun Sewer District was created by a special act of the legislature, Stats.1951, ch. 303, p. 553, and was duly organized. Bonds in the amount of \$1,060,000 were approved by the voters on November 2, 1954, by a vote of 1392 for and 428 against. A resolution providing for the issuance of said bonds and a resolution calling for bids for the sale of the bonds and directing the clerk to give notice of sale by publication and by mail was adopted by the board of directors of the sewer district. A demand was made on the clerk to comply with the resolution and mail a notice of sale. He refused on the grounds (1) that the district was created by a special act of

the legislature in contravention of Article IV, section 25, subdivision 33, of the California Constitution and is an illegal entity, (2) that the notice of the bond election did not comply with the provisions of the organic act, (3) that the ballots were improperly worded, and (4) the election was never canvassed by the directors of the district.

[1] Mandate is a proper remedy. In re City and County of San Francisco, 195 Cal. 426, 429, 233 P. 965; Dufton v. Daniels, 190 Cal. 577, 581, 213 P. 949; Hartsock v. Merritt, 93 Cal.App. 365, 269 P. 757. Original jurisdiction has frequently been exercised by the upper courts in proper cases of this nature. City of Grass Valley v. Walkinshaw, 34 Cal.2d 595, 212 P.2d 894; Ventura County Harbor District v. Board of Supervisors, 211 Cal. 271, 295 P. 6; In re City and County of San Francisco, supra; Los Angeles County Flood Control Dist. v. Hamilton, 177 Cal. 119, 169 P. 1028.

The obvious purpose of the proceeding is to obtain a judgment establishing the validity of the district and its right to issue bonds. Section 97 of the act authorizes the district to bring an action in the superior court to obtain such a judgment. The present proceeding was instituted in the hope that some time would be saved in bringing the proceeding to final judgment.

Article IV, section 25, of the Constitution provides:

"The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say:

* * * * *

"Thirty-third—In all other cases where a general law can be made applicable."

The act which created petitioner, being a special law, is a valid enactment if there was no general law which could be made applicable to accomplish the purposes of the special law. This is the first question to be decided.

The powers of the district are enumerated in section 42 of the act as follows:

294 P.2d—7½
Cal.Rep. 293-294 P.2d—33

"The district may acquire, construct, reconstruct, alter, enlarge, lay, repair, renew, replace, maintain and operate such sewers, drains, septic tanks and sewage collection, outfall, treatment works and other sanitary disposal systems, and storm water and storm water collection, outfall and disposal systems, within or without the district as in the judgment of the board shall be necessary and proper."

The purpose of the act is stated in section 160 as follows:

"The purpose of this act is to form the Fairfield-Suisun Sewer District in order that the area benefited may be served with sewer and storm drain facilities; special facts and circumstances, applicable to the area in which the district lies and not generally, makes the accomplishment of this purpose impossible under existing general laws, and therefore special legislation is necessary. The special facts are as follows:

"a. The area has no facilities for the treatment and disposal of sewage and is consequently contaminating and polluting the waters of Suisun Bay.

"b. Recent increases have resulted in a population disproportionate to the assessed valuation of taxable property in the area, and construction of adequate facilities cannot therefore be financed within the framework of existing general laws.

"c. The area is of strategic importance during times of war or threatened war because of the proximity of the Travis Air Force Base, formerly known as the Fairfield-Suisun Army Air Base, center of military air operations on the Pacific Coast. Influx of military men and their families has greatly aggravated the problem of sewage disposal in the area."

The reasons for the urgency of the act were stated by the legislature as follows, section 161:

"Water pollution and contamination are critical problems in the proposed

district. State and local health authorities are agreed on the urgent need for immediate sewage treatment facilities in the area if a serious health condition is to be avoided. Inadequacy of existing law makes it necessary that this legislation take immediate effect so that necessary facilities may be provided."

[2,3] The recitals of section 160 are determinations of fact as to the conditions which required the organization of a special sewer district. Such recitals, if not contrary to facts which are of common knowledge, will be deemed conclusive by the courts. *People ex rel. Chapman v. Sacramento Drainage Dist.*, 155 Cal. 373, 103 P. 207; *Ventura County Harbor Dist. v. Board of Supervisors*, supra. It is a judicial question whether existing laws could have been made applicable to accomplish the purpose of the special act but the declaration of the legislature that the purposes of the act could not be accomplished under existing general laws is entitled to great weight.

It is urged by respondent that the Fairfield-Suisun Sewer District could and should have been organized under one of several general laws. We shall refer briefly to these laws, noting their powers, and pointing out wherein they differ from and are not applicable to the Fairfield-Suisun Sewer District.

[4] 1. The Municipal Sewer Districts Act of 1911, H. & S.C.A., sec. 4600 et seq., which provides for "sewers for sanitary or drainage purposes, and drains * * * for surface and storm waters." Bonds could be issued after an approval of the bond proposition by a two-thirds vote. It further provides for joint acquisition and use of sewers and sewage disposal plants. H. & S.C.A. sec. 4636.8. There are several reasons why the Fairfield-Suisun Act differs sufficiently so that the Municipal Bond Act of 1911 does not prevent special legislation.

a. The act is permissive. In *American River Flood Control District v. Sweet*, 214 Cal. 778, 7 P.2d 1030, the Supreme Court held that a special act was valid where the general law is permissive only.

b. The special act provides for approval of bonds by a majority vote while the general act requires a two-thirds vote.

c. The act provides that as land is annexed to either city, it becomes a part of the district. Sec. 1. No comparable provision is in the act of 1911.

[5] 2. County Sanitation Districts. H. & S.C.A., sec. 4700 et seq. This type of district does not have power to provide for storm drainage facilities. Taxes are levied against real property while the Fairfield-Suisun Act provides for the levy of taxes against all taxable property. Sec. 122.

[6] 3. A Joint Municipal Sewage Disposal District, H. & S.C.A., sec. 5700 et seq., does not provide for drainage facilities and this act was not enacted at the time the Fairfield-Suisun Act became law.

[7] 4. A Sanitary District as provided by section 6400 et seq. of the Health and Safety Code Annotated. This district requires a two-thirds vote on bonds and it has a bond limit of 15% of assessed valuation. The Fairfield-Suisun Act only requires a majority vote and has no limitation.

[8] 5. A County Water District also seems to be applicable since it has the power to construct and operate facilities for the treatment and disposal of sewage waste and storm water, Water Code, sec. 31000 et seq., but formation is permissive and the powers include storage and furnishing of water which apparently is more than is needed in the Fairfield-Suisun District.

Other acts could be cited or a combination of several acts might possibly achieve the same objectives but none are mandatory and no act provides similar provisions for bond security and voting requirements.

The legislature has frequently exercised the power to create improvement and protection districts by special laws when it was deemed necessary in order to accomplish purposes that could not be accomplished by existing general laws. The following language of the court in *Solvang Municipal Improvement District v. Jensen*, 111 Cal.App.2d 237, at page 241, 244 P.2d

492, at page 491, is quite applicable to the instant proceeding:

"It clearly appears from the face of the act that there is pressing need for the public improvements which the district proposes to provide. The people of the area wished to organize a district with limited powers. If they had desired to incorporate as a city, or as a utility district, they would have done so. Proceedings under either of the general laws are permissive. They require petitions signed by percentages of the voters or landowners, and elections at which a majority vote is required to carry the propositions. In considering the propriety of creating the Solvang district by special act the legislature no doubt was influenced by the fact that the landowners and voters of the area were evidently averse to both the utility district and city forms of government, and might not adopt either. This has been recognized as a good reason for the creation of an improvement district by special act, where there was imperative need for local public improvements or facilities. *American River Flood Control Dist. v. Sweet*, 214 Cal. 778, 7 P.2d 1030, *supra*; *Monterey Peninsula Airport Dist. v. Mason*, 19 Cal.2d 446, 121 P.2d 727, *supra*. The special act authorizes the facilities which the district needs. Incorporation under the general law would give the residents a form of government which they do not need and do not want. Special legislation in this situation has none of the evils against which the Constitution affords protection. Upon the contrary, it was the only means by which the requirements and the desires of the people in the area could be satisfied. That they are satisfied is attested by the fact that the vote was 205 to 28 in favor of the issuance of revenue bonds in the amount of \$250,000 for the establishment of water and sewage facilities. No action by the legislature could have been more consistent with the proper exercise of its powers than to give the district the form of district government the people asked for."

Respondent clerk contends also that the "bond proceedings are fatally defective in that the notice of bond election failed to contain the denomination of the proposed bonds, as required by the act, and the ballot contained the words 'Bond—Yes' and 'Bond—No' instead of 'Bonds—Yes' and 'Bonds—No', as required by law and the order of the board."

[9, 10] Section 85 of the act provides that the notice of election shall, in addition to stating the time, place and purpose of the election, state also the amount and denomination of the proposed bonds. It is conceded that the notice here involved did not contain the denomination of the bonds. Section 90 of the act provides that bonds issued by the district "shall be of such denominations as the board determines except that no bonds shall be of a denomination less than one hundred dollars (\$100) or greater than one thousand dollars (\$1,000)." In authorizing the amount of the bond issue the voters must be presumed to know that the denominations of the bonds would be in accordance with this provision, and we do not believe that the rights of anyone could be prejudiced by the failure to state the denomination of the bonds. As stated in *E. M. Derby & Co. v. City of Modesto*, 104 Cal. 515, at page 523, 38 P. 900, at page 903:

"* * * Those directions which are not of the essence of the thing to be done, and by the failure to obey which the rights of those interested will not be prejudiced, are not to be regarded as mandatory. *Suth.St.Const. § 447*. The change did not affect the validity of the bonds, and, as no greater burden is imposed upon the taxpayers, the appellant cannot complain."

See also *Rideout v. City of Los Angeles*, 185 Cal. 426, 432, 197 P. 74.

We are of the opinion that the requirement as to the denomination of the bonds is directory, not mandatory.

[11] But even if it should be held that requirement that the notice of election should contain the denomination of the proposed bonds is mandatory we believe

that the bond proceedings here involved were validated by the First, Second and Third Validating Acts of 1955, Stats.1955, Chs. 11, 1565, 1572, pp. 454, 2844, 2851. Section 5 of each of these acts provides:

"All acts and proceedings heretofore taken by or on behalf of any public body under any law, or under color of any law, for the authorization, issuance, sale, or exchange of bonds of any such public body for any public purpose are hereby confirmed, validated, and declared legally effective. This shall include all acts and proceedings of the governing board of such public body and of any person, public officer, board or agency heretofore done or taken upon the question of the authorization, issuance, sale, or exchange of such bonds."

The acts specify the various categories of public bodies to which the act shall be applied. Some of the public bodies named are broad enough to include the Fairfield-Suisun Sewer District. These include Municipal Sewer Districts, Sewer Maintenance Districts, Storm Water Districts, Joint Municipal Sewage Disposal Districts, and Drainage Districts. Any of these could be construed to embrace the Fairfield-Suisun District. The legislature did not specifically name any district, and we think it is clear that what the legislature was validating was bond proceedings of any district empowered to act in the manner named. Therefore, any errors in the election proceeding would be cured.

[12] There is no merit in the further contention of respondent that the fact that the ballot contained the words Bond—Yes and Bond—No instead of Bonds—Yes and Bonds—No made the bond proceedings fatally defective. It must be apparent that this was a mistake of the printer and that no voter could have been misled as to the significance of a Yes or No vote. Furthermore we believe that any such error would be cured by the validating acts hereinbefore referred to.

The final contention of respondent is that the bond election proceedings were void because the ballots were not canvassed by the board of directors of the district.

The bond election was duly consolidated with the statewide election held the same day, the board of directors, pursuant to section 10054 of the Elections Code, had authorized the canvass of the returns by the board of supervisors who had in turn, pursuant to the same section and section 7921, authorized the canvass to be made by the county clerk.

Upon completion of the canvass, the county clerk duly entered a statement of the result on the records of the board of supervisors.

[13] The canvass of election returns is merely a ministerial and not in any sense a legislative act. *Devlin v. Donnelly*, 20 Cal. App. 495, 129 P. 607; *Cerini v. De Long*, 7 Cal.App. 398, 94 P. 582; 16 Op.Cal.Attys. Gen. 141; 16 Op.Cal.Attys.Gen. 120. The entry of the statement of the result is of the same ministerial nature. 29 C.J.S., Elections, § 237, pp. 346, 347, and cases cited.

[14] We do not believe that under the circumstances here present there was any such irregularity as to render the election invalid. The directors, in proceeding in the manner they did, no doubt were actuated by the commendable desire to save expense to the district by taking advantage of the general election. And, furthermore, we believe that any irregularity would likewise be cured by the said validating acts of 1955.

In view of the foregoing we conclude that the Fairfield-Suisun Sewer District was created by valid act of the legislature, that it has the right to issue the bonds approved at the bond election, and that it is entitled to a writ of mandate directing respondent clerk to publish and mail a notice of sale of certain bonds as provided in the resolution of the board of directors.

Let the writ issue.

VAN DYKE, P. J., and PEEK, J., concur.

139 Cal.App.2d 651

Paul C. EVERLY, Plaintiff and Appellant,
v.

Harry B. CREECH, Great American Indemnity Company, a corporation, et al.,
Defendants and Respondents.

GREAT AMERICAN INDEMNITY COMPANY, a corporation, Cross-Complainant and Respondent,

v.

Paul C. EVERLY, Harry B. Creech, Normac, Inc., a corporation, Standard Accident Insurance Company, a corporation, et al.,
Cross-Defendants and Appellants.

Civ. 4954.

District Court of Appeal, Fourth District,
California.

March 1, 1956.

Hearing Denied April 25, 1956.

Declaratory judgment action to determine liability under automobile policy covering a newly acquired automobile, if insured notified insurance company within 30 days following date of delivery. The Superior Court of Kern County, William L. Bradshaw, J., rendered judgment for defendants, and plaintiff and others appealed. The District Court of Appeal, Barnard, P. J., held that evidence warranted finding that, though legal title was not transferred until several days before subject accident, insured had exercised complete dominion over and had acquired equitable title to second hand automobile from widow friend more than 30 days prior to accident, and, accordingly, insurance company would not be liable absent such notification.

Judgment affirmed.

1. Insurance ⇨435.3

Under automobile policy covering a newly acquired automobile only if insured notified insurance company within 30 days from date of delivery, absent such notification prior to accident involving newly acquired vehicle, coverage would be determined by whether or not insured was owner of new vehicle for more than 30 days before accident. West's Ann.Civ.Code, § 1738; Vehicle Code, § 66.

2. Insurance ⇨146(1)

An insurance policy, like any other contract, is to be construed to give effect to intention of parties. West's Ann.Civ. Code, § 1738; Vehicle Code, § 66.

3. Sales ⇨197

Under contract of sale, property is transferred to buyer at time parties intend it to be transferred; and that intention may be disclosed by conduct, common usage, and circumstances. West's Ann.Civ.Code, § 1738; Vehicle Code, § 66.

4. Automobiles ⇨19

Definition of "owner" in Vehicle Code does not apply under all circumstances; one may be considered an owner of an automobile though title has not been transferred to him in manner required by Code. West's Ann.Civ.Code, § 1738; Vehicle Code, § 66.

See publication Words and Phrases, for other judicial constructions and definitions of "Owner".

5. Property ⇨7

The word "dominion" denotes complete ownership or right to the property.

See publication Words and Phrases, for other judicial constructions and definitions of "Dominion".

6. Insurance ⇨435.3

The word ownership has different shades of meaning, depending on context in which it appears and circumstances in which it is used, upon consideration of meaning of requirement of automobile policy that insured notify insurance company within 30 days from date of delivery of newly acquired vehicle.

7. Insurance ⇨435.3

Where insured had full use and exercised dominion over automobile, such would be equivalent to ownership, within policy provision requiring notification to insurance company of newly acquired vehicle within 30 days from date of delivery. West's Ann.Civ.Code, § 1738; Vehicle Code, § 66.

8. Insurance ⇨435.3

Though mere possession for considerable period would not be sufficient to indi-

cate ownership in case of genuine borrowing of automobile, there should be convincing evidence that such was intention of parties, to obviate effect of such evidence under policy provision requiring that insured notify insurance company within 30 days from date of delivery of newly acquired automobile. West's Ann.Civ.Code, § 1738; Vehicle Code, § 66.

9. Declaratory Judgment $\S$ 347

In declaratory judgment action to determine liability under automobile policy covering a newly acquired automobile, if insured notified insurance company within 30 days following date of delivery, evidence warranted finding that, though legal title was not transferred until several days before subject accident, insured had exercised complete dominion over and had acquired equitable title to secondhand automobile from widow friend more than 30 days prior to accident, and, accordingly, insurance company was not liable absent notification. West's Ann.Civ.Code, § 1738; Vehicle Code, § 66.

Mack, Bianco & King, Bakersfield, for appellants.

Borton, Petrini, Conron & Brown, Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is an action to determine a question of liability under the "newly acquired automobile" provision of an insurance policy issued by Great American Indemnity Company and covering a 1949 Hudson owned by the plaintiff Everly. The policy was dated July 10, 1949, and contained the usual provision for an additional coverage which, so far as material here, reads:

"(4) Newly Acquired Automobile— an automobile, ownership of which is acquired by the named insured who is the owner of the described automobile, if the named insured notifies the company within thirty days following the date of its delivery to him, and if either it replaces an automobile described in this policy or the company insures all automobiles owned by the named

insured at such delivery date; but the insurance with respect to the newly acquired automobile does not apply to any loss against which the named insured has other valid and collectible insurance. The named insured shall pay any additional premium required because of the application of the insurance to such newly acquired automobile."

Everly was employed by Normac, Inc., as a cement finisher foreman and was living at Ridgecrest. He worked in that vicinity, most of his work being at a Naval Base some five miles away. As a part of his work he took some of his men to the job and while on the base, where a number of jobs were in progress, he took them back and forth between the various jobs as they were needed. He had asked his employer for a pickup truck for this purpose but none was available and in lieu thereof it was agreed that he would use his own car and the employer would pay for the gasoline, oil and expense of running it. When he acquired the Hudson on July 10, he used it for about a month and then stopped using it because of the abuse it was taking from the dirty clothes of the men and from getting stuck in the sand. About the middle of August he started "really using" a 1936 Ford which had belonged to Mrs. Gilliland, a widow, with whom Everly was going.

On September 27, 1949, Harry B. Creech was injured in a collision between an automobile operated by him and this 1936 Ford, which was being operated by Everly. Creech brought an action for damages against Everly, Mrs. Gilliland and Normac, Inc., and Everly filed a verified cross-complaint alleging that this Ford was worth \$350 at the time of the accident. While that action was pending Everly brought this action for declaratory relief against the Great American Indemnity Company. The complaint alleged, among other things, that Everly had purchased and acquired this 1936 Ford within thirty days of said accident; that Great American had refused to accept coverage, under the above quoted provision of the Hudson policy, for this Ford; and that a controversy had arisen between the parties as to the interpretation

of the policy and as to whether the Ford was thus covered at the time of this accident.

Great American filed an answer admitting the issuance of the policy but alleging that it covered only the Hudson. As affirmative defenses it was alleged that the insured had other insurance; that he did not notify the company within thirty days following the delivery of the Ford to him; and that he had violated the provisions of the policy by using the Ford as a work or business car. Great American also filed a cross-complaint for declaratory relief against Everly, Creech, Normac, Inc., and Standard Accident Insurance Company, alleging that at the time of the accident Everly was acting within the scope and course of his employment by Normac, Inc., and was using this Ford on behalf of Normac; that Normac was insured with Standard; and that Everly had available to him the insurance issued by Standard. The answer to this cross-complaint denied that Everly was acting in the scope of his employment, or that this insurance was available to him.

So far as material here, the court found that at the time of the accident the Great American policy covered the Hudson, with a private passenger car classification, and the policy issued by Standard to Normac, Inc. was also in force, copies of both policies being attached to the findings; that Everly acquired possession of the 1936 Ford prior to August 25, 1949, and more than thirty days before September 27, 1949; that he was "in possession with full use of and exercise of dominion over said vehicle at all times between" the date of acquiring possession and September 27; that he had the possession and use of said vehicle for a period in excess of thirty days before September 27; that he did not notify Great American of the delivery of this Ford to him within thirty days following the date of its delivery to him; that this Ford did not replace the Hudson; that Great American did not insure all automobiles owned by Everly during the period in question; that Everly did not pay any additional premium by reason of acquisition of the ownership of the said 1936 Ford, or

by reason of the delivery of it to him; that legal title to said 1936 Ford was acquired by Everly on September 24, 1949; that the 1936 Ford was used by Everly in his occupation, and used exclusively for business purposes; that the 1936 Ford was not at any time used by Everly as a substitute for the Hudson while that car was being repaired; that all the allegations of the complaint not found to be true are untrue; and that it is not true that the Great American policy also covered the Ford car. The court also found that it was unnecessary to determine the issues with respect to Everly's employment by Normac and with respect to coverage by the Standard policy, and that these issues should be tried in the other action. Judgment was entered accordingly, and Everly, Normac, Inc., and Standard Accident Insurance Company have appealed.

The appellants contend that the finding that Great American did not insure all the automobiles owned by Everly during this period, and the finding that Everly acquired "dominion" over the Ford more than thirty days before the accident are not supported by the evidence; and that the findings are insufficient to support the judgment because the court failed to find as to the date on which Everly acquired ownership of the Ford. It is argued that the real issue in this case is as to when a sale of the Ford from Mrs. Gilliland to Everly took place; that the time of delivery is not controlling; that delivery is only important when a car is delivered with the intent that the insured become the owner; that Everly did not acquire ownership of the Ford until September 24, when the pink slip was delivered to him; and that he was automatically covered by the Great American policy for a period of thirty days after September 24, regardless of notice before the accident, under the holding of this court in *Birch v. Harbor Insurance Co.*, 126 Cal.App.2d 714, 272 P.2d 784.

There was evidence that Mrs. Gilliland lived in a trailer at Ridgecrest. Before he acquired his Hudson, Everly had driven the Ford around Ridgecrest a time or two but had not used it for any other purpose. Prior to August 1, he had paid several re-

pair bills on the Ford for which Mrs. Gilliland reimbursed him. Early in August Mrs. Gilliland went to Texas by train, and Everly moved into her trailer. He did some work on the car in the evenings and then began to use it. Thereafter, he had it repaired several times at a garage, paying the bills himself.

Everly testified that it was the middle of August "when I started really using the Ford" and that he used his Hudson through July and up to August "because the Ford was gone at that time"; that he did not borrow the Ford; that prior to July 10 he had used the Ford one day but could not get it into the navy base because he could not get a pass for it; that he drove the Hudson on the job from July 10 to August 10, driving it until he almost wrecked it in the sand on the base; that he had no discussion with Mrs. Gilliland before July 10 about purchasing the car from her; that after he began to use the Ford on the job he had a sticker with his name on it on the windshield, which he procured in order to get the car into the naval base; and that when Mrs. Gilliland came back from Texas she went directly to Fresno.

He further testified that he went to Fresno on September 24 in response to a telephone call from Mrs. Gilliland; that she told him she had to go to a hospital and needed \$100 for that purpose; that he gave her the \$100 but she refused to accept it as a loan; that she told him to take the car for the money; that "I needed a work car, anyway," and so he took the pink slip; that he had ten days to make a transfer of title and figured on doing that the next weekend; that because the car was wrecked he never sent the pink slip in or endorsed it; that a few days after the accident he went to see the agent who had sold him the policy; and that when he told the agent he had driven the car for more than thirty days the agent said he could not help him any and "so I just dropped the matter."

Mrs. Gilliland testified that she left the Ford at her trailer house when she went to Texas; that it was all right with her if Everly drove it; that when she returned from Texas and went to Fresno she did not intend to sell it; that when Everly came

to Fresno in response to her call she did not want to borrow the \$100, but insisted that Everly take the car for the money; and that she then signed and dated the pink slip both as registered owner and as legal owner.

A witness, who operated a garage, testified that in May of that year Everly had some repair work done on the Ford, paid part of the bill, and told him that he intended to buy the car and it was his obligation to pay the balance. A witness who operated a service station at Ridgecrest testified that Everly started bringing in the Ford shortly after he purchased the Hudson; that when he first brought it in he said he was buying the Ford because he did not want to abuse the Hudson on the job, that he had bought the car from his girl friend, and that he bought it for a work car and Normac had authorized service on it; that the witness had a written authorization for this service from Everly's superintendent; that Everly brought the Ford in whenever it needed servicing, about two or three times a week, from the time he first brought it in until the time of the accident; and that he came in for this service over a period of a couple of months before the accident. The agent who issued the Great American policy testified that Everly came to see him a day or two after the accident; that Everly first told him that he had planned to come to see him about this work car and put some insurance on it for quite a long time but had been busy; that Everly told him he had acquired this old work car some two or three months back from a lady he either roomed with or boarded with; that Everly told him that he had not actually made the final payment on this car until about three days before the accident; that Everly asked him if that car would not be covered under the Hudson policy; that he told Everly there would be no such coverage due to the fact that it was used as a work car and he had owned it too long; and that Everly took the pink slip out of his pocket and told him that he had made the final payment. An investigator for Great American testified that Everly told him that he had acquired the car from a widow of an old friend in Ridgecrest;

that he was working for Normac, Inc., and was going to buy a car for a work car; that Normac told him they could not furnish him a pickup to use in his work and told him if he bought the car they would maintain it for him to use for his work; and that he purchased the car and started using it about two weeks after he acquired the new Hudson.

There was also evidence that the Ford car for which Everly claimed he had paid \$100 was worth \$350. He testified at the trial that he had not driven the Ford as much as 800 miles, but in his deposition he had stated that he had put about 800 miles on it while on the naval base, between the time he started to use the Ford in August and the date of the accident. The pink slip for this Ford car, which was introduced in evidence and is here as an exhibit, is also significant. It shows clearly that Mrs. Gilliland's release signature as registered owner was written with one pen, while her release signature as legal owner and the two release dates of "9-24-49" were written with a different pen. On its face the pink slip indicates that the two signatures were made at different times, and that both dates were inserted when the last signature was written.

[1] It clearly appears that Everly took complete possession of the Ford about the middle of August and for more than two months used it as a work car, exercising full control over it, and with all the appearance of ownership. The decision in the Birch case, in which transfer and delivery took place at the same time, is not controlling here. While it was there held that such a policy provision provided automatic coverage for thirty days, it would be unreasonable to interpret that provision as intended to provide coverage for months after delivery and for an additional thirty days after legal title passed, in the absence of the notice provided for. The real issue here is not as to the precise date when ownership of the Ford was acquired by Everly. The controlling issue is as to whether or not he was the owner of the Ford, within the meaning of the policy, for more than thirty days before the date of the accident.

[2-6] An insurance policy, like any other contract, is to be construed so as to give effect to the intention of the parties. *National Auto. Ins. Co. v. Industrial Acc. Comm.*, 11 Cal.2d 689, 81 P.2d 926. Under a contract of sale the property is transferred to the buyer at the time the parties intend it to be transferred, and their intention may be disclosed by their conduct, common usage, and the circumstances of the case. *Civil Code*, Sec. 1738. The conduct of the parties may well disclose their intention in this regard. *Hill v. Fowble*, 65 Cal.App.2d 25, 149 P.2d 862. The definition of an owner found in Section 66 of the Vehicle Code does not apply under all circumstances, *Dorsey v. Barba*, 38 Cal.2d 350, 240 P.2d 604, and one may be considered to be an owner of a car although he has not transferred the title in the manner required by the Vehicle Code. *Ferroni v. Pacific Finance Corp.*, 21 Cal.2d 773, 135 P.2d 569; *Logan v. Serpa*, 91 Cal.App.2d 818, 206 P.2d 70; *McCalla v. Grosse*, 42 Cal.App.2d 546, 109 P.2d 358. The word "dominion" denotes complete ownership or a right to the property. *Gruber v. Pacific States Sav. & Loan Co.*, 13 Cal.2d 144, 88 P.2d 137; *RCA Photophone, Inc., v. Huffman*, 5 Cal. App.2d 401, 42 P.2d 1059. The word ownership has different shades of meaning, depending on the context in which it appears and the circumstances in which it is used. *Pacific Coast Joint Stock Land Bank of San Francisco v. Roberts*, 16 Cal.2d 800, 108 P.2d 439; *Gates v. Levers*, 108 Cal. App.2d 131, 238 P.2d 143.

[7] Under the circumstances here appearing, a finding of full use and the exercise of dominion over this car is equivalent to a finding of ownership within the meaning of this provision of the policy. We think these findings were sufficient to support the judgment. The court found that Everly acquired possession of the Ford prior to August 25 and that he had possession with full use of it and exercised dominion over it at all times thereafter up to the date of the collision. It was also found that it was not true that he had purchased and acquired this car within thirty days of the accident. A clear intent appears from

the findings as a whole to find all the material facts against the plaintiff, and the findings are sufficient for that purpose. *Johndrow v. Thomas*, 31 Cal.2d 202, 187 P.2d 681.

[8,9] The evidence supports these findings, and supports the conclusion that Everly became the equitable owner of this Ford not later than the middle of August, and that the pink slip was delivered on September 24 to complete a previous sale and to enable legal title to be passed. Assuming that mere possession for a considerable period would not be sufficient to indicate ownership in the case of the genuine borrowing of an automobile, there should be convincing evidence in such a case as this that such was the intention of the parties. To hold otherwise would open the door to unlimited opportunities for fraud. There was no such convincing evidence here, and the evidence was sufficient to show at least a qualified ownership, within the meaning of the policy, calling for a notice within thirty days after delivery. Everly testified that he was not borrowing the car when he thus used it. He used it as a work car in his business for more than two months before the accident, kept it in repair at his own expense, and told several people that he was buying it. He used the service station facilities which his employer had provided for his use in connection with his own car. He told the insurance agent who sold him the policy that he had driven the car for more than thirty days, that he had acquired the car for the purpose of using it as a work car, that he had not actually made the final settlement on the car until about three days before the accident, and that he had just paid for the car and received the pink slip. The evidence of complete possession and use of the car for a long period, of its value, of the condition of the pink slip, together with Everly's admissions and statements, furnish sufficient evidence that ownership of the car had passed to Everly, within the meaning of the policy, long before the pink slip was signed. The question was one of fact for the court and when all of the circumstances are considered it cannot be held that the court's findings and conclusions, to the ef-

fect that the plaintiff had not sustained the burden of proving that this Ford car was covered by the newly acquired automobile provision of the policy, are not sustained by the evidence.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



139 Cal.App.2d 769

Wayne T. STEWART, Plaintiff, Cross-Defendant and Appellant,

v.

John MARVIN, Defendant, Cross-Complainant and Respondent.

Civ. 4958.

District Court of Appeal, Fourth District, California.

March 9, 1956.

Action was brought for partition, and defendant filed a cross-complaint for declaration that plaintiff held realty as constructive trustee for defendant, on ground that deed from defendant to his deceased wife, who was plaintiff's aunt, was obtained by fraud and undue influence of deceased wife. The Superior Court of Kern County, Norman F. Main, J., entered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Griffin, J., held that evidence sustained finding that deed was a product of coercion on part of deceased wife, and that deceased wife took unfair advantage of weakness of mind and distress of defendant, who was seventy-nine years old at the time, by coercing him to sign deed involved.

Judgment affirmed.

I. Deeds ⇐211(1)

In partition action, wherein defendant filed cross-complaint for declaration that plaintiff held realty as constructive trustee

for defendant, on ground that deed from defendant to his deceased wife, who was plaintiff's aunt, was obtained by fraud and undue influence of deceased wife, evidence sustained finding that defendant, who was seventy-nine years old at time of execution of deed, was affected to a substantial extent by senility and was not in complete control of his mental faculties. West's Ann.Civ.Code, § 1575.

2. Deeds ⇨196(3)

The influence, which the law presumes to have been exercised by one spouse over the other, is not an influence caused by any act of persuasion or importunity, but is that which is superinduced by the relation between them, and generated in the mind of the one by the confiding trust he has in the devotion and fidelity of the other, and such influence the law presumes to have been undue, whenever such confidence is subsequently violated or abused. West's Ann.Civ.Code, § 1575.

3. Deeds ⇨72(1)

"Undue influence" is a species of constructive fraud which the courts will not undertake to define by any fixed principles, lest the very definition itself furnish a finger-board pointing out the path by which it may be evaded. West's Ann.Civ.Code, § 1575.

See publication Words and Phrases, for other judicial constructions and definitions of "Undue Influence".

4. Deeds ⇨72(3)

Where a grantor has trust and confidence in the integrity and fidelity of the grantee, and the grantee takes advantage of the grantor, relief will be afforded the grantor, on ground that there was undue influence. West's Ann.Civ.Code, § 1575.

5. Deeds ⇨211(4)

Fact that parties stand in relationship of trust and confidence to one another, either by reason of relationship, professional employment, or otherwise, that the grantor is peculiarly susceptible to exertion or influence by the grantee, is a consideration of primary importance in determining whether deed is result of undue influence, in cases where the transaction is in itself improvi-

dent or disadvantageous to the grantor. West's Ann.Civ.Code, § 1575.

6. Deeds ⇨72(2)

Fact that grantor is lacking in such mental vigor as to enable him to protect himself against imposition by grantee is a reason for the interposition of equity to protect the grantor, though grantor's mental weakness is not such as to justify him in being regarded as totally incapacitated. West's Ann.Civ.Code, § 1575.

7. Deeds ⇨196(3)

Wills ⇨163(2)

No presumption of undue influence is indulged on the contest of a will, unless confidential relations are first established, but with respect to gifts or conveyances inter vivos, extreme age and infirmity of the grantor, together with slight evidence of circumstances from which it may be inferred that the instrument was the product of coercion, will suffice to shift burden and require beneficiary to show affirmatively that the transaction was fair and free from such influence. West's Ann.Civ.Code, § 1575.

8. Deeds ⇨211(4)

In partition action, wherein defendant filed cross-complaint for declaration that plaintiff held realty as constructive trustee for defendant, on ground that deed from defendant to his deceased wife, who was plaintiff's aunt, was obtained by fraud and undue influence of deceased wife, evidence sustained finding that deed was a product of coercion and that deceased wife took unfair advantage of defendant's weakness of mind and of his distress by coercing him into signing deed. West's Ann.Civ.Code, § 1575.

9. Trusts ⇨108

In partition action, wherein defendant filed cross-complaint for declaration that plaintiff held realty as constructive trustee for defendant, on ground that deed from defendant to his deceased wife, who was plaintiff's aunt, was obtained by fraud and undue influence of deceased wife, mutual wills of plaintiff and deceased wife were admissible to show a preconceived plan of wife to defeat the intent of defendant that

his property should go to her only in case she survived. West's Ann.Civ.Code, § 1575.

10. Witnesses ◊243

In partition action, wherein defendant filed cross-complaint for declaration that plaintiff held realty as constructive trustee for defendant, on ground that deed from defendant to his deceased wife, who was plaintiff's aunt, was obtained by fraud and undue influence of deceased wife, interests of justice required that certain latitude be allowed in questioning defendant, who was eighty-one years of age and lacking in memory, by leading questions in order to bring out his evidence in best manner possible.

11. Witnesses ◊243

In partition action, wherein defendant filed cross-complaint for declaration that plaintiff held realty as constructive trustee for defendant, on ground that deed from defendant to his deceased wife, who was plaintiff's aunt, was obtained by fraud and undue influence of deceased wife, trial court did not abuse its discretion in allowing defendant's counsel to propound leading and suggestive questions to defendant, who was eighty-one years of age and lacking in memory.

Deadrich, Gill & Bates, John H. Stewart, Bakersfield, for appellant.

Woodruff & Williams, Bakersfield, for respondent.

GRIFFIN, Justice.

Plaintiff brought this action against defendant to partition certain property in Kern County. Defendant answered and by way of cross-complaint sought a declaration that plaintiff held the property as constructive trustee for defendant because a former deed to the property was obtained by fraud and undue influence.

The facts show that defendant, in 1933, then aged 62, was married to Anastasia Marvin, then aged 42; that in 1948, they were divorced and a property settlement agreement was entered into whereby defendant, by deed, became the sole owner of their home as his separate property. Anas-

tasia acquired certain other properties, and thereafter she apparently believed she should have had a better settlement. After the divorce was granted it appears that Anastasia moved to set aside the interlocutory decree. The motion was denied. One month later, after overtures made to John about a reconciliation and a different property settlement, Anastasia, unaided by counsel, on June 15, 1949, took John to the judge and they there consented to set aside the interlocutory decree, and they resumed matrimonial relationship. Apparently Anastasia then began to "nag" John about transferring the home property to her. It appears that in the meantime John had transferred an interest in the property to his children by a former marriage. When Anastasia found this out she went to see her lawyer and endeavored to ascertain how the children could be made to return the property to their father. After some endeavor deeds were secured deeding the property back to defendant. It then appears that Anastasia set out to obtain an interest in it. She "nagged" John, who was then 79 years old and somewhat senile, until he consented to go with her to a notary public, not her lawyer, and on June 27, 1951, had him sign a joint tenancy deed of the property to the two of them. John testified he did it because he had a deep love and regard for the woman, implicit confidence in her, and "in order to make her happy"; that he did it because of her persistent nagging and threats that she was going to leave him again; that she was constantly after him to sign the deed, and he did so in order to have a little peace; that he wanted to provide in it that both could live in the house as long as they lived, and then the property was to go to his children; that he believed this was being accomplished by the making of the joint tenancy deed.

It appears that Anastasia was instrumental in having mutual wills drawn by them in November, 1950, whereby each left his or her property to the other in case one predeceased the other, and after their death the property was to go to the three children of John. It also appears that after obtaining the joint tenancy deed Anastasia, unbeknown to John, went to her attorney and

executed another will leaving her property to strangers to John; that in February, 1952, while they were living in the house and just before her death, unbeknown to John, she made a gift deed of her joint tenancy interest in the home place to plaintiff, her nephew. It was not until after her death that John found she had made a different will and had deeded the one-half interest in the home property to plaintiff.

The trial court found generally in accordance with these facts; that at the time of the execution of the joint tenancy deed on June 27, 1951, the parties were husband and wife, and that a confidential relationship existed between them; that John did not have independent advice and did not apprehend the results of his acts; that he was "affected to a substantial extent by senility and was not in complete control of his mental faculties"; that John intended that his wife should have and enjoy the property only in the event she should survive him; that prior to said deed she persistently and constantly nagged and demanded of him that he execute the deed in question to her; that he was so senile and his mental faculties sufficiently impaired as to make effective such nagging and demanding, and by reason thereof, and the trust and confidence reposed in her, she succeeded in procuring the execution of said deed with intent to defeat defendant's intent above stated; and that the deed was procured by undue influence exerted on John Marvin by Anastasia Marvin.

It then held that plaintiff take nothing by his complaint and that he be ordered to reconvey to defendant any claimed interest he might have therein.

[1] The main contention on this appeal is that the evidence is insufficient to support the finding of undue influence. In addition to what has been stated, the testimony of defendant is that he was 81 years of age on February 5, 1954, at the time of trial; that the joint tenancy deed had been prepared in advance and was awaiting his signature when his wife took him to the notary's office; that he did not know at that time that she could subsequently legally deed her joint tenancy interest in the prop-

erty to another without his consent; that he always went to his lawyer about legal affairs but unfortunately he did not do so on this occasion because she took him to a notary public. He testified on cross-examination that he was in good health and there was nothing wrong with his mind on June 27, 1951, "any more than there is today". The general course of cross-examination, as reflected by the record, clearly indicates that the trial court's finding that defendant was affected to a substantial extent by senility and was not in complete control of his mental faculties, has some evidentiary support. The trial judge made an observation of defendant on the witness stand and had an opportunity to judge his mental condition at the time of trial. *Payne v. Payne*, 12 Cal.App. 251, 253, 107 P. 148. From an examination of the record of his testimony it must have been obvious to all the parties present at that hearing that there was considerable indication of senility of the defendant.

Mr. Woodruff, who had been defendant's attorney since 1941, testified defendant came to him with all his legal problems but did not consult him about the joint tenancy deed here indicated; that he represented him in the divorce action and property settlement agreement; that Anastasia left defendant in 1947, and withdrew a good portion of their joint bank account; that she went to Texas and defendant filed a suit to attach and impound the funds; that defendant was then recovering from a very serious heart attack and that in 1947 he suffered a stroke and was in the hospital and unconscious for about 1½ months; that he then advised defendant to execute a deed of the home property which was in joint tenancy with Anastasia, to him, his attorney, who, in turn, executed deeds of the one half interest to his three children. Subsequently, as a result of the property settlement agreement, Anastasia deeded her one-half interest in the property to defendant. Woodruff testified that he drew their respective wills, after the reconciliation; that they each stated they wanted the property to go to the other in case of one's death, and then to the three children of defendant; that these wills were left with

him; that in the fall of 1951, when he was successful in obtaining the deeds from the three children, Anastasia demanded her will from him and he gave it to her; that he did not know that she had drawn a different will until after her death; and that Anastasia never contacted him again about any legal matter. There is some testimony of this witness that after defendant's heart attack, he "more or less" recovered from it and was physically about in the same condition as he was at the time of trial.

The notary who drew the joint tenancy deed here involved testified that although he did not know defendant before, from his appearance on that day, he did not notice anything about him that would indicate he was not in full possession of all his physical and mental faculties, or that he was under the influence or domination of any other person, and that his memory was refreshed only by the notation of the transaction in his record.

It is argued that from this evidence it does not show any undue influence, *at the time of the execution of the deed*, which would bring this case within the rules laid down in *Carleton v. Bonham*, 60 Cal.App. 725, 739, 214 P. 503; *Kelly v. McCarthy*, 6 Cal.2d 347, 364, 57 P.2d 118; and *Goodwin v. Goodwin*, 59 Cal. 560, 561, to the effect that in order to substantiate such findings as those made by the court, it was obligatory upon respondent to prove that the grantee made false representations as to a material fact, or exercised pressure which overpowered the mind and bore down the volition of the donor at the very time the deed was made, and to show that not only had undue influence been exercised but also that it had produced an effect upon the mind of the grantor by which the deed he executed was not the expression of his own desires.

[2] Counsel for plaintiff contends that the trial court relied solely upon a presumption of undue influence arising out of the husband and wife relationship in reaching its conclusion. The findings do not so indicate. In *Brison v. Brison*, 90 Cal. 323, 27 P. 186, it was held that the influence which the law presumes to have

been exercised by one spouse over the other is not an influence caused by any act of persuasion or importunity, but is that which is superinduced by the relation between them, and generated in the mind of the one by the confiding trust he has in the devotion and fidelity of the other. Such influence the law presumes to have been undue, whenever this confidence is subsequently violated or abused. *Tillaux v. Tillaux*, 115 Cal. 663, 47 P. 691. See also *Buchmayer v. Buchmayer*, 68 Cal.App.2d 462, at page 467, 157 P.2d 9, at page 11, where it is said: "While it is to be assumed, in the absence of evidence to the contrary, that the husband and wife reposed confidence in each other, that fact alone does not raise a presumption against the validity of their dealings with each other. * * *" The court there held that there was no evidence to support the finding of undue influence independent of the presumption, and said that a finding of the use of undue influence would have been unwarranted without proof independent of the presumption of the exertion of influence at the time the deed was executed, and there was no such proof.

[3-6] As to what constitutes undue influence and what constitutes sufficient proof thereof, as defined in Civil Code Section 1575, it has been said, depends upon the facts and circumstances of each particular case. It is a species of constructive fraud which the courts will not undertake to define by any fixed principles, lest the very definition itself furnish a finger-board pointing out the path by which it may be evaded; that where a grantor has trust and confidence in the integrity and fidelity of the grantee and the latter takes advantage of the grantor, relief will be afforded. *Sparks v. Sparks*, 101 Cal. App.2d 129, 135, 225 P.2d 238. The fact that the parties stand in such a position toward one another, either by reason of relationship, professional employment, or otherwise, that the grantor is peculiarly susceptible to exertion or influence by the grantee, is a consideration of primary importance in this connection, in cases where the transaction is in itself improvident or disadvantageous to the grantor. And the

fact that the grantor is lacking in such mental vigor as to enable him to protect himself against imposition is a reason for the interposition of equity to protect him, although the mental weakness is not such as to justify him in being regarded as totally incapacitated. The law makes a clear distinction between the proof of the existence of undue influence necessary to set aside a will and that which is required to cancel a deed of gift or conveyance *inter vivos*.

[7] It is said in *Longmire v. Kruger*, 80 Cal.App. 230, 238, 251 P. 692, that no presumption of undue influence is indulged in upon the contest of a will, unless confidential relations are first established. But with respect to gifts or conveyances *inter vivos*, the extreme age and infirmity of the grantor, together with slight evidence of circumstances from which it may be inferred that the instrument was the product of coercion, will suffice to shift the burden and require the beneficiary to show affirmatively that the transaction was fair and free from influence.

Applying these principles, it appears that defendant was possessed of the property as his separate property and the parties were reconciled at the wife's instigation. He consented because he said he "loved and trusted" her and had "implicit confidence in her". He wanted to see that she had a place in which to live in case he predeceased her. They had mutual wills so providing, which also provided that upon their deaths the property was to go to his children, since she had no children of her own. The evidence shows a preconceived plan to influence defendant to later have the property placed in joint tenancy, notwithstanding their mutual agreement set forth in the wills, whereby she could break the joint tenancy and otherwise dispose of a one-half interest in the property, leaving her nephew holding the home with defendant as tenants in common.

Although there is some evidence to the contrary, defendant stated he did not real-

ize that Anastasia could defeat the purpose of their understanding and their wills by secretly deeding her interest in the joint tenancy to her nephew.

[8] The evidence above related, when considered in conjunction with the evidence of defendant's mental condition, justified the court's finding that this joint tenancy deed was a product of coercion, and that Anastasia took unfair advantage of such weakness of mind and of his distress by coercing him into signing the joint tenancy deed involved. See *Seeborg v. Seeborg*, 9 Cal.App.2d 450, 50 P.2d 450.

[9] The next claim is that the court erred in admitting into evidence the mutual wills of the parties. Apparently the court found that there was a preconceived plan of Anastasia to defeat the intent of defendant that his property should only go to her in case she survived him. The terms of these wills were important in determining this question and were accordingly admissible.

[10,11] Lastly, it is argued that the court erred in allowing certain leading and suggestive questions to be propounded to the defendant while on the witness stand. From the nature of the answers and the questions propounded it clearly shows that the court and respective counsel were faced with considerable difficulty in an endeavor to elicit responsive answers to the questions. Defendant was 81 years of age and lacking in memory, and it was evident he had difficulty in grasping the meaning of the questions. There was no curtailment of the right of cross-examination. The interests of justice required that certain latitude be allowed in questioning defendant in order to bring out his evidence in the best manner possible. 27 Cal.Jur. p. 80, sec. 62. No abuse of discretion appears. See *Mead v. Mead*, 41 Cal.App. 280, 284, 182 P. 761.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

139 Cal.App.2d 432

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Manuel D. CANDELARIA, Defendant and
Appellant.

Cr. 5503.

District Court of Appeal, Second District,
Division 3, California.

Feb. 24, 1956.

Prosecution for robbery. From a judgment of the Superior Court of Los Angeles County, Clement D. Nye, J., the defendant appealed. The District Court of Appeal, Parker Wood, J., held that where all acts constituting the state offense were included in the federal offense and were necessary to constitute that offense, the conviction in the federal court was a bar to the state prosecution.

Reversed with directions to determine as a matter of law that the previous federal conviction was a sufficient defense

1. Criminal Law ⇨29

A robbery of a teller of a bank whose deposits were insured by the federal deposit insurance corporation was an offense against United States and also an offense against the state of California. 18 U.S.C.A. § 2113(d); West's Ann.Pen. Code, §§ 211, 213.

2. Criminal Law ⇨201

Generally, the same act may constitute different offenses against the United States and one against the state, and a conviction or acquittal based on that act in one of those jurisdictions is not a defense to a prosecution based on that act in the other jurisdiction, but exception exists, where there is a state statute, providing previous conviction or acquittal in a federal prosecution is a defense in a state prosecution.

3. Criminal Law ⇨201

Conviction of defendant in a federal court for robbery of a teller of a bank whose deposits were insured by the federal deposit insurance corporation was a bar to

a prosecution in the state court for robbery of the same bank teller involved in both prosecutions on the ground that the federal conviction was "founded upon the act" in respect to which the defendant was tried in the state prosecution within the state statute where all acts constituting the state offense were included in the federal offense, and the only additional element involved in the federal prosecution, regarding status of title to or insurance on the money, pertained to the matter of jurisdiction of the federal court, and did not pertain to any activity of defendant in committing the robbery. 18 U.S.C.A. § 2113(d); West's Ann.Pen. Code, § 656.

See publication Words and Phrases, for other judicial constructions and definitions of "Founded Upon the Act".

J. B. Mandel, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and James D. Loeb, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

On June 24, 1955, in a nonjury trial in the Superior Court of Los Angeles County, defendant was convicted of robbery. He appeals from the judgment.

Appellant contends that he had been convicted previously of the same offense (charged herein) in the United States District Court at Los Angeles; *United States v. Candelaria*, 131 F.Supp. 797; and that, by reason of the trial in the superior court, he was twice in jeopardy for the same offense.

In an information, filed May 4, 1955, by the District Attorney of Los Angeles County, it was charged that defendant committed robbery on December 10, 1954, in that, he unlawfully and by means of force and fear took from the presence of Ida Holland \$700. Defendant pleaded that he had been convicted previously of the offense charged herein in the United States District Court. The cause was continued to a later date, and a plea of "not guilty" was then entered because the defendant stood mute. Defend-

ant admitted an allegation in the information that he had been convicted previously in Los Angeles County of pimping, a felony. (Probation was granted upon that conviction.)

At the trial herein, Mrs. Holland testified that on December 10, 1954, about 10:45 a. m., while she was a teller in the Citizens National Bank in Los Angeles, the defendant was in the bank and he pointed a gun at her and told her to give him some money; she gave him \$950 that belonged to the bank; that was the only "hold-up" on that day.

A police officer testified that on December 10, 1954, about 7 p. m., he arrested the defendant in front of defendant's house; he asked defendant where the money was; defendant said that some of it was in the car, some in his pocket, and the rest of it was in the house in a boot; they (defendant and officers) went into the house and one of the officers took some money and a revolver out of a boot; the money was counted and there were "720-some-odd dollars"; the officers asked defendant about the additional money; defendant said that he and his girl friend had spent approximately \$200 for clothes; he (witness) asked defendant if he held up the bank on more than one occasion, and defendant said that he held it up only once.

Defendant testified that on December 10, 1954, he committed a robbery at the Citizens National Bank; he was the man described by Mrs. Holland; he did not rob the bank on more than one occasion on that date.

On January 12, 1955, a federal grand jury in Los Angeles filed an indictment against defendant which was titled, "Indictment (U.S.C., Title 18, Sec. 2113(d)—Robbery of national bank, use of dangerous weapon.)" The indictment charged: "On or about December 10, 1954, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant Manuel Duran Candelaria, by force and violence and by intimidation, did knowingly and wilfully take from the person and presence of another, namely: Ida Holland, the sum of approximately \$950.00 belonging to, and in

the care, custody, control, management, and possession of, a bank, namely: Citizens National Trust and Savings Bank of Los Angeles, Lincoln Heights Branch, which bank was then a bank whose deposits were insured by the Federal Deposit Insurance Corporation; and

"In committing the offense heretofore charged, defendant Manuel Duran Candelaria did assault, and put in jeopardy the life of, Ida Holland by the use of a dangerous weapon and device, namely: a .45 caliber revolver."

Defendant pleaded guilty in the federal court to the charge in the indictment. On February 7, 1955, he was sentenced by the federal court to imprisonment for five years. On April 1, 1955, the sentence was modified by the court, on its own motion, by changing the sentence from five years to sixty days.

With reference to defendant's plea in the present case that he had been previously convicted in the federal court of the charge herein, the superior court found that the "former conviction in this matter not true." In the present case, the defendant was sentenced to state prison—the sentence to run concurrently with the sentence in the former superior court case of conviction of pimping, a felony (wherein probation was revoked).

Appellant contends that by reason of the trial herein he was twice in jeopardy for the same offense. He argues that the federal charge and the state charge are identical in character and that the same robbery underlies both charges; that although the federal charge involved national bank funds which were federally insured, the act of defendant which constituted the robbery under the federal charge was the same act which constituted the robbery under the state charge; and that the conviction in the federal court was a bar to the prosecution in the state court.

As above shown, the federal indictment alleged that on or about December 10, 1954, in Los Angeles County, California, the defendant by intimidation wilfully took from the presence of Ida Holland approximately \$950 belonging to the Citizens

National Bank of Los Angeles, which was a bank whose deposits were insured by the Federal Deposit Insurance Corporation; and that in committing said offense defendant assaulted Ida Holland by the use of a dangerous weapon, namely, a revolver.

Also as above shown, the state information alleged that on or about December 10, 1954, in Los Angeles County, California, defendant unlawfully and by means of force and fear took from the presence of Ida Holland \$700 in lawful money of the United States.

It is conceded, and the evidence shows, that the act of defendant in taking money on December 10, 1954, from the presence of Ida Holland by putting her in fear was the act upon which both prosecutions (federal and state) were based. There was only one robbery involving Ida Holland. Both prosecutions related to the same Ida Holland and to the same taking of the same money from her at the same time and place. (With reference to the money being the same money, the defendant pleaded guilty in the federal court to taking \$950 from her; and the evidence in the state court shows that the officers found about \$720 of the stolen money in defendant's home, and that defendant said he had spent about \$200 of the stolen money.)

[1] The robbery was an offense against the United States, Bank Robbery Act, U.S.-C., Title 18, § 2113, and it was also an offense against the State of California, Penal Code of California, §§ 211, 213. Prior to the enactment of the Bank Robbery Act by the United States in 1934, the crime of robbery of a national bank was punishable only under state law. See *Jerome v. United States*, 1942, 318 U.S. 101, 63 S.Ct. 483, 87 L.Ed. 640.

In 48 A.L.R. 1106 (annotation) it is said: "The weight of authority, as shown by the earlier annotations * * * is to the effect that, since the same act may constitute an offense against both Federal and state laws, an acquittal or conviction in one jurisdiction will not prevent prosecution in the other. The question has now, it would seem, been authoritatively settled by

the decision of the Federal Supreme Court in the reported case" of *Hebert v. State of Louisiana*, 1926, 272 U.S. 312, 47 S.Ct. 103, 71 L.Ed. 270. It was said further in that annotation, 48 A.L.R. at page 1106: "In that decision [*Hebert v. State of Louisiana*], the court takes the view that the constitutional rule against double jeopardy, being limited to repeated prosecutions 'for the same offense,' is not infringed by prosecution and punishment in both the Federal and the state courts for an act which is denounced as a criminal offense both by the Federal and the state laws, as thereby two distinct offenses are committed, one against the United States and one against the state." In *United States v. Lanza*, 1922, 260 U.S. 377, 43 S.Ct. 141, 67 L.Ed. 314, wherein the question was whether a conviction in a state court (state of Washington) of unlawfully manufacturing, transporting and possessing intoxicating liquor was a bar to a prosecution in the federal court for unlawfully manufacturing, transporting and possessing the same liquor, it was held that the state conviction was not a bar to federal prosecution. In the opinion in that case, which was delivered by Chief Justice Taft, it was said 260 U.S. at page 382, 43 S.Ct. at page 142: "[A]n act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both, and may be punished by each. The Fifth Amendment, like all the other guaranties in the first eight amendments, applies only to proceedings by the federal government [Citation.], and the double jeopardy therein forbidden is a second prosecution under authority of the federal government after a first trial for the same offense under the same authority. Here the same act was an offense against the state of Washington, because a violation of its law, and also an offense against the United States under the National Prohibition Act. The defendants thus committed two different offenses by the same act, and a conviction by the court of Washington of the offense against that state is not a conviction of the different offense against the United States, and so is not double jeopardy." In *Jerome v. United States*, 1942, 318

U.S. 101, 63 S.Ct. 483, 87 L.Ed. 640, a federal indictment charged that the accused entered a national bank in Vermont with the intent to utter a forged note and thereby defraud the bank. The question therein was whether such act of the accused was a felony within the provisions of a certain federal statute. Under the law of Vermont, the utterance of a forged note was a felony. It was held therein that such act was not a federal offense; but, in discussing matters pertaining to the interpretation of the federal statute, the court said, 318 U.S. at page 104, 63 S.Ct. at page 486: "Since there is no common law offense against the United States * * * the administration of criminal justice under our federal system has rested with the states, except as criminal offenses have been explicitly prescribed by Congress. We should be mindful of that tradition in determining the scope of federal statutes defining offenses which duplicate or build upon state law. In that connection it should be noted that the double jeopardy provision of the Fifth Amendment does not stand as a bar to federal prosecution though a state conviction based on the same acts has already been obtained. See *United States v. Lanza* [supra] * * * *IHebert v. State of Louisiana* [supra] * * *." In *In re Morgan*, D.C.1948, 80 F.Supp. 810, a state bank in Iowa, which was a member of the Federal Deposit Insurance Corporation, was robbed. The question therein was whether Iowa or the United States should have priority in prosecuting the alleged robber, Morgan. It was not questioned therein that both were entitled to prosecute him. The court said, at p. 816: "The crime charged against Morgan by the State of Iowa is a separate and distinct crime from that charged against him by the United States. The conviction or acquittal of Morgan on the state charge would not absolve or exonerate him on the federal charge, or vice versa."

[2] It thus appears that the general rule is that the same act may constitute different offenses, one against the United States and one against the state; and that a conviction or acquittal, based on that act, in

one of those jurisdictions will not be a defense to a prosecution, based on that act, in the other jurisdiction. An exception to that rule, based on state statute, is referred to hereinafter. In the United States Supreme Court cases and the other federal case, above cited, it does not appear that any state involved in those cases (Louisiana, Washington, Vermont, and Iowa) had a state statute which provided contrary to the general rule. In *United States v. Lanza*, supra, 260 U.S. 377, 43 S.Ct. 141, it was indicated that a federal prosecution for an act, as to which there had been a state prosecution, could be barred by proper federal legislation. It was said therein, 260 U.S. at p. 385, 43 S.Ct. at page 143: "If Congress sees fit to bar prosecution by the federal courts for any act when punishment for violation of state prohibition [statutes] has been imposed, it can, of course, do so by proper legislative provision; but it has not done so." Likewise, a state prosecution for an act, as to which there has been a federal prosecution, can be barred by proper state legislation. See *Henderson v. State*, 30 Ariz. 113, 117-118, 244 P. 1020, 1021. Therefore, an exception to the above-mentioned general rule is where there is a state statute which provides that a previous conviction or acquittal in a federal prosecution is a defense in a state prosecution.

[3] In summary, it appears that the offense charged in the present case and the offense charged in the federal case against this defendant were separate offenses; and that the conviction in the federal case was not a defense in the present case, unless under statutory provision in California such a conviction is a defense.

Section 656 of the Penal Code of California provides: "Whenever on the trial of an accused person it appears that upon a criminal prosecution under the laws of another State, Government, or country, founded upon the act or omission in respect to which he is on trial, he has been acquitted or convicted, it is a sufficient defense." It does not appear that this section has been construed by a court of review in California. New York has a sim-

ilar statute. Penal Law of New York, § 33, McK.Consol.Laws, c. 40.¹

In *People v. Spitzer*, 1933, 148 Misc. 97, 266 N.Y.S. 522, the defendants were convicted in the federal court of conspiring to injure and oppress voters by depriving them of their electoral rights; and they were charged in the state court with making a false canvass in the performance of their duties as election inspectors. The matter before the court was a motion to dismiss the state charge on the ground of double jeopardy. The court said, 266 N.Y.S. at page 528: "The defendants participated in but a single transaction, and the acts for which they are indicted here are precisely and exclusively the facts upon which they were convicted and sentenced in the federal court. It is the spirit and purpose of the laws of New York that for the same acts and upon the same evidence a defendant shall not be twice put in jeopardy. The former conviction in the federal court is a bar to a further prosecution of the indictment here."

In *People v. Mangano*, 1945, 269 App. Div. 954, 57 N.Y.S.2d 891, the defendant had been convicted of larceny in the federal court and had been convicted of burglary and petty larceny in the state court. The petty larceny conviction in the state court involved the same property that was involved in the larceny conviction in the federal court. The state court, citing said section 33 of Penal Law, set aside the petty larceny conviction and dismissed the count charging petty larceny.

In *People v. Parker*, 1941, 175 Misc. 776, 25 N.Y.S.2d 247, it was said, at page 253: "It is true that in the Federal indictment involved in the matter under consideration there was the additional element to trans-

port the kidnapped person in interstate commerce; but it does not impress me that such additional element negatives the contention that the essential acts of defendants to a conviction in both jurisdictions are identical. The kidnapping of Wendel underlies both charges."

In *People v. Adamchesky*, 1945, 184 Misc. 769, 55 N.Y.S.2d 90, the defendant had been convicted in the federal court of transporting in interstate commerce cigarettes that had been stolen. The state charged the defendant with grand larceny of the same cigarettes. Defendant made a motion to dismiss the state charge under said section 33 of the Penal Law. The motion was denied, but the court said in effect that under the facts therein the offenses were distinguishable—that the gist of the state charge was the stealing of the cigarettes, and the gist of the federal charge was transporting the stolen cigarettes in interstate commerce.

Oklahoma has a statute similar to section 656 of the Penal Code of California, 21 Okl.St. Ann. § 25.² In *State v. Mills*, 82 Okl. Cr. 155 at page 189, 167 P.2d 669, the court said: "'Our statute above quoted (21 O.S.1941 § 25) is susceptible of but one construction. And a conviction in a federal court for the same act as charged in a prosecution in a state court is a conviction under the laws of another 'government' within the meaning of the statute; and by virtue of the statute alone such conviction is a complete defense to a prosecution for the same act or omission in the courts of this state.'"

In the present case, in considering the applicability of said section 656 of the Penal Code of California, the question arises as to whether the previous federal conviction was "founded upon the act" in

1. Penal Law of New York, § 33 provides: "Whenever it appears upon the trial of an indictment, that the offense was committed in another state or country, or under such circumstances that the courts of this state or government had jurisdiction thereof, and that the defendant has already been acquitted or convicted on the merits upon a criminal prosecution under the laws of such state, or country, founded upon the act or omission in re-

spect to which he is upon trial, such former acquittal or conviction is a sufficient defense."

2. 21 Okl.St. Ann. § 25 provides: "Whenever it appears upon the trial that the accused has already been acquitted or convicted upon any criminal prosecution under the laws of another State, government or country, founded upon the act or omission in respect to which he is upon trial, this is a sufficient defense."

respect to which the defendant was thereafter tried in the state court. Under the provisions of said section 656, if the federal conviction was "founded upon" that act then the fact that there was such a previous conviction is a sufficient defense to the state charge. As above shown, the federal prosecution and the state prosecution related to the one robbery involving the same Ida Holland, and both prosecutions related to the same taking of the same money at the same time and place. The only additional element involved in the federal prosecution was that the money belonged to a national bank whose deposits were federally insured. That additional element, regarding the status of title to or insurance on the money, pertained to the matter of jurisdiction of the federal court, and it did not pertain to any activity on the part of defendant in committing the robbery. The physical act or conduct of defendant in taking the money was the same whether the robbery be considered as a federal offense or a state offense. All the acts constituting the state offense were included in the federal offense and were necessary to constitute the federal offense. It is clear that, within the meaning of said section 656, the federal conviction was "founded upon the act" in respect to which the defendant was tried in the present case. It appears, as a matter of law, that the previous federal conviction is a sufficient defense in the present case.

Circumstances under which the federal judge reduced the federal sentence to sixty days are stated in his opinion in *United States v. Candelaria*, D.C., 131 F.Supp. 797. Although the modified sentence seems inadequate under the present circumstances, it is to be noted that defendant's probation on the prior state conviction (pimping) was revoked and defendant was committed to state prison to serve the sentence on that conviction.

The judgment is reversed, and the superior court is directed to determine, as a matter of law, that the previous federal conviction is a sufficient defense.

SHINN, P. J., and VALLÉE, J., concur.

Richard DARNOLD, Plaintiff and Respondent,

v.

Stanley H. VOGES, Raleigh A. Voges, and Ralph C. Voges, copartners doing business under the fictitious firm name and style of Inglewood Farms (sued as Inglewood Farms, Inc., a California corporation), Inglewood Daily News, a California corporation, Mrs. Pluma Whyte, individually, and doing business under the fictitious firm name and style of Torrance Herald, and Does I to X, inclusive, Defendants.

Stanley H. Voges, Raleigh A. Voges, and Ralph C. Voges, copartners doing business under the fictitious firm name and style of Inglewood Farms (sued as Inglewood Farms, Inc., a California corporation), Appellants.*

Civ. 21108.

**District Court of Appeal, Second District,
Division 2, California.**

Feb. 29, 1956.

Rehearing Granted March 22, 1956.

Action by milker to recover for personal injuries sustained when cow which he was tending crushed him after it became frightened by flashbulbs exploded by newspaper photographer who was in barn under authority of landlords of milker's employer against such landlords, newspaper, and others. The Superior Court, Los Angeles County, Jesse J. Frampton, J., entered judgment for plaintiff, and defendant landlords appealed. The District Court of Appeal, Moore, P. J., held that evidence sustained implied jury finding that landlords exercised dominion over barn equal with tenant-employer, that landlords' foreman had given photographer permission to photograph cows and that foreman was authorized by landlords to do so and finding that photographer did not have consent of injured milker to fire bulb and that photographer did not warn milker before firing bulb.

Judgment affirmed.

I. Landlord and Tenant §=165(1)

Where landlords shared occupancy of barn with tenant, employee of tenant, en-
* Opinion vacated 300 P.2d 255.

gaged to milk cows in barn was business invitee of landlords.

2. Landlord and Tenant ◊169(6)

Master and Servant ◊330(3)

In action by milker for injuries sustained when cow, allegedly frightened by flashbulb fired by photographer allegedly employed by landlords of milker's employer, crushed him, against landlords and others, evidence sustained implied jury finding that landlords exercised dominion over barn equal with tenant-employer, that landlords' foreman had given photographer permission to photograph cows and that foreman was authorized by landlords to do so and finding that landlord did not have consent of injured milker to fire bulb and did not warn him before firing bulb.

3. Negligence ◊4

All persons are required to use ordinary care to avoid injuring others. West's Ann. Civ.Code, § 1708.

4. Negligence ◊4

"Ordinary care" is such as an ordinarily prudent person is reasonably required to exercise under circumstances of given case and amount of such care must be determined according to danger that might be reasonably anticipated. West's Ann. Civ.Code, § 1708.

See publication Words and Phrases, for other judicial constructions and definitions of "Ordinary Care".

5. Landlord and Tenant ◊165(1)

Where landlords controlled matter of permitting strangers to enter into barn in which space was leased to tenant to keep cows, and landlords permitted photographer, as their guest, to enter barn to make pictures, landlords owed to milker employed by tenant duty to exercise reasonable care to see that milker should not incur risk of injury caused by cows becoming frightened at feeding time by light from exploding flashbulbs.

6. Landlord and Tenant ◊169(6)

In action by milker for injuries sustained when cow, which was allegedly frightened by flashbulb exploded by photographer authorized to enter barn by milker's employer's landlords, who exercised equal

dominion with employer over barn, crushed him, against such landlords and others, evidence on issue of whether landlords had exercised care expected of reasonably prudent men under circumstances to avoid creating foreseeable risk of harm to milker in allowing photographer to explode flashbulbs in barn at feeding time, allegedly knowing cows would become excited, supported verdict in favor of milker.

7. Appeal and Error ◊999(1)

In negligence case, appellate court could not disturb jury's findings, fairly determined, on issues of whether reasonable care had been exercised by defendants and of degree of care required by situation.

8. Negligence ◊32(1), 52

Building owners who directly or impliedly invite others to enter it must have premises in reasonably safe condition and must warn those who enter lawfully of concealed peril.

9. Landlord and Tenant ◊165(1)

Where landlords leased space in barn for cows to tenant, and exercised domain over barn equal with tenant, tenant's milker was invitee of landlords, and they breached duty to him when they failed to warn him of danger when they permitted photographer to enter barn and take flash pictures at feeding time, while milker was tending cow which became frightened and crushed him.

10. Negligence ◊10

One who can foresee harm from his failure to exercise reasonable care must pay consequences of his negligence.

11. Master and Servant ◊318(1)

The right to control is the very essence of employment.

12. Master and Servant ◊332(3)

Where employment relationship is oral, jury's finding as to relationship is final.

13. Master and Servant ◊301(4), 318(1)

Where proprietors of farm permitted photographer sent by newspaper which anticipated advertising contract from proprietors to make photographs and permitted him to enter area of barn, in which space was leased to another, and proprietors had

control over photographer at all times, photographer was proprietors' employee, appointee, or special guest, and they were responsible, for photographer's acts, and their failure to exercise control which they had opportunity to exercise, to prevent harm to milker from cow being frightened from exploding flashbulb was negligence.

14. Landlord and Tenant ⇨165(1)

Milker employed by tenant leasing space in barn from landlords who exercised equal dominion with tenant over barn was business invitee of landlords as well as of his own employer and was entitled to be protected by landlords against dangers while in barn arising from act of negligence.

15. Landlord and Tenant ⇨165(1)

An employee of a tenant is a business visitor of landlords in respect to those areas subject to landlords' control.

16. Landlord and Tenant ⇨169(6)

In action by milker for injuries sustained when cow, allegedly frightened by light from flashbulb fired by photographer allegedly employed by landlords of milker's employer, crushed him, evidence sustained jury's finding that landlords knew of probability that cows might resent sudden flash of photographic bulb, that they would become frightened and thereby attempt to free themselves from stanchions and that they might kick, fall or move violently against one another or against the milker.

17. Animals ⇨74(8)

In action to recover for injuries allegedly caused by defendants' frightening animal which injured plaintiff, the question as to whether a certain phenomenon should have tended to frighten an animal is for jury.

18. Negligence ⇨136(16, 25)

Whether an event was foreseeable and whether it was proximate cause of an injury are factual issues.

19. Damages ⇨132(3)

Award of \$47,813.90 to milker was not excessive where he sustained serious back injuries resulting in total disability for approximately two years, atrophy in left leg

and permanent limitation of motion of back and pain for indefinite period.

20. Appeal and Error ⇨1051(1)

In action by milker for injuries received when cow, which became frightened by flashbulb exploded by newspaper photographer who was taking pictures by permission of milker's employer's landlords, crushed milker, against such landlords and others, admission into evidence of newspaper advertisement of landlords' premises was not prejudicial under claimed infirmities of being irrelevant or improperly tending to show that photographer was agent of landlords, where it was merely cumulative.

21. Evidence ⇨471(2)

In action by milker for injuries received when cow, which became frightened by flashbulb exploded by newspaper photographer who was taking pictures by permission of milker's employer's landlords, crushed milker, against landlords and others, testimony of newspaperman accompanying photographer that he would have remembered any action of cow being frightened and would have remembered had plaintiff yelled to inquire who had let photographer and newspaperman in was conclusion and properly excluded.

22. Animals ⇨74(4)

In action by milker for injuries received when cow, which became frightened by flashbulb exploded by newspaper photographer who was taking pictures by permission of milker's employer's landlords, crushed milker, against landlords and others, testimony that cow in question had been sent to butcher in regular course of events was immaterial and properly excluded.

23. Evidence ⇨145

In action by milker for injuries received when cow, which became frightened by flashbulb exploded by newspaper photographer who was taking pictures by permission of milker's employer's landlords, crushed milker against such landlords and others, photographer's testimony as to number of flashlight pictures taken six years earlier without adverse reaction of cows was too remote to be relevant and was properly excluded.

24. Witnesses ⇨248(2)

In action by milker for injuries received when cow, which became frightened by flashbulb exploded by newspaper photographer who was taking pictures by permission of milker's employer's landlords, crushed milker, court properly excluded testimony of one of the landlords that cows would not have been retained if they were the kind that bucked and jumped, after he had given his evidentiary testimony, was conclusion not responsive to any question and was properly excluded.

25. Animals ⇨74(4)

In action by milker for injuries received when cow, which became frightened by flashbulb exploded by newspaper photographer who was taking pictures by permission of milker's employer's landlords, crushed milker, against landlords and others, testimony of another milker regarding taking of motion pictures that "you know, in every barn they do it * * * practically all of them I worked at", was irrelevant and was properly stricken.

26. Master and Servant ⇨332(4)

In action by milker for injuries received when cow, which became frightened by flashbulb exploded by newspaper photographer who was taking pictures by permission of milker's employer's landlords, crushed milker, against such landlords, on ground that their foreman had given permission for pictures to be taken, instruction on acts of such foreman as agent being deemed acts of landlord was proper and was not subject to claimed infirmity of charging that foreman had been guilty of omissions.

27. Appeal and Error ⇨216(2)

Where general instruction is correct as far as it goes, complaining party can get no relief on appeal unless at proper time he requested court to make charge more specific or unless appropriate qualifying instructions were denied.

28. Trial ⇨194(16), 240

In action by milker for injuries received when cow, which became frightened by flashbulb exploded by newspaper photographer who was taking pictures by permission of milker's employer's landlords,

crushed milker, against such landlords, newspaper, and others, instruction on liability of each participant in negligent acts where acts of two or more persons contribute concurrently to cause injury was not argumentative and did not invade province of jury.

29. Negligence ⇨62(1)

Where an invitee of another invitee is injured by reason of negligence of owner of premises, such negligence is cause of such invitee's injuries.

30. Landlord and Tenant ⇨167(7)

A landlord is generally not responsible for negligence of his tenant in event third party suffers injury on tenant's premises, but when injury is caused on part of premises controlled by landlord, he is liable.

31. Trial ⇨295(1)

Where instructions as a whole substantially and correctly cover law applicable to controversy, judgment will not be reversed, notwithstanding some technical but harmless errors in charge.

Gibson, Dunn & Crutcher, by Norman S. Sterry, and Sherman Welpton, Jr., Los Angeles, for appellants.

Robertson, Harney, Drummond & Dorsey, by David M. Harney, and Vernon W. Hunt, Jr., Los Angeles, for respondent.

MOORE, Presiding Justice.

Defendants demand the reversal of a judgment for damages allegedly resulting from personal injuries suffered when a cow kicked and fell upon plaintiff. They contend (1) the judgment is without evidentiary support; (2) prejudicial errors were made in rulings upon the admissibility of certain evidence; (3) certain instructions were prejudicial.

[1] The Voges Brothers, appellants, operated a dairy farm under the name of Inglewood Farms, Inc., near Torrance, where they processed milk purchased from divers milk producers. The elaborate processing plant included a barn which appellants had leased to John Bos. He owned a herd of some 300 milch cows which he caused to be

milking in the barn. Prior to the tragic occurrence of October 31, 1952, Bos had employed respondent as a milker, and on that day the latter was engaged in performing his customary task of milking Bos' cows by using a mechanical device. Thus he was a business invitee on the premises of appellants who shared the occupancy of the barn with their lessee. As he sat on a stool nine inches high, reaching under cow number 3 to attach a milking machine to her, a flashlight bulb flashed nearby, whereupon cow number 2 whose head was in a stanchion pulled back violently and in a moment had crushed respondent to the floor. On crawling out, respondent called to photographer Svensk to inquire who gave him permission to enter the barn and take pictures. The reply was that the foreman of appellants had done so. Respondent suffered serious injuries for which the jury returned a verdict for \$72,813.90. The motion for a new trial was denied on condition that the sum of \$25,000 be remitted from the verdict.

Appellants' plant was open to the public which was always welcome. In order to excite wider interest in their business, they contracted with the Torrance Herald to advertise their business. The Herald in turn engaged one Hartford to procure an advertisement from appellants. Having been promised a contract, Hartford arranged for Mr. Svensk, a photographer of the Herald to accompany him to Inglewood Farms. There he met Stanley Voges who introduced him to Mr. Barnard, superintendent of the plant for appellants. Hartford conferred with Stanley Voges and advised him that they desired to take photographs of "anything of interest."

Having taken a number of pictures of the Farms, Svensk said they would be pleased to get photographs of the actual milking. Barnard replied that permission to do so would be obtained from Bos, since he was lessee of the barn and in control. Appellants now say that "the record was conclusive that it was under Bos' complete control." Barnard escorted Svensk and Hartford to the barn where someone said something to somebody and Barnard told the photographer he now had permission to

take pictures of the actual milking. After Barnard left the scene, Svensk took two flashlight pictures of cows being milked. At that time the bovines stood so that their bodies were 2½ feet apart with their necks in stanchions. It was at the time of such photography that respondent was injured by cow number 2.

Did Defendants Control The Barn?

[2] In behalf of their contention that the evidence is not sufficient to support the judgment, appellants assert that they had no management of the barn; that they had leased it to Bos and he was in complete control. It is true he held the barn under a lease, but he had an agreement with appellants that they might bring visitors through the barn. This, appellants frequently did. They built a special platform alongside the barn on which their visitors stood while witnessing the milking machines at work. The passageway from which Svensk took his pictures was a common passageway that was used by appellants, Bos, and the milkers. From the foregoing, it is seen that the jury had sufficient evidence to support their implied finding that appellants exercised a free hand in maintaining dominion over the barn, equally with their lessee. Certainly was that true in so far as appellants' having a photographer enter the barn and photograph the cows in the course of the milking. Not only did they exercise that privilege, but in the case of Hartford and Svensk, Bos made it emphatic that neither he nor his agent had ever consented to anyone's taking flash pictures in that area.

Mr. Barnard likewise testified that neither himself nor anyone in appellants' office was authorized to permit pictures to be taken in the barn. But the jury were justified in rejecting Barnard's testimony for the reason that Hartford and Svensk had come to the plant for the purpose of taking pictures to be used for the benefit of appellants' business. They were to be published in the Torrance Herald. The contention that they were there on their own business and not for the benefit of Inglewood Farms is to disregard the implied finding that they were there with appellants' permission to take the photographs, if, indeed they were

not present on the invitation of appellants. The advertisement was not to benefit Bos or his herd. Moreover, when Hartford and Svensk arrived at Inglewood Farms, they were greeted by Stanley Voges who left them with Barnard, the Farms' foreman. The latter "paved our way for all pictures" testified Hartford, and accompanied the two men as they photographed a number of scenes. Having been placed in Barnard's charge, they asked him and he told them what pictures might be taken. After cows 2 and 3 had been taken, to the sorrow of respondent, he inquired of Svensk who gave "him permission to take a picture in there." The only reply was: "The foreman, the foreman." Since Svensk had met only Stanley Voges and Barnard and since the milkers had no foreman, it must be conceded that the jury were correct in finding that Barnard, foreman of Inglewood Farms, gave Svensk permission to photograph cows 2 and 3 and that he was authorized by appellants to do so.

But appellants go off on a tangent when they direct so much attention to the matter of appellants' not having consented to the activities of Hartford and Svensk. In doing any act that might disturb a herd or a single bovine, the person to be consulted is he who is close at hand and likely to be affected. Because a man is engaged in the performance of a menial task is not a valid excuse for ignoring him when danger lurks in the offing. He is still an individual whose personality demands respect and protection against potential dangers. In so far as his rights to be protected against latent perils are involved every man is a king. But Darnold was ignored by Svensk and by Barnard. While the latter disclaimed having authority to permit pictures to be taken of the cows, and Bos denied having been requested to allow them to be photographed, the glaring facts remain that respondent heard nothing prior to the flash, Barnard was in charge of the photographers in the plant for the occasion and Svensk answered respondent that permission had been given by "the foreman." It is true that Barnard testified he had called out requesting the milkers to cooperate; that he knew all four milkers, but had heard no response and

never identified a milker as having consented; but Mr. Hartford testified that he heard no statement of Barnard that it was necessary to get the permission of the milkers; nor did Barnard make request of anyone in the barn to do so. The evidence is sufficient to justify a finding that appellants did not have the consent of respondent to explode a flash bulb before the cows where he was in pursuit of his duties, nor did they or the photographer warn respondent.

[3, 4] It is fundamental that all persons are required to use ordinary care to avoid injuring others. Such care is that of an ordinarily prudent person reasonably required under the circumstances of a given case. The amount of such care must be according to the danger that might reasonably be anticipated. *Hilyar v. Union Ice Company*, 45 Cal.2d 30, 286 P.2d 21. Everyone is bound without contract to abstain from injuring the person of another or of infringing upon his rights. Civ.Code, § 1708.

[5-7] Appellants did not exercise the care expected of a reasonably prudent man under the circumstances, to avoid creating a foreseeable risk of harm to respondent. They must have known that to send a photographer into the cow barn at feeding time to explode a flash bulb would excite the cows or some of them, cause them to pull and jerk their stanchions, to kick, push or fall against any object near. They knew four milkers were at work among the 60 cows; that one or all of them might be under a 1200-pound animal and that a sudden fright might result in the trampling of the milker. They knew, also, there was no urgent necessity of either a public or private nature requiring such speed in the photographing of the cows as would not allow a moment's delay to call the milkers out. Because appellant's controlled the matter of permitting strangers to enter the barn and because the photographers were their guests, they owed it to respondent to exercise reasonable care to see that neither respondent nor any other milker should incur the risk of injury. Inasmuch as whether reasonable care was exercised

and whether the amount of such care required by the situation was exercised were factual issues fairly determined by the jury that determination cannot be upset by an appellate court. In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689. That finding is supported in reason: Knowing there was, at least, doubt about the propriety and safety of their project, appellants could readily have called to respondent to gain his cooperation. Not so with appellants. They "paved the way" for Hartford and Svensk who naturally concluded that arrangements had been made by the "head man." Their only admonition to the photographers was "not to scare the cows," knowing at that very moment that Svensk was armed with a device that would cause more terror to the bovines than would a battering ram against the barn. Appellants made no attempt to ascertain whether the milkers had notice of the pending explosion of the flash bulb. Having no reason to anticipate the event, respondent had no opportunity to avoid it.

[8-10] Not only did appellants owe a general duty to respondent, but, also, they were obliged to know that as an employee of Bos, he was an invitee of appellants. The owners of a building who directly or impliedly invite others to enter it, must have their premises in a reasonably safe condition and must warn those who enter lawfully of concealed perils. Mautino v. Sutter Hospital Association, 211 Cal. 556, 560, 296 P. 76; Foster v. A. P. Jacobs & Associates, 85 Cal.App.2d 746, 750, 759, 193 P.2d 971; Davis v. Pacific Power Co., 107 Cal. 563, 574, 40 P. 950. By virtue of the fact that appellants conducted the photographers into the barn and onto the passageway to take the pictures, respondent was their business invitee. They made no attempt to warn him of his danger. By reason of the premises, appellants breached their duty to respondent as a proximate result of which respondent sustained injuries to his damage. Since both court and jury determined that appellants failed to act as reasonably prudent persons, they have no escape from the judgment on the basis of not having breached their duty to respondent. One who can foresee harm from

his failure to exercise reasonable care must pay for the consequences of his negligence. Richardson v. Ham, 44 Cal.2d 772, 776, 285 P.2d 269.

[11-13] Furthermore, the duty of appellants to control the movements of Svensk is clearly established. He was their employee, or appointee or special guest. He gave no indication that he was there in any other capacity while the fact that appellants sent him into the barn to take the pictures was clearly established. They had control over him at all times. The right to do so is the very essence of employment. Villanazul v. City of Los Angeles, 37 Cal.2d 718, 721, 235 P.2d 16. Where such employment is oral the jury's finding as to the relationship is final. Robinson v. George, 16 Cal.2d 238, 242, 105 P.2d 914. If Svensk and Hartford were employees of appellants, under the doctrine of respondeat superior, appellants were responsible for their acts. If they were not employees, they were under the control of, and did as they were told by, appellants. If they had the opportunity to control and did not do so, their failure was negligence. Edwards v. Hollywood Canteen, 27 Cal.2d 802, 810, 167 P.2d 729; Rest. Torts, secs. 317, 318, 449, 414.

The notion that the photographer was an "independent contractor" cannot avail. He was in the barn at the instance of appellants and did as he was told by them. That he did not call respondent from his place beside the cow was witnessed by appellants who according to their own testimony asked respondent's permission to take the pictures, but which the jury found to be false.

Appellants' Breach of Duty

[14, 15] Appellants contend lustily that they breached no duty to Bos or his employees in entering the barn. Such a breach is not at issue. Respondent raised no such question. It is immaterial whether Bos gave permission. He was not a milker and could not have suffered detriment by the movements of his cows. The breach that caused the damage was the breach of duty due respondent and his fellow milkers. The jury found no permission had been giv-

en by respondent to explode bulbs and make flashlights in the face of the cow that injured him. It is contended that Svensk was a licensee and could not be liable for doing the act he was licensed to do so long as he was free from negligence, citing *Defense Supplies Corporation v. Lawrence Warehouse Co.*, D.C., 67 F.Supp. 16, 20. But that decision is not pertinent. It involves an act of a licensee that was not negligent. The duty in the instant matter was the duty appellants owed respondent. He was the individual in a place of danger. They should have warned him of their intention and to leave his position under the cow. He was a business invitee of appellants as well as of Bos and as such was entitled to be protected against dangers while in the barn arising from active negligence. *Biondini v. Amship Corp.*, 81 Cal.App.2d 751, 760, 185 P.2d 94; *Dobbie v. Pacific Gas & Electric Co.*, 95 Cal.App. 781, 786, 273 P. 630; also see *Foster v. A. P. Jacobs & Associates*, supra. An employee of a tenant is a business visitor of the lessor in respect to those areas subject to the lessor's control. *Foster v. A. P. Jacobs & Associates*, 85 Cal.App.2d 746, 193 P.2d 971.

Anticipate a Cow's Emotional Upset?

[16] Appellants appear amazed at the implied finding that it was reasonable to anticipate a distressful reaction by a cow in the event of a sudden flashlight in her face or that it is reasonable to foresee that the cow would probably be frightened by an unexpected flash in the homey environment of a cowbarn. Whether it was reasonable to anticipate such a reaction, whether in the exercise of ordinary care, appellants should have known that a cow on the explosion of a flash bulb in her face would have reacted violently to the phenomenon is not a question of law, but one of fact to be determined by the jury who had to consider all the circumstances of the event. Who knows what the behavior of a brute will be? Some are placid and not disturbed when a red rag is waved before their eyes, some are the opposite. Some might not be resentful if brought by degrees to an acquaintance with

a flash bulb while others are excitable or resentful when a light is suddenly flashed. A person who approaches a cow at feed time for the purpose of exploding a bomb or of discharging a gun cannot be excused for his negligence merely because he did not know for a certainty that the bovine would resist the sudden light and noise. As men of experience in dealing with livestock, appellants knew or should have known that the cows might be startled and might attempt to escape from their stanchions. A single, simple rule for all situations cannot be declared with safety. A jury knows that there are many animals that shudder, shy, run or fight when startled. They know that out of a herd of 60 cows, some of them might react violently when frightened and that only ordinary prudence would suggest the exercise of caution where the safety of a human being is at stake.

The milch cows of Mr. Bos were large animals weighing about 1200 pounds. Each had her head fastened in a stanchion. She could move it vertically about three feet. Her body was about 2½ feet from her neighbor on each side, providing space for the milker to enter with the machine. Appellants and their foreman knew that each cow could not only pull back, kick, move from left to right, but could lie down. In that space she had room to move her body with force and rise high enough to throw it against and upon a person. Respondent with twenty years experience with milch cows testified that a flashlight in the immediate presence of a cow would excite her. He had witnessed such an event in the barn of appellants only two months previously. Also, Barnard knew cows were subject to fright from sudden movements and warned the photographers not to "scare" the cows. So profound was the conviction of Bos that strangers would disturb his herd, he allowed them to enter upon condition that they *not* scare his cows. Moreover, Stanley Voges testified that cows are "touchy"; that "violent or sudden noise will cause a panic among cows; that cows are so subject to fright from the unexpected that one may even kick her own milker when he comes up unexpectedly; that he had seen cows go down on

their knees at a sudden, unexpected flash of light. Witness Lindsay testified a scared cow may kick, go down on her knees and roll on the milker. Cletus Howard, a milker, had seen cows jump in the barn with both rear feet off the ground.

From the foregoing testimony and from their general knowledge of cows, the jury were justified in finding that on and prior to October 31, 1952, appellants knew of the probability that the cows of Bos might represent the sudden flash of a photographic bulb; that they would become frightened thereby and attempt to free themselves from their stanchions; might kick, fall or move violently against one another or against a milker. That appellants must have had such knowledge is proved by their declarations of having undertaken to obtain permission to take the pictures. Barnard, appellants' foreman, warned Svensk just prior to the flashing of cow number 2 not to scare the animals. Of course, if appellants could anticipate that the cows would violently react to a sudden light, they knew it was probable that someone would be injured by a 1200-pound cow's kicking or falling upon a milker while attempting to attach a milking machine. Such event was not only probable but it did happen to respondent. Appellants' thrusts at the latter's testimony that the cow jumped or reared and fell upon his back miss their mark. With the huge bovine's head in a stanchion and her resisting the fright the flash caused her, she had not far to go to fall upon respondent and to trample him with her cloven feet. He testified that he could not say definitely what she did; all he knew was that "she reared and jumped and got on my back." The cow had the advantage by being at his back. While his tongue was unschooled in the art of fine rhetoric, his words were understood by all. Her body was free from her head to her hind feet. She had sufficient freedom of movement to pull back, to rear, to slip, to fall upon respondent, to mash him and to cause his injuries.

But appellants contend that by reason of the reputation of the cows of Mr. Bos for kindly conduct, they had the right to assume that no violent reaction of any of them

would occur after the flashing of a photographic bulb and therefore no one could have been negligent in the photographing of the cows in the barn. They cite as precedents: *O'Brien v. Gateway Stables*, 104 Cal.App.2d 317, 231 P.2d 524; *Finney v. Curtis*, 78 Cal. 498, 501, 21 P. 120; *Clowdis v. Fresno Flume & Irrigation Co.*, 118 Cal. 315, 50 P. 373; *Schnell v. Howitt*, 158 Or. 586, 76 P.2d 1130, 1131; *Barnett v. Pulda*, 116 N.J.L. 141, 182 A. 879. They declare that "the *O'Brien* case is so factually indistinguishable from the instant case" etc. that upon the strength of it and their cited decisions, the action at bar should be reversed.

Let us see: The father of appellant in the *O'Brien* case had for many years maintained a boarding stable and kept two riding horses for rent. One was a mare, by name Roxan, a spirited animal but gentle and quiet; she had never reared up, run sideways or pitched, and had no bad habits. Appellant invited the plaintiff for a horse-back ride before dinner at his parents' home. In the ride, Roxan cantered, galloped, and for no apparent cause turned right and left and threw the plaintiff to the ground. She sued, charging negligence in allowing her to ride the "blooded and spirited mare." Because the trial court had found that Roxan was not vicious, but was a normal, gentle riding animal, and that appellant did not have any reason to believe that she was dangerous or of refractory propensities, and had found that appellant was not negligent in permitting Miss *O'Brien* to ride her, we concluded that an award of damages was unjust, and reversed the judgment. The difference between the mare and cow number 2 lies in the fact that Roxan was an intelligent animal of a species whose members are readily habituated to the ways of man. They love their human companions and happily bear their burdens. Roxan had worked at her trade for many years, had never been known to be vicious, wild or intemperate, but had gained a reputation at Gateway Stables for being docile, kind, and amenable. Because she had not been known in six years of riding to run away or pitch, kick, bite or indulge in any equine vices, appellant had no reason to anticipate that she would run

away and throw the young lady to the ground. We have in the instant action no such animal. While Roxan was a highly intelligent quadruped, cow number 2 was merely a dumb brute. Her dinner had not been daily attended by a flashlight exploded by a stranger, hence she could not have gained a reputation for silence and inaction in the presence of those phenomena. Since she had not become inured to their effect, no one could have been certain that she would calmly stand in their presence. Appellants knew too much not to suspect her resistance to a combined flash and explosion. While Miss O'Brien's saddle mare had repeated daily her kindness, patience and gentleness as a beast of burden over a long time, cow number 2 had presumably done nothing but march back and forth to and from the barn with no knowledge gained of her except the amounts of her daily consumption and her gift of milk and calves. No regular tests of her reactions to a flash bulb had evidently been made. She had no good reputation for any like or dislike for a flashlight in her face.

[17, 18] Unless an animal has established a reputation for phlegmatic behavior in the sudden appearance of an unusual spectacle, its unpredictability is assumed by reasonably prudent men. A quiet gentle horse had a searchlight thrown upon him. He ran away and caused damage to the plaintiff. Contrary to the defense of non-foreseeability, the defendant was held to have been negligent. *Maiss v. Metropolitan Amusement Association*, 241 Ill. 177, 89 N.E. 268, 269. Where a team of mules became unduly excited by the driver causing the passenger to fall off and be killed, it was held that the accident was due to the negligence of defendant's driver. *Dover v. Mayes Mfg. Co.*, 157 N.C. 324, 72 S.E. 1067, 1070, 46 L.R.A., N.S., 199. See where a whistle frightened a horse, *City of Winona v. Botzet*, 8 Cir., 169 F. 321, 23 L.R.A., N.S., 204; a horse was suddenly slapped on the back, *Casey v. Sawyer Biscuit Co.*, 163 Ill.App. 145; a canvas flapped, *Buchanan v. Hurd Creamery Co.*, 215 Iowa 415, 46 N.W. 41, 45. In the *Buchanan* case the court observed that some animals react one way, while others react a contrary way;

that therefore a person is not warranted in assuming that his own animal will not be frightened. But it is the law that the question as to whether a certain phenomenon should have tended to frighten an animal is for the jury. *Tanner v. Culpeper Construction Co.*, 117 Va. 154, 83 S.E. 1052, 1055; *Crouter v. City of New York*, 130 App.Div. 873, 114 N.Y.S. 353. Also, whether an event was foreseeable and whether it was the proximate cause of the injury are factual issues. *Jones v. City of South San Francisco*, 96 Cal.App.2d 427, 435, 216 P.2d 25. In the instant controversy, the jury determined such issues against appellants.

The authorities cited by appellants on the issue of foreseeability are not in point. *Finney v. Curtis*, *supra*, an action for damages, is of little value. *Curtis*, not knowing his horse to be vicious, by alleged false statement induced plaintiff to assist in hitching the animal to a wagon, whereby *Finney* was injured. It was not proved that the horse had ever shown an evil disposition. That he was young and unbroken was known to both parties. Neither was negligent. The horse might have gained a reputation after a period of daily use, but had not enjoyed that experience.

Clowdis v. Fresno Flume & Irrigation Co., *supra*, involved a bull, known to be vicious, property of defendant who had caused it to be driven onto the highway. There it tossed *Clowdis* in the air and he recovered for his injuries. The case merely demonstrates the converse of the rule as to an animal of good reputation.

The Injuries

[19] For the injuries suffered by respondent, the jury assessed his damages at \$72,813.90. That they were serious there is no doubt. Three physicians, each a specialist in his field, assisted the jury in finding the extent of respondent's pain and anguish. It was proved that he had suffered from a herniation of the fourth lumbar intervertebral disc. That was determined in February 1953. The disc was then herniated in the midline with the left fifth lumbar nerve root arched over the herniation. The disc was removed to effect a spinal fusion. The resulting rupture pressed on the left side of

the fifth lumbar nerve root, causing pain to radiate down the outer aspect of the left leg. Dr. Cuneo, the surgeon, testified that prior to the operation, respondent was totally disabled and that the disability was caused by the cow's falling on respondent's back. Prior to his injury, he had been doing hard work but subsequent to the accident, he was totally disabled. The testimony of the surgeons established that the injuries were caused by the cow and that respondent was totally disabled until October 1954; that the atrophy of the leg resulted from the new nerve root pressure and could not have been present since 1948; that respondent will have a permanent limitation of motion in his back and will suffer pain for an indefinite record. Contrary to appellants' contention, respondent's work ceased on the day of the accident. It is true that he returned about three weeks thereafter to attempt to work, but his pain forced him to leave at once. The claim that respondent's old injury seriously impaired his ability to contrary to the proof that prior to the accident, and after his remote injury, he had done heavy, manual labor in felling timbers and in carrying a 150-pound saw; stacked timber and operated a lumber truck. After coming to this state he worked as a milker until October 31, 1952. That history evidently and justly convinced the jury that no vestige of the man's earlier accident remained while the testimony of the surgeons that an operation removing the ruptured disc and the fusing of the third, fourth and fifth lumbar vertebrae to the sacrum have resulted in permanent limitation of motion in his back with continuous pain can lead to but one conclusion, to wit, it was all the fruitage of the accident proximately caused by appellants' negligence.

The reduction of the verdict by the court on the hearing of the motion for a new trial in no respect diminishes the appraisal by the jury as implied by their findings. The judge, in the main, agreed with the jury, but pursuant to his concept of his judicial responsibility, he performed a duty in reducing the verdict on being convinced that it was excessive.

Other Assignments of Error

Appellants have gleaned the record for errors at the trial. We discuss them now.

[20] While Mr. Svensk was testifying, he was asked by respondent concerning a quarter-page advertisement of appellants' Inglewood Farms in the Torrance Herald. Over objection, the court admitted a copy of the Herald containing such advertisement. The vice charged to the document is that it is irrelevant, proves nothing about the alleged negligence, and was prejudicial in that "the jury must have assumed that the evidence had some tendency to show that the photographers were the agents" for defendants, or that because defendants paid large sums to the Herald which printed a picture of an operation of appellants, the latter thereby became liable for Svensk's manner of taking the picture. No prejudice resulted from such ruling. The advertisement was merely cumulative. The agreement was between the Herald and appellants that by the latter's payment for the advertisement, they would receive editorial mention.

[21] Assignment is made of the court's excluding Mr. Hartford's testimony "that he would have remembered any unusual action of a cow such as described in plaintiff's testimony and would have remembered if anyone had yelled, 'Who the hell let you fellows in here?'" The objection was properly sustained because it called for a conclusion. The fact that an event occurred at a remote time in the past does not make the rules of evidence inapplicable.

[22] Appellants complain of error in the exclusion of Mr. Voges' testimony that cow number 2 had been sent to the butcher "in the ordinary and regular course of events." The ruling was correct. It was immaterial whether the cow was sent to the butcher. Also, it was not proved that Voges was the owner of the cow.

[23] Appellants assign as prejudicial the court's exclusion of Stanley Voges' testimony as to the number of flashlight pictures taken in 1946 without adverse reaction of the cows. Such an inquiry involved an incident too remote to be relevant. The

court did not exceed the latitude of its discretion by excluding evidence of so remote an event. Even though the ruling had been erroneous, no prejudice could have resulted since the same witness had already testified that he had never seen any sudden reaction of a cow as the "result of any prior pictures taken."

[24] Assignment is made of the court's action in striking the testimony of Stanley Voges. After he had testified that at that time he was not too active in the barn and did not know of the animals that had any vicious propensities, he testified that prior to Darnold's claim that a cow reared and bucked, then jumped on him, he knew that it was a common occurrence in the barn for a cow to kick but he had never heard of any cow's having bucked and jumped and that if any of that type were being used, "*they wouldn't be retained if they were.*" The court properly struck the italicized sentence. The witness had already given his evidentiary testimony. What would happen if a cow should buck or jump was a conclusion and opinion and was not competent proof; neither was it responsive to any question.

[25] Appellants assert error in the court's action in striking testimony of witness Howard, a milker. He was asked if he recalled a discussion among people who came "in regard to the taking of pictures." He remembered once "they said something about taking moving pictures, but I never paid much mind to it. *You know, in every barn they do it * * ** Practically all

of them I worked at." The motion to strike the italicized portions was properly sustained. It was a nonresponsive and irrelevant answer and no foundation had been laid for it.

[26] Appellants assign as error the giving of BAJI'S instruction 54-A in that it "charged the jury that Barnard had been guilty of omissions." The only assumption included is that Barnard was superintendent of Inglewood Farms. No act or omission of Barnard except his failure to call out to the milkers prior to the flash was charged as necessarily negligent. The idea expressed is that the acts or omissions of an agent are, in law, the acts or omissions of the principal. It is uncontradicted that Barnard was superintendent of appellants' plant. In the case cited by appellants, *Finney v. Curtis*, 78 Cal. 498, 21 P. 120, the erroneous instruction assumed negligence.

[27, 28] There is no error in instruction 104-B.¹ The rule is that where a general instruction is correct as far as it goes, the complaining party can get no relief unless at the proper time he requested the court to make the charge more specific or unless appropriate qualifying instructions are denied. *Shook v. Beals*, 96 Cal.App.2d 963, 972, 217 P.2d 56, 18 A.L.R.2d 919. The instruction is not argumentative and does not invade the province of the jury, as was held in *McKeon v. Lissner*, 193 Cal. 297, 305, 223 P. 965.

[29, 30] Appellants criticize as prejudicial instructions "X" and 213-C.² They

1. 104-B: "When the negligent acts or omissions of two or more persons, whether committed independently or in the course of jointly directed conduct, contribute concurrently, and as proximate causes, to the injury of another, each of such persons is liable in the absence of contributory negligence. This is true regardless of the relative degree of the contribution. It is no defense for one of such persons that some other person, not here as a defendant in the action, participated in causing the injury even if it should appear to you that the negligence of that other person was greater in either its wrongful nature or its effect."

2. "X": "*Foster v. A. P. Jacobs & Assoc.*, 85 C[al.] A[pp.] 2d 746 [193 P.2d 971]. Plaintiff, as an employee of John Bos, was a business invitee of Stanley H. Voges, Raleigh A. Voges and Ralph C. Voges, doing business as Inglewood Farms, and these defendants owed to plaintiff the duty owed to a business invitee, as will be more fully explained in the following instructions."

213-C: "Toward an invitee, he who extended the invitation, express or implied, is obliged to refrain from active negligence and to exercise ordinary care to keep the premises in a condition reasonably safe for the invitee."

"But the responsibility of one having

assert that both announce "one absolutely erroneous rule of law," to wit, that the plaintiff was an invitee of the defendants and that 213-C is erroneous in charging that it was defendants' duty (1) to keep the premises in a reasonably safe condition; (2) assumed as a fact that there was a dangerous condition; (3) that it was defendants' duty to warn plaintiff of that danger.

No prejudice was suffered as a result of these instructions. It was clearly established that appellants were exercising control over the area where the photographer stood at the time of the flash. They could not maintain that they themselves were either trespassers or guests. Under the law, the court was compelled to instruct that respondent was a business invitee of appellants. When an invitee A of an invitee B is injured by reason of the negligence of the owner of premises, such negligence is the cause of invitee A's injuries. *Royal Insurance Co. v. Mazzei*, 50 Cal.App.2d 549, 552, 123 P.2d 586; *Mautino v. Sutter Hospital Association*, 211 Cal. 556, 560, 296 P. 76; *Foster v. A. P. Jacobs & Associates*, 85 Cal.App.2d 746, 751, 193 P.2d 971. Inasmuch as respondent was the employee of Bos, the tenant of appellants, the doctrine announced in the last cited decisions must be applicable. Although a landlord is generally held not responsible for the negligence of his tenant in the event a third party suffers injury on the tenant's premises, an exception to such rule operates when the injury is caused on that part of the premises controlled at the time by the landlord. *Pfingst v. Mayer*, 93 Cal.App.2d 265, 272, 208 P.2d 1002.

[31] In concluding this phase of the discussion, it might with propriety be ob-

control of the premises is not absolute; it is not that of an insurer. If there is danger attending upon the entry, or upon the work which the invitee is to do on the premises, and if such danger arises from conditions not readily apparent to the senses, and if the owner has actual knowledge of them, or if they are discoverable by him in the exercise of ordinary care, it is his duty to give reasonable warning of such danger to the invitee. The owner is entitled to assume that the invitee will perceive that which

served that where the instructions as a whole substantially and correctly cover the law applicable to the controversy, the judgment will not be reversed notwithstanding some technical but harmless errors found in the court's charge.

The judgment is affirmed.

FOX, J., concurs.

ASHBURN, Justice.

I concur in the judgment but cannot endorse some of the propositions stated in the majority opinion for they tend to inject uncertainty into areas of the law where the rules are now well defined.

The unqualified statement that a tenant's employee is an invitee of the landlord is not supported by the authorities. So far as the condition of the premises is concerned, the duty owed to the employee of a lessee who has exclusive possession is the same as that owed the lessee himself, and is substantially different from that owing to an invitee. Cf. *Neuber v. Royal Realty Co.*, 86 Cal.App.2d 596, 610, 195 P.2d 501; *Pfingst v. Mayer*, 93 Cal.App.2d 265, 272, 208 P.2d 1002; *Bickham v. Southern Cal. Edison Co.*, 120 Cal.App.2d 815, 819, 263 P.2d 32; *Prosser on Torts* (2d Ed.) § 80, pp. 465-467; 15 Cal.Jur. § 153, p. 741. The more restricted view that the tenant's employee is an invitee of the landlord when upon premises or portions of premises over which the landlord and tenant have joint control is recognized as correct (authorities supra), but it is not applicable to the case at bar. There was no such joint control of the Bos cow barn, and no evidence sufficient to raise that inference.

Plaintiff alleged the fact of a lease from

would be obvious to him upon the ordinary use of his own senses. In brief, there is no duty to give the invitee notice of an obvious danger.

"In the absence of appearances that caution him, or would caution a reasonably prudent person in like position, to the contrary, the invitee has a right to assume that the premises he was invited to enter are reasonably safe for the purposes for which the invitation was extended, and to act on that assumption."

defendant partnership to Bos; and Bos, as plaintiff's witness, testified to the fact, as did defendant Stanley Voges. Bos also said that he was in exclusive control of the barn which had been leased to him. Mr. Barnard, sometimes referred to as defendants' foreman, testified to the fact of the lease and lack of authority in the lessors to permit the taking of pictures in the barn; he told Svensk, the photographer, that he would have to get permission. Mr. Barnard was authorized by Bos to take school children and other visitors through the barn upon condition that they not scare the cows. The subject of taking flashlight pictures was never mentioned between him and Bos. Plaintiff's assertion that there was within the barn a common passageway for joint use of Bos and defendants does not find support in the evidence, nor does the claim that defendants had built an observation platform within the leased area; they had done so outside the barn and on property not leased to Bos. Barnard's status when within the leased area, the barn, was that of a licensee, 65 C.J.S., Negligence, § 32 p. 481, which term excludes any idea of control or joint control on his part.

Appellants make a powerful argument to the effect that the accident described by plaintiff did not occur because it could not happen. However, the testimony of plaintiff, of Stanley Voges and Virgil Lindsey, Jr., contains passages which, added to the jurors' combined experience with the common facts of life, *Cederberg v. Robison*, 100 Cal. 93, 96-97, 34 P. 625; *Miller v. City of Arcadia*, 121 Cal.App. 660, 662, 9 P.2d 587; *People v. Miller*, 41 Cal.App.2d 252, 258, 106 P.2d 239; *Lindemann v. San Joaquin Cotton Oil Co.*, 5 Cal.2d 480, 55 P.2d 870, rule out appellants' claim that the evidence was inherently improbable. To meet that test "there must exist either a physical impossibility that they [facts stated by witness] are true, or their falsity must be apparent without resorting to inferences or deductions." *People v. Huston*, 21 Cal.2d 690, 693, 134 P.2d 758, 759. The

same case says: "Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. *Hicks v. Ocean Shore Railroad, Inc.*, 18 Cal.2d 773, 781, 117 P.2d 850." 21 Cal.2d at page 693, 134 P.2d at page 759. The instant record presents a question of fact which the jurors and trial judge resolved in plaintiff's favor. We must accept as established his version of the accident and resultant injuries.

Appellants complain of error in instructing the jury that plaintiff, as an employee of Bos, was an invitee of defendants, and following it with BAJI¹ 213 C concerning the duty of invitor to invitee.² These instructions were erroneous. The first one invaded the province of the jury. It assumed and impliedly asserted that defendants and Bos had joint control of the barn, which at best was a fact question for the jurors. Instruction 213 C proceeds upon the faulty basis laid by the preceding one and defines rights and duties of the parties upon that erroneous premise. But certain other considerations must be examined in order to determine whether the error is so prejudicial as to require a reversal.

The evidence establishes that Barnard took photographers to the Bos barn; that he had no authority to permit them to take flashlight pictures inside; that Bos was away at the time; that no one had been delegated the authority to act for him in his absence; that there were four milkers in the barn when Barnard and the photographers arrived; that Barnard made no effort to learn where they were at the time. The evidence warrants the inference, contrary to his testimony, that Barnard did not seek or obtain consent of any of the milkers to the taking of flashlight or any other pictures. Plaintiff heard no such request and gave no consent; and there was no one there acting for him. Svensk said that Barnard asked someone in the barn

1. Book of Approved Jury Instructions, Los Angeles Superior Court.

2. Both are quoted in the majority opinion.

whether he could take pictures, etc., but he heard no response; Barnard himself was vague about the kind of response or responses he received. Although Barnard did not have the right to authorize the taking of flashlight pictures in the barn and got no consent thereto (as the jury impliedly found) he did tell Svensk he could go ahead. He, Barnard, was thus in the position of one who voluntarily undertakes to perform an act pregnant with danger to others. He must exercise reasonable care, *Perry v. D. J. & T. Sullivan, Inc.*, 219 Cal. 384, 390, 26 P.2d 485; *Prosser on Torts* (2d Ed.) pp. 186, 476; 65 C.J.S., *Negligence*, § 4(b), p. 343; and that includes reasonable foresight as to harmful consequences of his acts. *Mosley v. Arden Farms Co.*, 26 Cal.2d 213, 216-217, 157 P.2d 372, 158 A.L.R. 872; *Austin v. Riverside Portland Cement Co.*, 44 Cal.2d 225, 234, 282 P.2d 69; *Signorelli v. Potter*, 43 Cal.2d 541, 544-545, 275 P.2d 449; *De Mirjian v. Ideal Heating Co.*, 129 Cal.App.2d 758, 772-773, 278 P.2d 114. It is apparent that the question of whether Barnard did or did not have authority to tell Svensk to proceed with the flashlights becomes immaterial, as does the question of whether Svensk was technically an agent of defendants. When Barnard undertook to act he was required to act prudently, to exercise that degree of foresight which a reasonably prudent man would display in the same circumstances. The question of foreseeability of harm is ordinarily one of fact, *Mosley v. Arden Farms Co.*, *supra*, 26 Cal.2d 213, 157 P.2d 372, and that was true in this instance. The question of what cows do or do not do in given circumstances is one for the jury, not the reviewing court (authorities *supra*).

That question of foreseeability of the conduct of milch cows proved to be the crucial issue in this case, but it was not made clear to the jurors. BAJI 213 C was the closest approach. Defendants did not

request any instruction on the subject and do not complain of failure to give one. They do assert error in giving 213 C, however. It should not have been given, but it was not actually prejudicial. Upon the assumption that plaintiff was an invitee of defendants it defined their duties as inviters toward him. The words "invitor" and "invitee" were not defined for the jurors, but they were told that plaintiff was defendants' invitee and as such entitled to protection against active negligence on defendants' part. References in the instruction to safe condition of the premises probably meant to the jurors, struggling to understand and apply it to the facts at bar, nothing more than legal mumbo jumbo. But, as stated, the instruction says that defendants (through Barnard) owed plaintiff a duty to refrain from active negligence and that "if such danger arises from conditions not readily apparent to the senses, and if the owner has actual knowledge of them, or if they are discoverable by him in the exercise of ordinary care, it is his duty to give reasonable warning of such danger to the invitee." As applied to the facts in hand, this was another way of saying that defendants must foresee and guard against danger to plaintiff which a reasonably prudent man would recognize and protect against. That is the essence of the controlling issue in this case. Appellants cannot complain of lack of clarity or precision in the instruction because they did not propose any proper qualifying or clarifying instruction. *Colgrove v. Lompoc Model "T" Club, Inc.*, 51 Cal.App.2d 18, 24, 124 P.2d 128; *Tabata v. Murane*, 24 Cal.2d 221, 228, 148 P.2d 605. In my judgment it cannot be said that in the absence of the error in this instruction a different verdict would have been probable. *Code Civ.Proc.* § 475; *Treu v. Kirkwood*, 42 Cal.2d 602, 607, 268 P.2d 482; *Gilbert v. Pessin Grocery Co.*, 132 Cal.App.2d 212, 227, 282 P.2d 148.

139 Cal.App.2d 580

SEARS, ROEBUCK AND CO., a New York corporation, Plaintiff and Respondent,

v.

Frank R. BLADE, Defendant and Appellant.
Civ. 20782.District Court of Appeal, Second District,
Division 2, California.

Feb. 29, 1956.

Hearing Denied April 25, 1956.

Action by retailer against retailer's advertising manager for "kickbacks" received by manager from engravers and printers to whom manager had let work on behalf of retailer. The Superior Court, Los Angeles County, Jesse J. Frampton, J., entered judgment for retailer, and manager appealed. The District Court of Appeal, Fox, J., held that, where complaint prayed for judgment in stated amount, with interest thereon from certain date, and for such other relief as might by court be deemed just and proper, but affidavit for attachment and writ of attachment claimed interest at rate of 6%, award of interest at legal rate of 7% from time manager became obligated to turn over his illicit gains to retailer was proper.

Judgment affirmed.

1. Limitation of Actions ⇨104(2)

Where, over the years, retailer's advertising manager had fraudulently concealed facts upon which retailer's action against manager for "kickbacks" received by manager from engravers and printers to whom manager had let work on behalf of retailer was based, such fraudulent concealment tolled statute of limitations until retailer discovered, or in exercise of reasonable diligence should have discovered, facts on which cause of action was based, and then applicable statute of limitations would commence to run. West's Ann.Code Civ. Proc. § 339, subd. 1.

2. Limitation of Actions ⇨104(1)

Defendant's fraudulent concealment of facts upon which a legal common-law action is based will, under proper circumstances, toll statute of limitations until

discovery, and, upon discovery, the applicable statute commences to run.

3. Election of Remedies ⇨7(1)**Limitation of Actions** ⇨104(1)

Issuance and levy of writ of attachment, in action by retailer against retailer's advertising manager for "kickbacks" received by manager from engravers and printers to whom manager had let work on behalf of retailer, provided conclusive proof of retailer's election to proceed on its contractual remedy, but invocation of such provisional remedy did not affect retailer's right to avail itself of manager's fraudulent concealment as basis for tolling the statute of limitations. West's Ann. Code Civ.Proc. § 339, subd. 1.

4. Limitation of Actions ⇨104(1)

In action by retailer against retailer's advertising manager for "kickbacks" received by manager from engravers and printers to whom manager had let work on behalf of retailer, fact that retailer, by its complaint which consisted of a common count for money had and received, elected to pursue a quasi-contractual remedy founded on the promise to pay which the law implies, would not preclude retailer from availing itself of manager's fraudulent concealment of the cause of action as basis to prevent running of applicable statute of limitations. West's Ann.Code Civ.Proc. § 339, subd. 1.

5. Limitation of Actions ⇨199(2)

Where the facts are susceptible to opposing inferences, questions whether party had notice of circumstances sufficient to put prudent man on inquiry as to particular fact, and whether, by prosecuting such inquiry, he might have learned such fact, are ones of fact for trial court's determination as regards running of statutes of limitations.

6. Principal and Agent ⇨48, 69(1)

Retailer's advertising manager, as retailer's agent, occupied a confidential status akin to that of a fiduciary was bound to a duty of good faith towards his principal and was precluded from making secret profits for his own benefit from the subject

matter of the agency. West's Ann.Civ. Code, § 2295.

7. Trial ⇨139(1), 140(1), 143

It is for trial court to pass upon credibility of witnesses, resolve conflicts and inconsistencies in the testimony, and determine weight to which testimony is entitled, and this rule also applies to conflicts and inconsistencies in testimony of an individual witness.

8. Limitation of Actions ⇨187

Where, in action by retailer against retailer's advertising manager for "kickbacks" received by manager from engravers and printers to whom manager had let work on behalf of retailer, retailer proceeded on the promise implied in law, and manager set up affirmative defense of statute of limitations, retailer properly plead its cause of action in form of a common count for money had and received and was not required to plead facts which would toll the statute of limitations. West's Ann.Code Civ.Proc. § 339, subd. 1.

9. Limitation of Actions ⇨197(2)

In action by retailer against retailer's advertising manager for "kickbacks" received by manager from engravers and printers to whom manager had let work on behalf of retailer, evidence was sufficient to sustain trial court's implied finding that the statute of limitations had been tolled by manager's fraudulent concealment of facts giving rise to the cause of action. West's Ann.Code Civ.Proc. § 339, subd. 1.

10. Trial ⇨397(1)

Trial court's failure to make express finding upon an issue is not error if it is implicit in the findings made.

11. Master and Servant ⇨66

In action by retailer against retailer's advertising manager for "kickbacks" received by manager from engravers and printers to whom manager had let work on behalf of retailer, evidence was sufficient to establish that manager had received \$8,212.65 from one of the engravers.

12. Appeal and Error ⇨996

A reviewing court is not at liberty to draw inferences contrary to those drawn by trial court.

13. Equity ⇨65(2)

Fact that, in action by former employer against former employee for "kickbacks" received by former employee, former employer had an attachment issued and levied pursuant to affidavit that indebtedness involved was in sum of \$75,000 plus interest did not constitute a fraud upon the court or abuse of process and would not under doctrine of unclean hands, preclude former employer from availing itself of former employee's fraudulent concealment to toll statute of limitations, even though the indebtedness amounted to \$46,682.68, in view of facts that final judgment was in excess of \$66,000 and that original claim was made without benefit of audit.

14. Appeal and Error ⇨173(2)

Defense of "unclean hands" must ordinarily be raised in the trial court and cannot be raised for first time on appeal.

15. Interest ⇨1

Interest is in nature of damages which law allows for wrongful detention of money which should be turned over to person entitled thereto. West's Ann.Civ.Code, § 3287.

16. Damages ⇨163(1)

Unlike other items of special damage, no evidence is necessary to establish a plaintiff's right to the legal rate of interest as damages for wrongful detention of his money. West's Ann.Civ.Code, § 3287.

17. Interest ⇨66

In a contested case, interest may be awarded, if plaintiff is entitled thereto, notwithstanding fact that complaint does not contain a prayer for interest. West's Ann.Code Civ.Proc. § 580.

18. Interest ⇨66

Where, in contested action, interest is prayed for as of a particular day, court may award interest as of time antedating the date specified in the prayer if interest is otherwise allowable.

19. Interest ⇨66

In a contested action on a money claim which can be made certain by calculation, matter of interest for withholding of money is embraced within issue, and the appropriate interest may be allowed even though

not prayed for or prayer is for less interest than the evidence shows plaintiff to be entitled to. West's Ann.Code Civ.Proc. § 580.

20. Interest ⇨31

Legal rate of interest in California for detention of money is 7 per cent per annum.

21. Interest ⇨66

Where there is a prayer for "interest" without specifying the rate, it is deemed a prayer for legal interest.

22. Interest ⇨66

Where, in action by retailer against retailer's advertising manager for "kickbacks" received by manager from engravers and printers to whom manager had let work on behalf of retailer, complaint prayed for judgment in stated amount with interest thereon from certain date and for such other relief as might by court be deemed just and proper, but affidavit for attachment and writ of attachment claimed interest at rate of 6%, award of interest at legal rate of 7% from time manager became obligated to turn over his illicit gains to retailer was proper. West's Ann.Civ. Code, § 3287; West's Ann.Code Civ.Proc. § 580.

Gerald R. Knudson, Gerald R. Knudson, Jr., Tobias G. Klinger, Los Angeles, for appellant.

John L. Wheeler, Eugene D. Williams, Newlin, Holley, Tackabury & Johnston, George W. Tackabury, Hudson B. Cox, Los Angeles, for respondent.

FOX, Justice.

By its complaint for money had and received plaintiff seeks to recover from defendant, who was its advertising manager, "kickbacks" that he had received from engravers and printers to whom he let such work on behalf of plaintiff. Judgment was rendered in favor of plaintiff for \$66,089.06. Defendant appeals.

Defendant contends that (1) the major portion of the items comprising the judgment was barred by the statute of limitations; (2) the evidence is insufficient to establish the amount of such kickbacks from one of the engraving concerns; and (3) interest was computed on an erroneous basis in view of the prayer of the complaint. We have concluded the judgment must be affirmed.

Defendant was advertising manager of the retail stores in plaintiff's Los Angeles group. He assumed this position in August, 1929, and continued in it (except for one year of military service) until December 10, 1951, when it was discovered that he had been receiving kickbacks from engravers and printers with whom he had been doing business for plaintiff. It was his job to "produce the advertising." As an executive of Sears he received bids for the engraving work and generally determined who performed such services for Sears. He approved the bills and allocated the advertising costs among the 12 stores of the group. Payment was made on his approval after going through the auditing department. Defendant handled any complaints that arose with respect to advertising. His immediate superior was the sales promotion manager.

From 1937 to the summer or early fall of 1949 defendant turned all of Sears engraving work to Metropolitan Engravers.¹ At this latter point defendant began to give some of the engraving business to Barnard & Quinn Company,² at the suggestion of Mr. Plummer who had become sales promotion manager in March, 1949. During 1950 and 1951 both of these concerns received from defendant substantial engraving business for Sears. From 1937 to December 10, 1951 (when defendant's services were terminated by Sears), defendant received from Metropolitan a total of \$34,150. In a little more than two years he received \$8,212.65 from Barnard & Quinn. In 1948 defendant began receiving kickbacks from a publishing company for

1. From 1945 through 1951 the account appears to have been in the name of Metropolitan Mat Service, but they were under the same management, one being a subsidiary of the other.

2. The name of this company was changed to Barnard Engraving Company when Mr. Quinn severed his connection.

printing that he ordered for Sears. From this source he received \$4,270.03. In 1948 defendant received a kickback of \$50 from another printing concern. The total of such sums thus appropriated was \$46,682.68.

Although the complaint prayed for interest from December 1, 1951, the court allowed interest at 7 percent "from the first of January of each year next succeeding the date of receipt of such sums for the entire amount received during the preceding year until the date of the decision in this case, to wit, June 16, 1954." The interest thus calculated amounted to \$19,406.38.

Sears did not have actual knowledge of these payments to defendant until it concluded an investigation early in December, 1951. A three hour conference was then held with defendant on the 10th at which he admitted receiving payments from the engravers. The investigation resulted from information that came to President McConnell of Sears from the president of a Chicago bank. This information³ was passed on to A. T. Cushman, Vice President of Sears, for the Pacific Coast, with the request that he have the matter investigated. This was in the latter part of May, 1951. The investigation followed in due course.

When Mr. Plummer became sales promotion manager in March, 1949, various representatives of engraving concerns called on him in an effort to get some of Sears' business. They represented that they could save Sears a lot of money, do a good job and give good service. When Plummer discussed with Blade the idea of giving their engraving work to two or three companies Blade discouraged it on the ground that Metropolitan was equipped to give a more prompt service than others and this was important to Sears, and that dividing the business would lead to difficulties and delays. Quinn, of Barnard & Quinn, called on Plummer a number of times in his campaign to get part of Sears' engraving business. Finally Plummer sug-

gested an order be placed with Barnard & Quinn on a trial or experimental basis. Sometime thereafter during the summer Plummer directed that Barnard & Quinn be given a portion of the engraving business.

In August, 1949, Quinn told Plummer that there was a payoff to his advertising manager. Plummer asked him if he could prove that. Quinn said, "No—I can't prove it, but I think it is going on. I'm sure it is going on." Plummer told him, "If you have any proof of that accusation I would like to have it." Quinn never provided him with any additional information on that subject. Plummer did not investigate this charge because Quinn, "by his own admission had nothing to prove that statement at all." Plummer just considered Quinn's statement as "one of the 'outs' trying to get 'in.'"

Plummer regarded Blade as "a very excellent advertising manager." He observed that "Blade lived in rather moderate circumstances," so far as housing accommodations were concerned, "at a housing development adjacent to Sears." He went home for lunch each day; he dressed neatly but not expensively; had no extravagant habits; and drove a car that was not new. He lived "on the conservative side." Plummer knew Blade's salary and the approximate amount of his bonus. He did not observe anything in Blade's conduct or manner of living that caused him to become suspicious that he might be taking money that belonged to plaintiff.

In reply to President McConnell's request to Mr. Cushman to investigate the report of payoffs in the purchase of printing (see footnote 3), Mr. Cushman wrote in part: "About a year and a half ago a charge was made by an engraver here in town that people were getting paid off because he was unable to get any business. I investigated this and found there was no foundation to it." This referred to the accusation Quinn made to Plummer which the latter, according to Cushman, conveyed

3. The initial report indicated the kickback was in connection with printing that Sears purchased. No mention was made of engraving. Later it developed

that this portion of the report was erroneous—that in fact the kickbacks referred to in the report related to the engraving business.

to him. Cushman testified he had a check made of Blade by the personnel department sometime early in 1945 or 1946. He found that Blade "lived a normal life, and that he was a good man." Cushman further testified: "I had him (Blade) checked that once" (in 1945 or 1946) and "then I made my own checks as far as the reports were concerned, from then on," and "that continued up until" he (Cushman) received the report from President McConnell. Up to that time Cushman had not "learned anything as a result of his checks" on Blade and he "had no information of any facts" which caused him to believe or suspect that Blade was taking money from persons with whom he was dealing on behalf of Sears.

Plaintiff's complaint consists of a common count for money had and received. A writ of attachment was issued and a levy made. Defendant plead the two-year statute of limitations, Code Civ.Proc. § 339, subd. 1. The court found that no part of the cause of action was barred by the statute.

In approaching his argument on the statute of limitations, defendant points out that by suing on a common count for money had and received and by causing a writ of attachment to be issued, the plaintiff has elected to waive the tort by which defendant acquired the money in question and to rely on the promise the law implies to pay over to his employer the funds he had wrongfully obtained, *Philpott v. Superior Court*, 1 Cal.2d 512, 36 P.2d 635, 95 A.L.R. 990; *McCall v. Superior Court*, 1 Cal.2d 527, 36 P.2d 642, 95 A.L.R. 1019; *Steiner v. Rowley*, 35 Cal.2d 713, 221 P.2d 9; and that an action on a contract not founded upon an instrument in writing must be brought within two years. Code Civ.Proc. § 339, subd. 1. Defendant therefore concludes that the recovery against him should be limited to payments received by him within the two years preceding December 10, 1951, the date on which this action was filed. He then argues that the statute cannot be tolled to permit recovery of payments received prior to December 10, 1949, since the statute does not expressly so provide, and, as an alternate proposition, he argues that the evidence

is insufficient to toll the statute. The cases do not support defendant's position.

[1,2] It is unmistakably clear that over the years Blade had fraudulently concealed the facts upon which plaintiff's action and right of recovery are based. Such fraudulent concealment tolls the statute of limitations until plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the facts on which its cause of action is based and then the applicable statute commences to run. The rule is admirably stated in *Kimball v. Pacific Gas & Electric Co.*, 220 Cal. 203, at page 210, 30 P.2d 39, at page 42: "We are of the opinion, however, that independent of statute, a fraudulent concealment by the defendant of the facts upon which a legal common-law action is based, under the proper circumstances, tolls the statute until discovery, and that upon discovery the statute applicable to that particular action (in this case section 340, subd. 3, of Code Civ.Proc.) then commences to run. There are cases from other jurisdictions, many of which are cited by appellant, which hold that in the absence of a statutory exception, the fraudulent concealment of the fact upon which the cause of action accrues does not toll the statute, but, in our opinion, the cases in this state and the weight of authority elsewhere support the rule that under such circumstances the statute is tolled. See 37 Cor.Jur., 972, § 353, where many cases are collected."

In *L. B. Laboratories, Inc., v. Mitchell*, 39 Cal.2d 56, 244 P.2d 385, plaintiff's action was based on the breach of a written contract which occurred more than four years before its complaint was filed. The court held that defendant's wilful and fraudulent concealment of the facts on which plaintiff's cause of action was based tolled the statute of limitations.

In *Broadway Federal Savings & Loan Ass'n v. Howard*, 133 Cal.App.2d 382, 285 P.2d 61, plaintiff sought to recover secret profits and rebates which defendant received during the time he was president of plaintiff. The amended complaint, and every particularized count thereof, was for money had and received, *ex contractu*, plaintiff having expressly waived the torts

and elected to sue on the implied promise to repay such secret profits and rebates. This court pointed out, 133 Cal.App.2d at page 395, 285 P.2d at page 70, that defendant's relation to the various transactions was "purposely and painstakingly covered up", and that he concealed the information from the board of directors. In that factual setting we held defendant was estopped to assert the limitations of time applicable to a contract implied in law.

In *Pashley v. Pacific Electric R. Co.*, 25 Cal.2d 226, 153 P.2d 325; *Boyer v. Barrows*, 166 Cal. 757, 138 P. 354, and *Parmely v. Boone*, 35 Cal.App.2d 517, 96 P.2d 164, it is emphasized that *in all cases* a fraudulent concealment of the facts upon the existence of which the cause of action accrues, is a good answer to the defense of the statute of limitations. As the Supreme Court concludes in the *Pashley* case, *supra*, 25 Cal.2d at page 232, 153 P. 2d at page 328: "The rule is applicable in this state whether or not the action itself be based on fraud."

[3] Defendant emphasizes the fact that a writ of attachment was issued in the instant case and asserts that the statute of limitations may not be tolled by the fraudulent concealment of the cause of action by defendant where plaintiff has invoked the provisional remedy of attachment. He attaches undue significance to this fact. The issuance and levy of the writ merely provides conclusive proof of plaintiff's election to proceed upon his contractual remedy. *Steiner v. Rowley*, *supra*. The invocation of this provisional remedy does not affect plaintiff's right to avail itself of defendant's fraudulent concealment as a basis for tolling the statute of limitations. *Acme Paper Co. v. Goffstein*, 125 Cal.App.2d 175, 270 P.2d 505, 506, a strikingly similar case, is a complete answer to defendant's argument. In that case defendant was an employee of plaintiff. Over a period from 1948 to 1952 he was engaged in cheating his employer by representing that merchandise had been bought from one Kahn from time to time and obtaining checks in payment thereof upon which he forged Kahn's endorsement and cashed the checks. The complaint was, as here, in the form of a "common count

for money had and received". An attachment was levied, as in the instant matter. The tolling of the statute of limitations was also an issue in the case. What the court had to say on that question is particularly apposite here. At pages 179 and 180 of 125 Cal.App.2d, at page 509 of 270 P.2d the court stated: "The statute of limitations is not a bar to this action, although it sounds in contract. Even where an express contract was the subject of the action, rather than a contract implied in law, the Supreme Court has held that fraud would toll the running of the statute on the cause of action for breach thereof when 'The breach was accomplished underhandedly, by secret confederacy with another, and the use of his name to cloak the movements of the defendant * * *.' *Gregory v. Spieker*, 110 Cal. 150, 153, 42 P. 576, 577. When, as here, the contract sued upon relies for its existence upon the rule of law that implies a contract to repay money that should not in good conscience be kept by appellant, the language quoted is strikingly apposite. Appellant used Kahn's name and his own false representations as to the source of goods purchased to 'cloak the movements of the defendant' and concealed the fact that checks given to him for delivery to Kahn were in fact delivered to another and the proceeds divided with defendant. Upon discovery of the fraud this action was promptly filed."

[4] Defendant's fundamental fallacy is his uncritical assumption, based upon a misconception of the import of *Steiner v. Rowley*, 35 Cal.2d 713, 22 P.2d 9, that because plaintiff has elected to pursue a quasi-contractual remedy founded on the promise to pay which the law implies, he may not avail himself of defendant's fraudulent concealment of the cause of action to prevent the running of the applicable statute of limitations. The cases herein discussed thoroughly refute this contention. They unequivocally demonstrate that in actions based on negligence, malpractice, breach of written contract, and in various types of restitutionary actions brought upon the common count to recover benefits tortiously acquired, defendant's undiscovered fraud or fraudulent concealment will toll the

statute of repose. Though fraud is not the gravamen of such actions, the plaintiff is not precluded in a proper case from relying upon the fraud or concealment which permeated the transaction, to toll the particular limitation provision germane to his action. *Steiner v. Rowley*, supra, simply holds that a plaintiff who, by running an attachment, has elected to waive the tort and sue upon an implied contract, is estopped to pursue a cause of action sounding in fraud. Such election also precludes him from obtaining a measure of damages appropriate to a tort action. It does not in any way inhibit his right to use the other party's fraudulent concealment as an answer to the latter's defense that the statute of limitations bars the claim. *Kimball v. Pacific Gas & Elec. Co.*, 220 Cal. 203, 211, 30 P.2d 39; *L. B. Laboratories, Inc. v. Mitchell*, supra; *Broadway Federal etc. v. Howard*, supra; *Boyer v. Barrows*, supra; *Parmely v. Boone*, supra; *Acme Paper Co. v. Goffstein*, supra; and *Pashley v. Pac. Electric*, supra.

In support of his argument that the evidence is insufficient to sustain the finding that no part of plaintiff's cause of action is barred by section 339, subd. 1, Code of Civil Procedure, defendant relies on the testimony that in August, 1949, Quinn told Plummer, in effect, that Blade was being paid off by the engraving suppliers. He then argues that if Sears had made an investigation at that time, it would have discovered these payoffs. Defendant therefore concludes "that Sears knew everything in 1949—more than two years before this action was filed."

[5, 6]. Whether Plummer acted as a reasonably prudent man in not investigating Quinn's charge must be viewed in the factual setting in which it was made. Evidently Quinn was earnestly trying to get some of Sears' engraving business and these efforts had gone on for some months after Plummer became sales promotion manager. Quinn had gotten an experimental or test order about June but had

received no further business of consequence. In these circumstances Plummer's appraisal of Quinn's statement as "one of the 'outs' trying to get 'in'" is not unreasonable, particularly in view of the latter's admission that he had nothing at all to prove his charge, his failure to produce any proof of his accusation though invited to do so by Plummer, and the latter's knowledge of Blade's modest living circumstances, and his apparent frugality. "When the facts are susceptible to opposing inferences, whether a party had notice of circumstances sufficient to put a prudent man on inquiry as to a particular fact, and whether by prosecuting such inquiry he might have learned such fact, are questions of fact to be determined by the trial court." *Tognazzini v. Tognazzini*, 125 Cal.App.2d 679, 687, 271 P.2d 77, 82. Under this rule we cannot say as a matter of law that plaintiff was required to investigate the accusation and that plaintiff is chargeable with knowledge of Blade's kickbacks in 1949. It must be borne in mind that defendant was plaintiff's advertising manager and represented plaintiff in its contractual dealings with the parties from whom he was receiving the rebates or payoffs. As plaintiff's agent⁴ he occupied a confidential status akin to that of a fiduciary (2 Cal. Jur.2d, Agency, sec. 104, p. 771.) He was bound to a duty of good faith towards his principal and was precluded from making secret profits for his own benefit from the subject matter of the agency. *Schwartz v. Artel*, 40 Cal.App.2d 433, 436, 105 P.2d 380; *Whitnack v. Ellworthy*, 63 Cal.App. 411, 422, 218 P. 631. In cases involving confidential relationships, "it is recognized that * * * facts which would ordinarily require investigation may not excite suspicion, and that the same degree of diligence is not required." *Hobart v. Hobart Estate Co.*, 26 Cal.2d 412, 440, 159 P.2d 958, 973, and cases cited; *Lee v. Hensley*, 103 Cal.App.2d 697, 704, 230 P.2d 159.

Furthermore, there is evidence that Mr. Cushman, plaintiff's vice president, did investigate this charge but discovered no

4. Civil Code, section 2295, provides: "An agent is one who represents another, called the principal, in dealings with third

persons. Such representation is called agency."

foundation for it. He mentioned it in his reply to Mr. McConnell's initial request that he investigate reports of payoffs in connection with Sears' purchase of printing. There was also evidence that Cushman had the personnel department make a spot check on Blade in 1945 or 1946 and report thereon to him, and that thereafter he made his own checks on Blade until he received the report on asserted kickbacks for printing from President McConnell in May, 1951. Up to that time there was nothing that caused Cushman to be suspicious that Blade was taking money from persons with whom he dealt on behalf of Sears. It is thus apparent that there is ample evidentiary support for the finding that no part of plaintiff's cause of action was barred by the statute of limitations, for the suit was filed immediately upon discovery of Blade's receipt of kickbacks.

[7] Defendant points to a conflict in the testimony of Plummer and Cushman as to whether the former advised the latter of the Quinn charge, and to inconsistencies in Cushman's testimony as to what investigation, if any, he had made. It was, of course, for the trial court to pass upon the credibility of the witnesses, resolve conflicts and inconsistencies in the testimony, and determine the weight to which it was entitled. *Dillard v. McKnight*, 34 Cal.2d 209, 223, 209 P.2d 387, 11 A.L.R.2d 835. This rule also applies to conflicts and inconsistencies in the testimony of an individual witness. *Showalter v. Western Pac. R. R. Co.*, 16 Cal.2d 460, 479, 106 P.2d 895; *Peterson v. Peterson*, 74 Cal.App.2d 312, 319, 168 P.2d 474.

[8] Defendant complains that "there is nothing in the complaint or in the findings to indicate fraud sufficient to toll the statute of limitations." It is not essential that there should be such facts either in the complaint or in the findings.

Since the plaintiff proceeded on the promise implied in law, it was proper to plead its cause of action in the form of a common count for money had and received. The statute of limitations was an affirmative defense to be set up by the defendant. It is therefore obvious that it was not necessary

for plaintiff to plead facts which would toll the statute. *Adams v. Harrison*, 34 Cal. App.2d 288, 293, 93 P.2d 237; *Minor v. Baldrige*, 123 Cal. 187, 190, 55 P. 783.

[9,10] As to the findings, the court found that no part of plaintiff's cause of action was barred by the statute of limitations. This express finding sufficiently disposes of the defense based on the statute. *Weaver v. Grunbaum*, 31 Cal.App.2d 42, 52, 87 P.2d 406. Inherent in this finding is the implied finding that the statute of limitations had been tolled by defendant's fraudulent concealment of the facts giving rise to plaintiff's cause of action, and, as we have previously pointed out, there is ample evidence to support such an implied finding. "There is no error in the failure of the trial court to make an express finding upon an issue if it is implicit in the findings made * * *." *Haigler v. Donnelly*, 18 Cal.2d 674, 677-678, 117 P.2d 331, 333; *Richter v. Walker*, 36 Cal.2d 634, 640, 226 P.2d 593. Illustrative of this principle, in an analogous context, is the statement of this court in *Wilkman v. Banks*, 124 Cal.App.2d 451, 457, 269 P.2d 33, 36: "By its finding of no laches, the court impliedly found that nothing had occurred to put respondents on notice of a violation."

[11] Defendant asserts there is no evidence to justify the finding as to the amount of money received by him from Barnard & Quinn. With that assertion we cannot agree.

The court found Blade received \$473.83 in 1949; \$2,762.49 in 1950; \$4,976.33 in 1951. At the outset checks representing the various payments were made out to cash. Quinn was the salesman on this account until he severed his connection with the company. Barnard testified that Quinn instructed the bookkeeper as to the amounts for which the checks should be made. The checks were cashed and the money placed in envelopes. Although Barnard did not count the money, he stated "I took that money, and gave it to Mr. Blade." Miss Davis, bookkeeper for Barnard & Quinn, read into the record the face amount of seven checks (all dated in 1949) which totaled \$473.83, the amount the court found

Blade received in 1949. These checks and the proceeds therefrom appear to have been handled in the above described fashion. It is a reasonable inference that Blade received the full amount of these seven checks in 1949.

[12] Early in 1950, Quinn developed the idea of having an account set up in the books of the company under the fictitious name of Franklyn Art Service as a means of handling these payments. He instructed the bookkeeper to make the checks payable to the Franklyn Art Service. She gave them to Quinn for his and Barnard's signatures. "They were cashed" according to Barnard and he was "given the cash in an envelope" and he turned these envelopes containing the money over to Blade. Appropriate entries reflecting these checks were made in the books to the account of the Franklyn Art Service. Blade admitted receiving payments from Barnard from time to time in the form of cash in an envelope. He did not, however, know the total thereof. The amounts varied and were received at irregular intervals. They were to represent 15 percent of the Sears' business that Blade turned to Barnard & Quinn. Since the bills came to Blade for approval, it was a simple matter for him to determine whether he was getting his agreed 15 percent. Knowing that he had a ready means of figuring the amounts coming to him from time to time Barnard & Quinn would not be likely to "short change" him in their payments, for it might well interfere with the relationship and the amount of business they would get in the future. It does not appear that anyone other than the principals had anything to do with these transactions once the checks were drawn except to make the proper book entries. The amounts of the checks payable to the Franklyn Art Service and the dates on which they were credited to that account were stipulated by counsel. From the foregoing it is a reasonable inference that Blade received the amounts covered by the stipulation. The difficulty with defendant's argument on this point is that he would have us draw inferences contrary

to those drawn by the trial court. This an appellate court is not at liberty to do.

[13, 14] Defendant attempts to raise on appeal the defense of "unclean hands." His argument is that even if his fraudulent concealment would have tolled the applicable statute of limitations plaintiff has disentitled itself from relying thereon because it did not come into court with "clean hands." He bases this on the fact that an attachment was issued and levied pursuant to plaintiff's attachment affidavit reciting that defendant and his wife⁵ were indebted to it in the sum of \$75,000 plus interest, while at the time of trial plaintiff filed an amended bill of particulars stating that defendant alone was indebted to it in the sum of \$46,682.68. Defendant now urges that this discrepancy in figures constituted a fraud upon the court and an abuse of process and should have precluded plaintiff from availing itself of defendant's fraudulent concealment to toll the limitations period. Defendant's strained attempt to invoke the equitable doctrine of "unclean hands" in the instant context is both specious and unsound. Assuming, *arguendo*, that the doctrine is applicable, this defense was neither pleaded nor, so far as the record discloses, suggested in any fashion to the trial court. This defense must ordinarily be raised in the trial court to be available, and cannot, as here, be raised for the first time on appeal. *Watson v. Poore*, 18 Cal.2d 302, 311-312, 115 P.2d 478; *Stone v. Lobsien*, 112 Cal.App.2d 750, 758, 247 P.2d 357; *Scannell v. Murphy*, 82 Cal. App.2d 844, 849, 187 P.2d 790. It has been held in one case, *Katz v. Karlsson*, 84 Cal. App.2d 469, 191 P.2d 541, that in a clear case involving flagrantly unconscionable conduct, a court may *sua sponte* apply the clean hands doctrine. But this is patently not such a case. The final judgment of the court awarded plaintiff a sum in excess of \$66,000. This is reasonably close to the claim asserted in its complaint and in its original attachment affidavit. That plaintiff in its attachment affidavit and in its amended bill of particulars recited that defendant was obligated in differing amounts

5. A nonsuit was granted upon the motion of Nella Blade, defendant's wife.

was not so much an indication of bad faith on its part as a reflection of its confusion due to defendant's adroitly surreptitious *modus operandi*. The rational explanation is that plaintiff, while groping for the true extent of defendant's peculations, took general and incomplete information immediately available to it and attempted without benefit of audit to ascertain defendant's indebtedness to it. There is obviously no such discrepancy between the judgment and the amount sought to be secured by the attachment proceedings as to suggest bad faith in any degree on the part of plaintiff. There is no requirement that an attaching plaintiff must be able to fix with mathematical exactitude the amount of the claim asserted in his affidavit. *Peninsula Properties Co. v. County of Santa Cruz*, 34 Cal. 2d 626, 631, 213 P.2d 489; *Lewis v. Steifel*, 98 Cal.App.2d 648, 651, 220 P.2d 769. In the factual setting before us, the "unclean hands" strictures ascribed to plaintiff have a singularly hollow ring.

As his final point, defendant contends that the court erred in awarding plaintiff interest upon the money he received prior to December 1, 1951, and at a rate in excess of 6 percent per annum. The complaint prayed for judgment in the sum of \$75,000, "with interest thereon from the first day of December, 1951 * * * and for such other and further relief as may by the court be deemed just and proper." Plaintiff's affidavit for attachment and the writ of attachment claim interest on the amount due at the rate of 6 percent from December 1, 1951. It is not disputed that defendant's obligation is of the character upon which the law awards interest from the time the money received was payable to plaintiff. However, defendant argues that in view of the specific prayer and the averments in the attachment proceedings, the court incorrectly awarded interest on the sums he received prior to December 1, 1951, and erred in computing the interest allowed at the rate of 7 percent. In so doing, defendant misconceives the rules uniquely ap-

plicable to the allowance of interest as distinguished from the recovery of other types of damages.

[15-22] Interest is in the nature of damages which the law allows for the wrongful detention of money which should be turned over to the person entitled to it. *Civ.Code*, § 3287; *Nesbit v. MacDonald*, 203 Cal. 219, 222, 263 P. 1007; *Hargett v. Gulf Ins. Co.*, 12 Cal.App.2d 449, 458, 55 P.2d 1258; *Cook v. Western Trust etc. Bank*, 137 Cal.App. 436, 440, 30 P.2d 1006. Unlike other items of special damage, no evidence is necessary to establish a plaintiff's right to the legal rate of interest as damages for the wrongful detention of his money. *Gray v. American Surety Co.*, 129 Cal.App.2d 471, 475, 277 P.2d 436. It is well established, consistent with the liberal rule enunciated in section 580 of the *Code of Civil Procedure*,⁶ that in a contested case interest may be awarded, if the plaintiff is entitled thereto, notwithstanding the complaint contains no prayer for interest. *Perry v. Magneson*, 207 Cal. 617, 622, 279 P. 650; *Katz v. Enos*, 68 Cal.App.2d 266, 278, 156 P.2d 461; *Hill v. New York Life Ins. Co.*, 38 Cal.App.2d 627, 637, 101 P.2d 752; *Deaux v. Trinidad Bean etc. Co.*, 8 Cal.App.2d 149, 47 P.2d 535; *Durbin v. Hillman*, 50 Cal.App. 377, 382, 195 P. 274. Likewise, in a contested action, where interest is prayed for as of a particular day, the court may award interest as of a time antedating the date specified in the prayer if the interest is otherwise allowable. *McKesson v. Hepp*, 62 Cal.App. 619, 217 P. 802. The rationale of these cases is the simple proposition that in a contested action on a money claim which can be made certain by calculation, the matter of interest for the withholding of the money is "embraced within the issue", *Code Civ.Proc.* § 580, and the appropriate interest may be allowed even though not prayed for or the prayer is for less interest than the evidence shows the plaintiff to be entitled. The legal rate of interest in California for the detention of money is 7 percent per annum.

6. *Code of Civ.Proc.* § 580, reads:

"The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his com-

plaint; but in any other case, the Court may grant him any relief consistent with the case made by the complaint and embraced within the issue."

Gray v. American Surety Co., supra. Where, as in the instant pleading, there is a prayer for "interest" without specifying the rate, it is deemed a prayer for legal interest. Nesbit v. MacDonald, supra. There was thus ample authority for the judgment awarding interest at the legal rate from the time the particular obligation to pay arose. In conformity with exemplary practice, the court added the interest accruing from the time defendant became obligated to turn over his illicit gains to the principal amounts found owing and entered judgment for the aggregate. Boscus v. Bohlig, 173 Cal. 687, 691, 162 P. 100.

The judgment is affirmed.

MOORE, P. J., and ASHBURN, J., concur.



139 Cal.App.2d 394

Helen POWELL, Plaintiff and Appellant,
v.

Robert M. BARTMESS, Defendant and Respondent.
Civ. 21189.

District Court of Appeal, Second District,
Division 2, California.
Feb. 23, 1956.

Action arising out of collision between plaintiff's northbound automobile, which was making left turn in intersection, and defendant's southbound automobile. The Superior Court, Los Angeles County, Fred Miller, J., rendered verdict for defendant on plaintiff's complaint and against defendant on cross-action, and plaintiff appealed. The District Court of Appeal, Fox, J., held that evidence as to whether plaintiff had maintained proper lookout and had properly yielded right of way sustained finding that plaintiff had been contributorily negligent.

Judgment affirmed.

1. Trial ⇨134

It is not the judge's function to make a finding in a civil action tried to a jury.

2. Appeal and Error ⇨105

The giving or refusing of an instruction directing jury on an issue is reviewable upon appeal.

3. Appeal and Error ⇨216(1)

Where trial court refused plaintiff's request to find defendant negligent as a matter of law, and plaintiff failed to accept trial court's invitation to submit an instruction directing jury on that point, trial court had no proper opportunity to pass upon contention, and there was no reviewable error.

4. Appeal and Error ⇨930(1)

If there be evidence of facts supporting an inference favorable to judgment, a reviewing court is without power to substitute its own deductions for those of jury.

5. Appeal and Error ⇨1001(1)

Negligence ⇨136(26)

Issue of contributory negligence is for trier of fact, and its determination will not be disturbed on appeal if there is any substantial evidence to sustain it.

6. Automobiles ⇨244(43)

In action arising out of collision between plaintiff's northbound automobile, which was making left turn in intersection, and defendant's southbound automobile, evidence as to whether plaintiff had maintained proper lookout and had properly yielded right of way sustained finding that plaintiff had been contributorily negligent. Vehicle Code, § 551(a).

7. Automobiles ⇨245(80)

Mere fact that plaintiff, whose northbound automobile was making left-hand turn in intersection and collided with defendant's southbound automobile, first entered intersection did not as a matter of law exculpate plaintiff from negligence.

8. Trial ⇨252(7)

In action arising out of collision between plaintiff's northbound automobile, which was making left turn at intersection,

and defendant's southbound automobile, which passed upon right several other southbound automobiles, wherein it did not appear that defendant had driven off the paved or main traveled portion of roadway, trial court's failure to read to jury that part of statute which prohibits driving off the paved or main traveled portion of roadway when passing on right was not error. Vehicle Code, § 529(b).

9. Trial ⇨260(7)

In action arising out of collision between plaintiff's northbound automobile, which was making left turn at intersection, and defendant's southbound automobile, wherein it appeared that there was only one marked southbound lane on the wide street, and defendant was not in that lane, trial court's refusal to give plaintiff's requested instruction relating to driving on roadways which are divided into three or more marked lanes was not error, particularly since the matter was covered by other instructions. Vehicle Code, § 526.

10. Automobiles ⇨173(6)

A motorist is not absolutely prohibited from overtaking and passing a vehicle stopped at an intersection.

11. Automobiles ⇨173(6)

A motorist has no absolute and unqualified duty not to pass a vehicle which is stopped at an intersection to yield right of way to another. Vehicle Code, § 551.

12. Trial ⇨248

In automobile accident case, instruction presenting question whether a reasonable and prudent person would have acted as defendant allegedly did under stated circumstances was obnoxious as a formula instruction and was properly refused.

13. Negligence ⇨3

Trial ⇨244(4)

Basic question in an ordinary negligence case is whether parties exercised degree of care of a reasonably prudent man under similar circumstances, and an instruction should not single out certain testimonial facts and instruct jury that they spell negligence if a prudent man would not have so conducted himself.

14. Trial ⇨244(2)

Instructions should not focus jury's attention on particular items of evidence.

15. Trial ⇨260(7)

In automobile accident case, necessity of giving plaintiff's requested instruction to effect that a motorist who is obeying law has right to presume that other motorists will perform their duty and obey law, and that failure to anticipate negligence or violation of law on part of others is not contributory negligence, was obviated by the giving of B.A.J.I. No. 138.

16. Trial ⇨260(7)

In action arising out of intersection automobile accident, necessity for giving plaintiff's requested instruction that a motorist having a right of way at intersection has a right to proceed and assume that driver of any vehicle approaching it will decrease speed if necessary to yield such right of way was obviated by giving B.A.J.I. No. 138 and by reading statute setting out duty of driver of an approaching vehicle to yield right of way to a left-turning vehicle. Vehicle Code, § 551(b).

17. Trial ⇨260(7)

In action arising out of collision between plaintiff's northbound automobile, which was making left turn at intersection, and defendant's southbound automobile, plaintiff's requested instruction to effect that a person making a left-hand turn need not be certain of absolute safety before she turns and proceeds was rendered unnecessary by giving instruction covering same matter.

18. Automobiles ⇨246(22)

In automobile accident case, wherein questions of negligence and proximate cause were for jury, giving of defendant's requested instruction on unavoidable accident was not error.

19. Automobiles ⇨246(21)

In action arising out of collision between plaintiff's northbound automobile, which was making left turn at intersection, and defendant's southbound automobile, wherein defendant contended that plaintiff's automobile loomed up in front of him suddenly as defendant was passing other south-

bound automobiles stopped at intersection, giving defendant's requested instruction on doctrine of sudden peril was proper, particularly since instruction was effective only if defendant were without negligence.

20. Automobiles ⚡246(58)

In action arising out of collision between plaintiff's northbound automobile, which was making left turn in intersection, and defendant's southbound automobile, giving of B.A.J.I. No. 140, relating to failure to see that which is in plain sight, was proper under plaintiff's evidence that she looked to north before making turn and that defendant's automobile collided with her almost immediately thereafter.

21. Automobiles ⚡246(25)

In action arising out of collision between plaintiff's northbound automobile, which was making left turn in intersection, and defendant's southbound automobile, instruction embodying statute providing that no person shall turn a vehicle from direct course unless such movement can be made with reasonable safety and only at the giving of appropriate signal was necessary to orient jury intelligently on responsibilities of a driver executing a turn. Vehicle Code, § 544(b).

22. Appeal and Error ⚡1064(1)

Automobiles ⚡246(25)

In action arising out of collision between plaintiff's northbound automobile, which was making left turn in intersection, and defendant's southbound automobile, wherein it appeared that, since defendant's vision was obscured by automobiles stopped in intersection, plaintiff's alleged failure to give signal could not have caused accident, giving of instruction on statute relating to requirement that turn signal be given was error, but not prejudicial. Vehicle Code, § 544(b).

23. Appeal and Error ⚡1027

A reversal is not warranted unless it appears probable that a different result would have obtained but for giving of inapplicable instruction.

Betts, Ely & Loomis, Los Angeles, for respondent.

FOX, Justice.

Plaintiff initiated an action to recover for personal injuries arising out of an intersection collision while she was making a left turn. Defendant denied negligence on his part and interposed the defense of contributory negligence. Defendant also filed a cross-action to recover for property damage to his vehicle. The jury returned a verdict for defendant on plaintiff's complaint and against defendant on his cross-action. The sole appeal is by plaintiff from the judgment adverse to her.

The accident occurred at about 1:30 p. m. on April 27, 1952, at the intersection of Lakewood Boulevard and South Street, in the county of Los Angeles. The day was dry and sunny. Lakewood Boulevard runs in a north and south direction and is divided at its center by a traffic island or barrier. The distance between this barrier westward to the curb line, or in other words, the width of the southbound side of the highway at the intersection, is about 43 feet. Approximately 10 or 12 feet to the west of the barrier on the southbound side of the street is a marked traffic lane. On plaintiff's Exhibit 1, which is a diagram of the scene, the area between the traffic barrier and the marked traffic lane is denominated Lane 1. Immediately to the west side of the marked traffic lane is a section marked Lane 2, which is also about 10 or 12 feet in width. Both lane 1 and lane 2 are paved with concrete. To the west of lane 2, the exhibit shows another lane about 10 feet wide, marked Lane 3. Lane 3 is paved with concrete from the northerly crosswalk of Lakewood Boulevard and South Street to a point about 50 to 75 feet to the north, after which it is paved entirely with asphalt. Closest to the west curb of Lakewood Boulevard is a section of the street marked as Lane 4 on the exhibit, which is paved entirely in asphalt. It is about 8 feet from lane 4 to the curb. Lakewood Boulevard was posted with signs authorizing a 35 mile per hour speed limit.

Plaintiff was driving north on Lakewood Boulevard when she entered the intersec-

Emanuel Gyler, Long Beach, for appellant.

tion on the green light intending to make a left turn and travel west on South Street. Traffic was proceeding in the opposite (southbound) direction, so she stopped and waited. Plaintiff then drove a bit further north, and when at length one of the southbound cars stopped in lane 1 as its driver was endeavoring to turn left, plaintiff moved her car partially astride lane 1. She halted there (with traffic in lane 1 immobilized) while several oncoming, southbound cars passed by in lane 2. Finally a car traveling in lane 2 stopped, and its driver motioned plaintiff to proceed with her turn. Plaintiff resumed her movement, looking to her right in the direction of southbound traffic as she passed the car stopped in lane 2. She testified that she could see for a distance of about four or five car-lengths back of where she was making her turn but saw no cars. As she went by lane 3 she glanced to the north but saw no car approaching the intersection. She was going about 15 miles per hour when she was struck by defendant's car, which was traveling south in lane 3.

Defendant testified that he was driving south in lane 3 prior to the accident and observed the traffic signal change to green when he was 200 to 300 feet north of the intersection. He was traveling about 20 to 25 miles per hour. There were vehicles moving alongside him in lanes 1 and 2. As he neared the intersection, he observed that cars were stopped in lanes 1 and 2. When he was about three car-lengths north of the leading car stopped in lane 2, he first observed plaintiff's car emerging from in front of that car and pass across lane 3. He immediately applied his brakes, as hard as he could, but his automobile continued past the stopped vehicles and collided with plaintiff's car. He left about 20 feet of skidmarks leading to the point of impact. He testified the point of impact was about 20 feet south of the north curblin of South Street.

Sgt. George, a witness called by plaintiff, testified that he had stopped his car facing west on South Street and observed plaintiff during the time she was making her left turn. He stated that as plaintiff commenced her movement to pass the car

parked in lane 2 he observed defendant's car some 100 feet north of the intersection going about 45 to 50 miles an hour. He testified defendant passed cars stopped in lanes 1 and 2 as he approached the intersection; he estimated defendant's speed at the time of impact at about 20 to 25 miles per hour. Sgt. George observed the 20 feet of skidmarks left by defendant's car, starting at the north curblin and continuing to the point of impact.

When all the evidence had been received, plaintiff made an oral motion "that the Court find that the defendant was guilty of negligence as a matter of law." The court replied that he could make no finding in a jury case and stated to counsel that if he wanted "any instructions, you may offer them and then it is all taken care of by instructions to the jury." Thereafter, the court stated that if counsel would offer an instruction he would pass on whether he would so instruct the jury. To the court's question whether he had any additional instructions to offer, plaintiff's counsel replied, "No, I do not."

[1-3] Plaintiff contends that the court "erred in refusing to find defendant negligent as a matter of law." There is no merit in this contention. As the court correctly pointed out, it is not the judge's function to make a finding in a civil action tried to a jury. In the instant case, proper practice called for the submission by counsel, if he were so advised, of an instruction directing the jury that defendant's negligence was established as a matter of law. The giving or refusing of such an instruction is reviewable upon appeal. The court invited counsel to submit an instruction embodying his theory that defendant was negligent as a matter of law and stated he would pass on its propriety. Counsel declined to do so. The court's action being in accord with exemplary procedure and plaintiff having neglected to afford the court an opportunity to pass upon her contention in the appropriate manner, there appears no error susceptible of review by this court.

Plaintiff argues that the evidence was insufficient as a matter of law to support the verdict. She contends that only after the southbound cars in lanes 1 and 2 had

stopped did she proceed with her left turn, at which time "she had secured an absolute right of way when she was within the intersection." This argument is manifestly untenable.

[4-6] It is axiomatic that if there be evidence of facts supporting an inference favorable to the judgment, a reviewing court is without power to substitute its own deductions for those of the jury. It may reasonably be inferred from the evidence that, conceding that defendant was negligent, plaintiff was likewise guilty of contributory negligence which was a proximate cause of the accident. "The issue of contributory negligence is one left to the determination of the trier of fact, and such determination will not be disturbed on appeal if there is any substantial evidence to sustain it. *Klinefelter v. Machen*, 100 Cal. App.2d 812, 813, 224 P.2d 877; *Page v. Cudahy Packing Co.*, 31 Cal.App.2d 282, 289, 87 P.2d 913; *Reeves v. Lapinta*, 25 Cal.App.2d 680, 682, 78 P.2d 465. Defendant testified that he was about three car-lengths north of the car stopped in lane 2 when plaintiff pulled out from in front of that car to pass lane 3. The jury may well have concluded that plaintiff's testimony that she looked to her right for a distance of four to five car-lengths before starting to pass the car in lane 2 and that she glanced to her right as she passed lane 3 without at any time seeing defendant's car was either unworthy of belief or that she was negligent in failing to see the approach of defendant's car which must have been in her vision under the circumstances related. *Huetter v. Andrews*, 91 Cal.App.2d 142, 146, 204 P.2d 655; *Holibaugh v. Ito*, 21 Cal.App.2d 480, 485, 69 P.2d 871; *Berlin v. Violett*, 129 Cal.App. 337, 340, 18 P.2d 737; *Donat v. Dillon*, 192 Cal. 426, 429, 221 P. 193. The jury might also have concluded that plaintiff violated section 551(a) of the Vehicle Code, which provides: "The driver of a vehicle within an intersection intending to turn to the left shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection *or so close thereto as to constitute an immediate hazard.*" (Emphasis added.) Plaintiff was in the process of

negotiating a left turn in the face of traffic approaching along three lanes. The evidence presented could well support a finding that after moving into lane 2, plaintiff crossed lane 3 without exercising reasonable care to ascertain that defendant's car at that time was in a position which constituted an immediate peril to the safe execution of her turn. In light of the fact that the accident occurred almost immediately thereafter, and in view of defendant's testimony as to his proximity to the intersection before plaintiff crossed lane 3, there was room for the jury to infer that defendant's vehicle constituted an immediate peril to one making a left turn in the circumstances and manner in which plaintiff proceeded. As stated in *Washam v. Peerless Automatic Staple Mach. Co.*, 45 Cal.App. 2d 174, 177, 113 P.2d 724, 727, in discussing the provisions of section 551(a) of the Vehicle Code: "But if such other car is not within the intersection, the motorist must complete his left turn only after he has cautiously estimated that the vehicle approaching from the opposite direction is not 'so close (to the intersection) as to constitute an immediate hazard'. If he miscalculates and a collision occurs, upon a trial of the resulting controversy, it is a fact to be determined from the evidence whether a reasonably prudent person in making the same turn would, under such circumstances have reached the same conclusion." It being peculiarly a question of fact for the jury to decide whether or not plaintiff was negligent in the execution of her maneuver, we may not disturb its determination when, as here, it finds support in the evidence and inferences which might reasonably be drawn therefrom.

[7] But even if it be granted, as plaintiff urges, that having entered the intersection first, she had the right of way, that fact alone does not exculpate her from negligence as a matter of law since a fact question concerning her conduct in the circumstances would still remain. *Donat v. Dillon*, 192 Cal. 426, 429, 221 P. 193; *Reyes v. Gonzales*, 110 Cal.App.2d 266, 268, 242 P.2d 401; *Allin v. Snively*, 100 Cal.App. 2d 411, 414, 224 P.2d 113; *Almanerz v. San Diego Electric Ry. Co.*, 15 Cal.App.2d 423,

426-427, 59 P.2d 513. As was said in *Donat v. Dillon*, supra [192 Cal. 426, 221 P. 194]: "Assuming, therefore, that the defendant had the right of way, he was required to proceed across the intersection in a careful and prudent manner, ever watchful of the direction in which danger was most likely to be apprehended." In *Allin v. Snively*, supra [100 Cal.App.2d 411, 224 P.2d 115], this court remarked: "Under traffic conditions prevailing upon the highways of California ordinary care frequently requires the operator of an automobile who has the right of way to yield in order to avoid disastrous consequences although he may have entered an intersection first and therefore legally be entitled to the right of way. It may be negligence as a matter of fact for him to proceed into the path of a fast moving car." It is thus clear that factual questions were presented with respect to whether plaintiff, who had come to a stop in the intersection, was justified in turning into the path of a car which was traveling at least 25 miles an hour under the circumstances prevailing at the intersection. Whether she exercised the requisite care under the conditions shown by the evidence was for the jury. As has been noted, there is substantial evidence to support its verdict.

Plaintiff claims that the court erred in refusing to give certain instructions she requested. The first relates to section 529 (b) of the Vehicle Code, which provides:

[8] "The driver of a motor vehicle may overtake and pass another vehicle upon the right only under conditions permitting such movement in safety. In no event shall such movement be made by driving off *the paved or main traveled portion of the roadway*." (Emphasis added.) The court read only the first sentence thereof. Plaintiff assigns as error the court's omission of the second sentence. The part deleted did not apply to the facts adduced. The evidence showed that the road area upon which defendant was driving was both paved and traveled on, and at no time did he drive off such portion of the roadway while overtaking or passing another vehicle.

[9] Plaintiff complains of the refusal to give the following instruction (sec. 526, Vehicle Code): "Whenever any roadway has been divided into three or more clearly marked lanes for traffic, the following rules in addition to all others consistent herewith shall apply: (a) A vehicle shall be driven as nearly as practical entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety." It will be observed that this section applies where a roadway "has been divided into three or more clearly marked lanes for traffic". Exhibit 1 shows that there was only one highway lane marked west of the traffic barrier on the southbound side of Lakewood Boulevard. Nonetheless, the rule announced in section 526 was amply covered by the court's instruction that "the driver of a motor vehicle may overtake and pass another upon the right only under conditions permitting such movements in safety" and its further instruction that "no person shall turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety." The essence of plaintiff's instructions having been incorporated in these instructions, no prejudice attaches from the failure to give another instruction to the same effect couched in different language. *Duff v. Schaefer Ambulance Service, Inc.*, 132 Cal.App.2d 655, 679, 283 P.2d 91.

[10, 11] Equally without merit is the claim that the court's refusal to give plaintiff's instructions 38 to 41 was prejudicially erroneous. Instruction 38 reads: "Whenever a driver of a motor vehicle observes that vehicles traveling in the same direction as he is have stopped at an intersection, such driver of a motor vehicle shall not overtake and pass the vehicle stopped at the intersection." This is clearly an erroneous statement of the law. Taken literally, this instruction would tell the jury that even if a vehicle was stopped at an intersection because of motor trouble, it could not be overtaken and passed, which is preposterous on its face. Instruction 41 reads: "Whenever any vehicle has stopped at an intersection

to yield the right of way to another, the driver of any other vehicle approaching from the rear shall not overtake and pass such stopped vehicle." This is patently an incomplete, inaccurate and misleading statement, since it fails to take into consideration how close to the intersection the vehicle approaching from the rear may be. There exists no requirement of an absolute and unqualified duty not to pass such stopped vehicle, as the instruction suggests. On the contrary, as applicable to the facts of this case, section 551 states that the driver of a motor vehicle may overtake and pass a vehicle on the right on the type of street here involved if such movement can be done in safety. Since plaintiff's instruction purports to lay down a categorical rule nowhere to be found in the Vehicle Code and inconsistent with provisions thereof, it was properly refused.

[12-14] Instruction No. 40¹ was obnoxious as a formula instruction of the character frequently criticized by appellate courts and was properly refused. In *Taha v. Finegold*, 81 Cal.App.2d 536, 543, 184 P.2d 533, 536, the court stated: "Formula instructions should not be given. As said in *Tice v. Pacific Electric Ry. Co.*, 36 Cal.App.2d 66, 71, 96 P.2d 1022, 1024, 97 P.2d 844, formula instructions 'are not calculated best to serve most successfully administration of justice. Their final disappearance will improve the conduct of court trials.'" In an ordinary negligence action such as here confronts us, the basic question is whether or not the parties exercised the degree of care of a reasonably prudent man under similar circumstances and the jury was properly instructed on the principles of law applicable under the evidence to this phase of the case. It is improper to single out certain testimonial facts and instruct the jury that they spell negligence if a prudent man would not have so conducted himself. The vice in any

such instruction is that it unduly emphasizes one portion of the evidence, puts the court in the position of making an argument to the jury, and misleads the jury into thinking that because the court has specifically mentioned certain testimonial facts they are of undue importance or that the court believed them to be true. In *re Estate of Clark*, 180 Cal. 395, 398-399, 181 P. 639; *Kalfus v. Frazee*, 136 Cal.App.2d 415, 288 P.2d 967; *Roy v. Mission Taxi Co.*, 101 Cal.App.2d 438, 446, 225 P.2d 920; *Hamlet v. Hook*, 106 Cal.App.2d 791, 795, 236 P.2d 196. Instruction No. 39 was likewise vulnerable to the criticism last stated, as an attempt to push out and stress specific parts of the evidence in violation of the established rules that instructions should not focus the jury's attention on particular items of evidence and that it is proper to reject instructions which overemphasize and make unduly prominent selected portions of the evidence. *Kalfus v. Frazee*, supra; *Dodge v. San Diego Electric Ry. Co.*, 92 Cal.App.2d 759, 764, 208 P.2d 37; *Davis v. City and County of San Francisco*, 45 Cal. App.2d 443, 446, 114 P.2d 359.

The court failed to give the following instructions requested by plaintiff:

[15] (1) "A driver of a motor vehicle who is obeying the law has a right to presume that other persons operating motor vehicles upon the highway will perform their duty and obey the law, and a failure to anticipate negligence or violation of law on the part of others is not an act of contributory negligence." Plaintiff's complaint on this score is captious since this was clearly covered by the giving of BAJI No. 138, which reads in part: "A person who, himself, or herself, is exercising ordinary care has a right to assume that others, too, will perform their duty under the law, and he or she has a further right to rely and act on that assumption. Thus it is not negligence

1. Instruction No. 40 reads: "In determining the question of whether or not the defendant was negligent in colliding with the plaintiff's automobile you should take into consideration whether a reasonable and prudent person would have entered the intersection involved herein, pass two lanes of traffic which had stopped to per-

mit the plaintiff to make her left-hand turn. In the event you find that a reasonable and prudent person would not have over-taken and passed the two lanes of stopped traffic under the circumstances then and there existing, then you must find that the defendant was negligent."

for such a person to fail to anticipate injury which can come to him or her only from a violation of law or duty by another."

[16] (2) "A motorist having a right of way at an intersection has a right to proceed and to assume that the driver of any vehicle approaching will decrease its speed if necessary to yield to her such right of way." This instruction was covered in substance by BAJI No. 138, previously quoted, and by the reading of section 551(b) of the Vehicle Code, which sets out the duty of the driver of an approaching vehicle to yield the right of way to a left-turning vehicle. Plaintiff was not entitled to another instruction to the same general effect in different language. *Duff v. Schaefer Ambulance Service, Inc.*, 132 Cal.App.2d 655, 679, 283 P.2d 91. Although the court did not phrase its instruction in the terms employed by plaintiff, in our opinion it sufficiently informed the jury of defendant's statutory obligation with respect to a left-turning driver having the right of way.

[17] (3) "The plaintiff in making a left-hand turn at the intersection involved herein is not required to be certain of absolute safety before she turns and proceeds, she must use only such care as would be exercised by a reasonable and prudent person under similar circumstances." There was no necessity to give this instruction since the subject was adequately covered in the following instruction which the court gave on its own motion: "The words just quoted from the Vehicle Code, namely, that 'no person shall turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety,' do not mean that the driver of a motor vehicle, before making such a turn, must know that there is absolutely no possibility of accident. They mean that before starting to turn a vehicle on a public highway, and while making the turn, the driver of the vehicle must use such precaution as would satisfy a reasonably prudent person, acting under similar circumstances, that the turn can be made safely." This clearly told the jury plaintiff was only required to use reasonable care in making her left turn.

[13] Plaintiff contends the court erred in giving at defendant's request an instruction on unavoidable accident, asserting there was no evidence to indicate the accident happened due to anything the driver could not control. That this contention cannot be maintained where it is a jury question whether defendant was negligent and whether such negligence was a proximate cause of the accident is well established. *Carroll v. Beavers*, 126 Cal.App.2d 828, 839, 273 P.2d 56; *Parker v. Womack*, 37 Cal.2d 116, 121-122, 230 P.2d 823; *Sherrillo v. Stone & Webster Engineering Corp.*, 110 Cal.App.2d 785, 791, 244 P.2d 70. The court was careful to obviate any misconception by clarifying the availability of this theory by instructing as follows: "Bearing in mind, however, that if the defendant or cross-defendant failed to exercise ordinary care, and if that failure was the proximate cause of the accident in question, then, whether or not such conduct was the sole cause, the accident was not unavoidable and the defense of unavoidability may not be maintained by the defendant or cross-defendant."

[19] The court gave the jury the standard instruction on imminent peril requested by defendant (BAJI 137), modified only by use of both the masculine and feminine of the third person singular pronoun, to make it applicable to both plaintiff and defendant. Plaintiff assigns error, contending there was no evidence to support such an instruction. Defendant testified plaintiff's car loomed up in front of him suddenly when he was about three car-lengths north of the front car stopped in lane 2 and that he immediately applied his brakes as hard as he could. It is clear that it was defendant's theory that he was unexpectedly confronted with a dangerous situation when plaintiff suddenly appeared from in front of a stopped car. In this state of the evidence, an instruction on the doctrine of sudden peril was proper. *Fischer v. Keen*, 43 Cal. App.2d 244, 251, 110 P.2d 693, and cases there cited. In addition, the instruction could not have prejudiced plaintiff because it begins with the words: "A person who, *without negligence on his part*, is suddenly and unexpectedly confronted with peril

* * *” (Emphasis added.) Defendant could benefit from such instruction only if his conduct at the time in question was not negligent. If defendant was negligent, the instruction would be inapplicable and could have done no harm. *Folger v. Richfield Oil Corp.*, 80 Cal.App.2d 655, 665, 182 P.2d 337; *Koon v. Sher*, 98 Cal.App.2d 530, 533, 220 P.2d 784.

[20] Plaintiff challenges the giving of BAJI 140.² The instruction is merely a commonplace observation, a truism within the ken of anyone qualified to serve as a juror. By its own phraseology, the instruction is applicable where there is “evidence to the effect that one did look, but did not see what was in plain sight.” At one point in her cross-examination, plaintiff testified that “as I went by lane 3, I glanced at the lane 3 as I went by it.” In answer to the next question, she stated: “I didn’t see anyone in that lane.” Since defendant’s car collided with her almost immediately thereafter, there was evidence from which the jury might infer either that had plaintiff actually been looking, defendant’s vehicle would have been visible to her or that she was negligently inattentive. The instruction was responsive to the evidence in the case, to the issues tendered, and was correctly given. *Rednall v. Thompson*, 108 Cal.App.2d 662, 666–667, 239 P.2d 693; *Berlin v. Violet*, 129 Cal.App. 337, 340, 18 P.2d 737.

[21–23] Finally, plaintiff attacks the instruction embodying section 544(a) and (b) of the Vehicle Code. Section 544(a) was necessarily given by the court to intelligently orient the jury on the responsibility of a

driver executing a turning maneuver on a roadway. It was properly qualified by BAJI 142, to which reference has previously been made. Plaintiff urges that the reading of 544(b) pertaining to a signal of intention to turn was erroneous since it could in no way have been applicable to the accident here involved. While plaintiff’s position seems to be well taken in this regard, we do not believe this single error resulted in any prejudice. In *Klinefelter v. Machen*, 100 Cal.App.2d 812, 814, 224 P.2d 877, 878, where a similar argument was made with respect to section 544(b), the court stated: “While to avoid any controversy that portion of the code section pertaining to signals might have been, and possibly should have been omitted, in view of section 4½ of Article VI of the Constitution, we cannot say that the reading of the whole code section resulted in a miscarriage of justice.” This statement applies with equal validity to the instant case. It is elementary that a reversal is not warranted unless it appears probable that a different result would have obtained but for the giving of the inapplicable instruction. *Crooks v. White*, 107 Cal.App. 304, 312, 290 P. 497; *Neilson v. Walker*, 105 Cal.App. 23, 27, 286 P. 1091; *Lewis v. Western Truck Line*, 44 Cal.App.2d 455, 468, 112 P.2d 747. We are satisfied that the error here was inconsequential and had no bearing on the ultimate outcome. Under such circumstances the judgment may not be disturbed.

The judgment is affirmed.

MOORE, P. J., and ASHBURN, J., concur.

2. BAJI No. 140 reads: “General human experience justifies the inference that when one looks in the direction of an object clearly visible, he or she sees it, and that when he or she listens, he or she hears that which is clearly audible. When there is evidence to the effect that

one did look, but did not see that which was in plain sight, or that he or she listened, but did not hear that which he or she could have heard in the exercise of ordinary care, it follows that either some part of such evidence is untrue or the person was negligently inattentive.”

139 Cal.App.2d 561

WELLS FARGO BANK & UNION TRUST CO., Special Administrator of the Estate of Elizabeth Petzold, Deceased, Plaintiff and Respondent,

v.

H. J. "Jack" DOWD, Dorothy Taylor Dowd, Harriet Bradford, Joseph M. Dowd, Laur-etta Dowd et al., Defendants and Appellants.

Civ. 16484.

District Court of Appeal, First District, Division 2, California.

Feb. 29, 1956.

Hearing Denied April 25, 1956.

Principal brought action against real estate broker and his agents to recover property and monies allegedly received by them through alleged fraudulent transactions. The Superior Court, City and County of San Francisco, Clarence W. Morris, J., entered judgment adverse to broker and his agents, and they appealed. The District Court of Appeal, Kaufman, J., held that evidence sustained the decision, but that award of damages should be reduced.

Judgment affirmed as modified.

1. Pleading Ⓒ291(2)

Where findings recited that motion of defendants to amend their answer to first amended complaint was allowed under the trial of the matter and was deemed denied by plaintiff under oath in the order allowing it, fact that no affidavit was filed by plaintiff as required by statute providing that when defense to an action is founded on a written instrument, genuineness and due execution are deemed admitted unless plaintiff files an affidavit denying genuineness and due execution within ten days and serves a copy on defendant, would not prevent plaintiff from questioning actual execution of release and genuineness of signature on release. West's Ann.Code Civ.Proc. § 448.

2. Evidence Ⓒ589

Trial judge, who held court in hospital and took testimony of eighty-nine year old plaintiff, could decide what part of plaintiff's testimony, if any, was worthy of belief,

and he could accept it in part and reject it in part.

3. Evidence Ⓒ589

Where eighty-nine year old plaintiff was tired and confused when trial judge held court in hospital and took plaintiff's testimony, trial judge could believe that plaintiff's testimony favorable to defendants was the product of inadvertence or mistake.

4. Brokers Ⓒ38(4)

Principal and Agent Ⓒ190(3)

In action by principal against real estate broker and his agents to recover property and monies allegedly received by them through alleged fraudulent transactions, evidence sustained the decision in favor of principal.

5. Brokers Ⓒ19

The relationship between a broker and his principal is fiduciary in nature and imposes upon the broker the duty of acting in the highest good faith toward the principal.

6. Brokers Ⓒ31

A broker cannot sell to or purchase from his principal without the knowledge and assent of the principal, and, if the broker does so, transaction may be set aside at principal's option.

7. Brokers Ⓒ31

A broker is liable to his principal for all secret profits secured in a sale to or purchase from his principal without the knowledge and assent of the principal.

8. Brokers Ⓒ38(4)

In action by principal against real estate broker and his agents to recover property and monies allegedly received by them through alleged fraudulent transactions, evidence sustained finding that representations of the broker were false, were made with intent to deceive and defraud principal, and that principal relied on the representations and had no knowledge of the true facts.

9. Principal and Agent Ⓒ190(3)

In action by principal against real estate broker and his agents to recover prop-

erty and monies allegedly received by them through alleged fraudulent transactions, evidence sustained finding that when broker's agents allegedly converted the property of the broker's principal, they were acting as agents of the broker and as fiduciaries of broker's principal.

10. Principal and Agent ⇨159(2)

An agent is guilty of conversion, even if he acts in good faith and in accord with his instructions, if his principal is guilty of conversion.

11. Principal and Agent ⇨158

In action by principal against real estate broker and his agents to recover property and monies allegedly received by them through alleged fraudulent transactions, judgment against broker was not subject to reduction because of any benefit his agents may have received from alleged conversions of principal's property, since one is liable for his agent's fraud, even if he receives no benefit therefrom.

12. Principal and Agent ⇨158

Where an agent knowingly participates with his principal in a transaction which is fraudulent, he is equally responsible with the principal for a return of the money.

13. Brokers ⇨38(1)

Principal and Agent ⇨184(1)

In action by principal against real estate broker and his agents to recover property and monies allegedly received by them through alleged fraudulent transactions, principal was entitled to recover against such defendants as were proved to have united with each other in causing the principal's loss.

14. Evidence ⇨571(1)

In action by principal against real estate broker and his agents to recover property and monies allegedly received by them through alleged fraudulent transactions, trial judge's award of damages was not improper on ground that it was in accordance with the speculation of certified public accountant, who was called as a witness by principal, where accountant at no time rendered an opinion on values but merely supplied mathematical calculations.

15. Brokers ⇨38(7)

Principal and Agent ⇨190(3)

In action by principal against real estate broker and his agents to recover property and monies allegedly received by them through alleged fraudulent transactions, evidence established that principal was entitled to recover damages in the sum of only \$105,772.68, rather than in the sum of \$145,018.08 awarded by trial judge.

16. Brokers ⇨31

Where secret profits are made by a real estate broker in real estate transactions without disclosing to principal that broker is buying the realty for himself, the broker is liable to the principal for all secret profits realized.

17. Brokers ⇨38(4)

Principal and Agent ⇨190(3)

In action by principal against real estate broker and his agents to recover property and monies allegedly received by them through alleged fraudulent transactions, evidence sustained trial judge's findings as to monies collected by broker and his agents and not paid over to principal and as to unauthorized withdrawals from principal's bank account.

18. Pleading ⇨87

Laches is an affirmative defense, and one, who relies on such defense, must plead facts constituting laches.

19. Brokers ⇨38(4)

Principal and Agent ⇨190(3)

As respects charge that principal was guilty of laches in bringing action against first real estate broker and his agents to recover property and monies allegedly received by them through alleged fraudulent transactions, fact that principal suspected another broker of dishonest dealings, did not compel inference that principal should have suspected first broker and should have begun an investigation of his dealings with her.

20. Trial ⇨29(4)

In action by principal against real estate broker and his agents to recover property and monies allegedly received by them through alleged fraudulent transactions, record failed to establish that trial judge

pre-judged the case and deprived broker and his agents of a fair trial.

21. Continuance ⇨31

Where counsel for defendants was present at preliminary hearing in municipal court when handwriting expert, who testified for plaintiff at the trial, testified that certain documents were not signed by plaintiff, trial judge did not abuse his discretion in refusing a continuance when defendants contended that they needed more time on ground that charge of forgery made at the trial could not have been anticipated because it was not raised in the pleadings.

22. Evidence ⇨177

In action by principal against real estate broker and his agents to recover property and monies allegedly received by them through alleged fraudulent transactions, trial judge did not err in permitting schedules of accountant, who testified for principal, to be introduced in evidence, where the trial judge clearly indicated that he would not be bound by the schedules.

23. Witnesses ⇨372(2)

In action by principal against real estate broker and his agents to recover property and monies allegedly received by them through alleged fraudulent transactions, trial judge did not err in sustaining objection to question asked by broker and his agents of witness for purpose of showing that witness made a profit in selling a note to principal, where witness' conduct was clearly not an issue in the case.

24. Appeal and Error ⇨1052(1)

Where no finding was based on testimony to which objection was made, alleged error in overruling the objection was not prejudicial error.

MacInnis, Alaga & Glassman, James Martin MacInnis, San Francisco, for appellants.

Ruth Cessna, Leslie Lubliner, San Francisco, for respondent.

KAUFMAN, Justice.

This is an appeal from a judgment of the Superior Court in and for the County of

San Francisco, in favor of plaintiffs and respondents in an action brought against a real estate broker and the other defendants as his agents, to recover certain real and personal property, and monies, allegedly received by them through fraudulent transactions. Elizabeth Petzold, the original plaintiff, died shortly after the judgment was entered and Wells Fargo Bank & Union Trust Co., as Special Administrator of her estate, was substituted as plaintiff. Judgment was rendered against appellant H. J. Dowd in the sum of \$223,602.02; against his wife Dorothy Taylor Dowd for \$201,799.49; against Dowd's sister Harriet Bradford, for \$149,014.08; and against Joseph Dowd and Lauretta Dowd, his wife, each in the sum of \$145,018.08. It was ordered that any and all payments made by any defendants be credited against the total judgment in favor of each of the other defendants. The property in the hands of the receiver was declared the property of plaintiff, and the defendants were to be given credit on the judgment to the extent of the actual value of said property.

The first amended complaint herein alleged that at all times mentioned therein, H. J. Dowd was a real estate broker acting in the capacity of broker, agent and fiduciary of plaintiff, Elizabeth Petzold, that Dorothy Taylor was associated with him and acted as his agent, and that J. M. Dowd, Lauretta Dowd and Harriet Bradford were relatives of H. J. Dowd and were acting as his agents. It was alleged that plaintiff owned real property of the approximate value of \$150,000, and deeds of trust of an approximate face value of \$150,000, that she was of great age, and during the period of 1946-1952 particularly, when she was hospitalized for long periods and unable to conduct her own affairs, she relied exclusively upon H. J. Dowd, for the management and control of her properties and finances. Such reliance was alleged to have been induced by his representations that he was able and experienced in real estate matters and would do only those things which would benefit her holdings. In September, 1952, an investigation of plaintiff's accounts revealed that she then owned but one parcel of real property of an approxi-

mate value of \$7,500, no deeds of trust, and a total of \$15,118.43 cash in bank deposits. The complaint charged Dowd with selling parcels of her realty on his own account secretly through the use of fictitious names or "dummies", to her damage in the sum of \$100,000; that he transferred all her deeds of trust secretly to his own account and those of his agents, and failed to pay over the monies received, except in the amount of \$9,500, resulting in a loss of approximately \$175,000. Rents and payments on deeds of trust which he failed to pay over to plaintiff were alleged to amount to the sum of \$50,000. The complaint recited that upon a prior contested hearing a receiver had been appointed, who had in his hands deeds of trust of the approximate value of \$60,000 together with \$25,000 cash.

Elizabeth Petzold was at the time of trial approximately 89 years of age. She had, through dealings in second mortgages, accumulated a considerable fortune, which in 1946 was estimated to have been of a value of approximately \$235,000. Her most recent husband was Julian Sanchez, a real estate salesman, some 40 to 45 years her junior, whom she had married on April 25, 1951. They were still married at the time of trial, but were separated for some time prior thereto. Sanchez, a witness at the trial, had been in partnership with H. J. Dowd in the Acme Realty Company, established in San Francisco in August of 1950. Dowd and Sanchez each had a 45% share of the profits, while Dorothy Taylor, a real estate broker, who appears later herein as Mrs. H. J. Dowd, received the remaining 10%. In 1950 Mrs. Petzold was confined to San Francisco Hospital with a broken hip for several months. Defendant's witness Sanchez stated that she was registered there as Elizabeth Seegos, Seegos being the name of a predeceased husband.

Until about five years prior to this action, Mrs. Petzold dealt with four real estate brokers, one of whom was H. J. Dowd. Each of these brokers, including Dowd, had never known her to sell a mortgage note or deed of trust prior to the transactions herein involved. Each of these brokers, with the exception of Dowd, had ceased doing business with her before January 1,

1951. Dowd had prepared Mrs. Petzold's income tax returns for the years 1945 to 1951, inclusive. Mrs. Petzold's husband, Sanchez, testified that he had never had any business dealings with his wife, had never discussed any business transactions with her. She had not discussed with him the matter of getting rid of all her properties in August of 1951 and he claimed to know nothing of an agreement made on August 16 of that year by which Mrs. Petzold disposed of practically all of her property. They were still living together at that time.

The trial of the action was by the court without a jury. The largest single transaction was the purported purchase on August 16, 1951, of approximately seventy-eight of Mrs. Petzold's notes secured by deeds of trust and an equity in a piece of real property. By this agreement Elizabeth Petzold was supposed to have transferred her second mortgage accounts, with a face value of approximately \$107,000 for a consideration of \$34,500. Some days prior to the agreement of August 16, 1951, H. J. Dowd and Dorothy Taylor arranged with the San Francisco Bank, Mission and 21st Street Branch, to take over Elizabeth Petzold's notes for collection which were then being collected by Dowd's office. The bank agreed to take them, and Dowd and Miss Taylor were given signature cards to be signed by Mrs. Petzold and returned to the bank. Later, H. J. Dowd drove Mrs. Petzold to the bank, and she remained in the car. Dowd returned the signed cards to the bank. He and William Bloom, an officer of the bank who knew Mrs. Petzold, then came out to the automobile. Bloom advised her that there would be a charge of \$1 for setting up each collection card, and a 25 cent charge for each monthly payment collected. She protested that she would not pay the collection charge, and Dowd said, "Don't worry, it has all been taken care of." The banker did not see her sign any of the cards, and did not ask her if she had signed them. Handwriting experts testified that the purported signature on each of these cards was simulated, and was not the signature of Elizabeth Petzold. On August 13, 1951, a letter was addressed to Herbert Eling, a broker who

still had five or six of her notes in his office, to turn them over to her, that she was placing them with the bank for collection. Her signature on this letter was also characterized as a forgery by the experts.

On August 17, 1951, Dorothy Taylor presented a purported authorization to the bank directing it to turn over all of the Petzold collection accounts to H. J. Dowd and Dorothy Taylor. The plaintiff's handwriting experts characterized Elizabeth Petzold's signature on this letter as a forgery.

On August 16, 1951, a contract was purportedly executed between appellant Harriet Bradford, sister of H. J. Dowd and Elizabeth Petzold under the terms of which Mrs. Bradford was to purchase all of the notes stipulated to have a face value of \$107,000 for \$34,500. Mrs. Bradford admitted that she had no interest in the transaction, and was a dummy for H. J. Dowd and Dorothy Taylor. The deeds of trust securing the notes were assigned to Mrs. Bradford and recorded. The handwriting experts for respondent testified that the signatures of Elizabeth Petzold on the contract and the assignments were all forgeries. The trial court found, and this finding was not objected to, that respondent did not execute the purported contract nor any of the assignments, nor did she have knowledge thereof.

On August 17, 1951, H. Bradford executed a contract providing for a sale of all the notes involved in the prior purported contract for \$34,000. It provided for payment of \$25,000 in cash, the balance of \$9,500 to be paid in 60 days. Both Mrs. Bradford and Dowd admitted that this was a sham agreement. A check for \$25,000 was made out by Dorothy Taylor to the order of Elizabeth Petzold, but was never negotiated. Mrs. Petzold's endorsement was found by respondent's handwriting expert Morrill to be a forgery. Miss Taylor explained that she held the \$25,000 check as a receipt. Some days later she drew two checks of \$12,500 each, to a Betty Wald. Respondent denied having received the checks or having endorsed the name of Betty Wald thereon.

Shortly thereafter, H. J. Dowd opened two accounts, one in the California Savings and Loan Company and another in the Citizens Federal Savings Association. These accounts were in the names of Betty Wald and H. L. Ford in joint tenancy with right of survivorship. H. J. Dowd admitted that he was H. L. Ford, and the bank's representatives testified that the passbooks were mailed to 1224, 16th Avenue, San Francisco, the address of Dorothy Taylor. These bank employees had never seen Elizabeth Petzold nor a Betty Wald, nor had they been advised that Elizabeth Petzold was the owner of the accounts.

Appellant J. M. Dowd testified that he had purchased \$20,000 worth of notes for \$10,000 and that the \$10,000 was in the form of currency and cashier's checks which he kept hidden in a cupboard behind the stove in the kitchen of his home. The income tax report of J. M. Dowd and his wife, Lauretta, also an appellant herein, shows that he listed on said return the income from all of the notes involved in the August 16th contract as their income.

There was listed in addition to the notes on the appendix to the purported agreement of August 16, 1951, the equity in real property at 503 Alvarado Street, Brisbane, California. The value of this property was stipulated to be \$3,996.

The trial court found that respondent did not execute the Uniform Agreement of Sale of August 16, 1951 covering the notes which were set forth in Schedule A of the Findings; that she did not execute or acknowledge the signatures on the assignment covering said notes and deeds of trust set forth in that schedule; that appellants and each of them without respondent's knowledge or consent, conveyed these notes and deeds of trust to themselves and converted them to their own use, and that the actual value thereof was \$145,018.08, and that the actual value of the equity in 503 Alvarado Street, Brisbane, found to have been converted by H. Bradford, H. J. Dowd and Dorothy Taylor, was \$3,996.

On November 29, 1950, appellants H. J. Dowd and Dorothy Taylor, acting under the name of Acme Realty Company, pur-

portedly made an agreement with Mrs. Petzold for the exchange of six notes secured by deeds of trust for five notes similarly secured, purportedly owned by said realty company. These six notes obtained by appellants were sold within a few months for their face value. Mrs. Petzold received notes in exchange of a face value of \$10,142.40, on which she received but \$74.90 in principal and \$183 in interest up to the time of the transaction of August 16, 1951, when all her notes were acquired by appellants. Handwriting expert Conway found Elizabeth Petzold's signature to this agreement had been forged. The trial court found that respondent did not execute the agreement and that her loss therefrom was \$8,295.45.

It was also found from a review of the dealings of the parties from 1946 to 1952, that H. J. Dowd and Dorothy Taylor collected sums of money for respondent's account which were not turned over to her, in a total amount of \$7,379.76.

In 1946, H. J. Dowd, while acting as agent and broker for Mrs. Petzold, negotiated the sale of her apartment house at 1337 Myrtle Street, Oakland, which respondent had bought in 1920 for \$20,000, to a Joseph Risher for the sum of \$14,000. Risher was a real estate salesman then in Dowd's employ. Dowd was to receive a commission of \$500 for the transaction. He held the property for about 18 months, spent substantial sums on it for improvements and sold it for \$25,000. The purchaser gave back a second deed of trust for about \$8,000 which Dowd sold to Mrs. Petzold for \$7,470.22. Dowd collected the rents from the property during the period which he held it. The court found that Dowd had purchased the property without the consent of respondent for his own account, and had realized a secret profit in the sum of \$21,802.53.

In September, 1950, Mrs. Petzold had purchased a piece of real property at 38 Ellert Street, San Francisco, from the Acme Realty Company for \$6,500, making a cash payment of \$900. Dowd negotiated a loan for her, and respondent assumed an existing loan of \$1,800. H. J. Dowd then sold the property, acting as broker, to Keohane, for the sum of \$7,950. H. J. Dowd and

Dorothy Taylor retained the profit on the transaction, and respondent received a note secured by third deed of trust for \$1,000. The court found that appellants H. J. Dowd and Dorothy Taylor, had made a secret profit on this transaction of \$1,162.50.

Mrs. Petzold owned two notes of the value of \$3,253 and \$1397 secured by deeds of trust on real property at 50 B Manchester Street, San Francisco. These were purportedly assigned to Patricia Anstey, sister of Dorothy Taylor. H. J. Dowd and Dorothy Taylor used the name Anstey as an alias. They exchanged for respondent's notes a note purportedly executed by Elizabeth Curtin, another alias used by these appellants. Nothing was paid on the Curtin note, and respondent's two notes were sold by appellants. The trial court found that respondent had not acknowledged or delivered these assignments of May 14, 1951, and that said appellant on that date without the knowledge or consent of respondent, conveyed to themselves and converted to their own use said notes and deeds of trust of the value of \$4,069.75.

Finally, it was found that from August 1, 1949, to and including August, 1951, there were numerous unauthorized withdrawals from respondent's savings account in the American Trust Company, 22nd and Mission Street Branch, and the San Francisco Bank, 21st and Mission Street Branch. These withdrawals were accomplished through withdrawal slips bearing the forged signature of Elizabeth Petzold. A cashier's check in each amount had been drawn to the order of Elizabeth Petzold. There was testimony that her endorsement on each cashier's check was found to have been forged. The exact amount of these withdrawals was found to have been deposited by Dorothy Taylor in her own account. These withdrawals amounted to the sum of \$20,036.35.

The trial court found that respondent was entitled to the return of the specific property described in paragraphs XIII, XIV, XV and XIX of the Findings, and that whatever property should be so returned, would be credited at its face value as of June 15, 1953, against the judgment. The above paragraphs of the Findings relate to

the major transaction of August 16, 1951, the exchange of notes on November 29, 1950, and the unauthorized assignment of the notes and deeds of trust on the Manchester Street property, all discussed above. It was further found that H. J. Dowd and Dorothy Taylor had not made a secret profit on a transaction concerned with property at 130 Lakeview Street, San Francisco; that the sum of \$8,253.44 was properly spent by respondent in tracing her property; and finally, that H. J. Dowd while acting as broker or fiduciary of respondent, removed from her home all of her records, books, papers and documents relating to her property, real and personal, and has continuously since September 1952, refused to return them, and that she is entitled to the return thereof.

[1] Appellants contend that the evidence was not only insufficient to support the court's decision, but was inconsistent with such decision. They assert that the testimony of respondent herself repudiated the charge of forgery upon which her handwriting experts had given opinion evidence. The court rejected a written release dated February 24, 1951, by which Elizabeth Petzold purportedly released appellants from all liability up to that date. This document was introduced in evidence as plaintiff's exhibit 106 when H. J. Dowd was being examined under Section 2055, Code of Civil Procedure. Respondent's handwriting expert stated that the signature thereon was a forgery. Although this release was dated prior to the August 16th transaction, and could not therefore bar respondent's claim in relation thereto, if genuine it would have barred recovery on earlier transactions included in the judgment. Appellants maintain that Section 448, Code of Civil Procedure, is mandatory, and since no affidavit was filed as required by the code section, respondent may not question the actual execution of the document and the genuineness of the signature. That section requires that when the defense to an action is founded on a written instrument, the genuineness and due execution are deemed admitted unless plaintiff files an affidavit denying same within ten days and serves a copy upon defendant.

However, the Findings herein recite that appellants' motion to amend their answer to the first amended complaint was "allowed under the trial of the matter and was deemed denied by plaintiff under oath in the order allowing it." This is a complete answer to appellants' argument. The clerk's transcript, furthermore, shows that this amendment of appellants' answer was not verified until July 14, 1953, hence when respondent attacked the genuineness and due execution of the instrument through her handwriting expert, on trial at an earlier date, the motion to amend the answer had not yet been made.

Appellants assert that respondent's case was submitted without the production of Elizabeth Petzold as a witness in person or by reading a deposition. It is contended that when she did testify, having been called by appellants under Section 2055, Code of Civil Procedure, her answers destroyed the foundation of her claim. Appellants without specific transcript reference (the transcript is 2,043 pages in length) state that Elizabeth Petzold remembered the contract of August 16, 1951 and recognized her own signature upon it; she stated her recognition of literally all of the signatures upon the 57 San Francisco Bank collection cards; she recalled talking to H. J. Dowd about selling all her mortgages and said she thought his buyer was an eastern syndicate named "Bradford"; she remembered an offer of \$34,500; she said that she had wished the money from this transaction to be deposited under the fictitious name of "Betty Wald" (a contraction of her maiden name of Betty Maywald) because she didn't want other persons, particularly her husband, to find out what she was doing. In addition to this, the banker, William Bloom, identified the signatures as genuine, and had discussed with Mrs. Petzold the opening of the collection accounts with her on the day that the cards were delivered by Dowd. Appellants maintain that respondent is bound by her own testimony, that it is testimony as to fact, whereas the testimony of her handwriting experts is mere opinion evidence.

In the deposition taken in December, 1952, Mrs. Petzold denied ever hearing of

the accounts in the names of Betty Wald and Ford, and denied ever depositing money in those names. She said she never used the name of Wald. She denied receiving a note for \$9,500 signed by H. Bradford, but thought that Dorothy Taylor had deposited that sum in the Haight Street Branch of San Francisco Bank for her as part of what Dowd and Dorothy Taylor owed her. Mrs. Petzold estimated that they owed her about \$75,000. She said that Dowd was her general manager, that she told him everything. She denied that she signed any papers by which she sold any notes and deeds of trust. She states that money stopped coming in from her notes and deeds of trust because of Dowd. She said that she guessed that he had sold them to an Eastern syndicate. She did not understand that Dowd was buying her property, but had discussed with him a sale to the eastern syndicate for a price close to \$100,000, then later a price of \$75,000. Still later Dowd said that they didn't have the money and she would have to take it on terms, whereupon the deal blew up. Mrs. Petzold when confronted with the survivorship agreement of August 25, 1951, in the names of Ford and Wald, said that the writing did not look like hers.

Because of Mrs. Petzold's physical condition, appellants had been restrained by court order from serving process upon Mrs. Petzold. The trial judge had assured the parties that if it were necessary to take her testimony he would go out to the hospital and hold court there. At appellants' request that was done. At the first hearing at the hospital Mrs. Petzold admitted that she had filed suit against Jack Dowd and the other defendants. She stated that for the three years preceding October 1952, Dowd had been her exclusive agent, and her exclusive agent part of the time since September 1945.

Counsel for respondent showed Mrs. Petzold the agreement of August 16, 1951, and asked her if the signature upon it was hers. She answered, "yes". She admitted also that it was her signature upon a Uniform Agreement of Sale and Deposit Receipt, dated July 11, 1951, which was between her and H. Bradford, but said "That is my signature, but Bradford, I never had

any business with him." She testified in like manner about a similar exhibit (Ex. 61).

Mrs. Petzold was questioned in regard to her purported signatures on numerous documents. In regard to Exhibit AA, she said, "It looks like it; I don't know, I couldn't swear to it." As to the signature Betty Wald on Exhibit I, she stated that it was not her writing. She answered "No" as to the signature on Exhibit L, a withdrawal receipt. She said she couldn't recognize as hers the endorsement on some of a series of cashier's checks, as to some she said, "No", to others that they looked like hers. One time she answered "I guess so"; another time, "Doesn't look like it". At one point she said "No, but I will accept it; anything is good enough, I don't care." The court then said: "No, that isn't the point, and she replied 'I'm so tired of it, Judge.'" The court told her to say she wasn't certain when she wasn't positive, and she said "Let's get through, Judge."

When Mrs. Petzold was examined in regard to the signatures on the 58 collection cards for the San Francisco Bank which authorized that bank to make collections on her notes she said that some bore her signature, that as to some she wasn't sure, and that others were not her signature.

In one of the hearings at the hospital she was asked if she hadn't agreed to sell all she had for \$34,500, and answered: "Well, I guess if the paper says so, it's so. I just don't remember every detail of it." She also admitted that "Betty Wald" was a nickname for her maiden name of Betty Maywald. Counsel for appellants said "So this money was to be placed in the savings and loan association in the name of 'Betty Wald', isn't that correct." She answered, "Yes".

[2] From the preceding review of plaintiff's testimony it can be seen that much of it was contradictory, that at times as fatigue set in the witness was ready to accept any signature as hers in order to escape further questioning. The trial judge was certainly better able to pass on her credibility than is this court, and it was for him to decide what part of her testimony,

if any, was worthy of belief. That he could accept it in part, and reject it in part, is certainly well established.

[3] Appellants say that the rule is well settled that a party is concluded by his own testimony which is favorable to the adverse party, citing *Braselton v. Vokal*, 53 Cal.App. 582, 200 P. 670, and *Trombley v. Kolts*, 29 Cal.App.2d 699, 85 P.2d 541. The first was a case in which it was held that a party could not claim the benefit of a presumption that in the case of a written instrument consideration is presumed, when his own admission under oath showed that there was none. In the second case, it was said that a party may not for his own advantage say that his own testimony is false and that of an opposing witness true. In the instant case, however, the handwriting experts who branded all of the questioned signatures of plaintiff as forgeries, were plaintiff's own witnesses, and not opposing witnesses. *Ringo v. Johnson*, 99 Cal.App.2d 124, 221 P.2d 267, 271, cited by appellants, is a case upholding the granting of a nonsuit. It holds that the presumption of due care in plaintiff's favor is dispelled by his own testimony which is directly contradictory to it "under circumstances which afford no indication that the testimony is the product of mistake or inadvertence". The physical condition of the plaintiff in the instant case was such that the trial judge could believe that much of her testimony was the product of inadvertence or mistake. She at times confessed to being tired and confused.

[4] In *Keyser v. San Diego Electric R. Co.*, 16 Cal.App.2d 48, 51, 60 P.2d 136, 138, it is said that "The usual rule is that the jury may believe a part of a witness' testimony and disbelieve other parts. Usually this rule must apply to any discrepancies between his testimony on the stand and other statements he may have made, unless it clearly appears that he is not to be believed at all. It has recently been held that a conflict between the testimony of a witness and statements he had previously made in a deposition presented a question of fact for the jury. [Citations.]" In the cited case plaintiff had made an admission against his interest at the time of the accident. His

testimony at the trial conflicted with the admission. The court stated that because of the plaintiff's condition and suffering at the time of the accident it could be inferred that respondent was confused by his suffering and had not attempted to make a full and complete statement. We do not believe therefore, as contended by appellants, that the evidence in support of respondent's case conclusively established a defense thereto. See, *Meadows v. Emett and Chandler*, 86 Cal.App.2d 1, 193 P.2d 785.

While appellants state that Mrs. Petzold's testimony was evidence as to fact, while that of the handwriting experts was opinion testimony in regard to her signatures, this is really an argument as to the weight of the evidence. Furthermore it may be said that in numerous instances, Mrs. Petzold merely expressed an opinion as to whether or not it was her signature when she said, "It looks like mine" or "It could be", but stated that she had no memory of the transactions.

It is contended that the supposed fiduciary relationship between Mrs. Petzold and H. J. Dowd was not urged by her at all, and its existence was disproved by uncontradicted evidence. It cannot be questioned, however, that a fiduciary relationship is clearly alleged in the complaint. The record shows that by January 1951, the three other brokers who had previously done business with Mrs. Petzold, were no longer transacting business with her. Dowd had negotiated sales of all eight pieces of her real property for her. He had prepared her tax returns from 1945 to 1951. He and Dorothy Taylor had arranged for collection of all Mrs. Petzold's notes by the San Francisco Bank. They had negotiated the exchange of several of respondent's notes. Mrs. Petzold, it will be recalled, referred to Dowd as "my general manager."

[5-8] Appellants say that a real estate broker is not necessarily a fiduciary, citing instances when such an agent may act for both buyer and seller at the same time, and where he may be principal as well as agent. But in such cases those facts are known to both parties. The rule is that "the re-

lationship between a broker and his principal is fiduciary in nature, and imposes upon the broker the duty of acting in the highest good faith toward the principal." 9 Cal.Jur.2d 199, Sec. 52. A broker cannot sell to nor purchase from his principal without the knowledge and assent of the principal, and if he does so it may be set aside at the principal's option. He is therefore liable to his principal for all secret profits secured in such transactions. See 9 Cal.Jur.2d 203-204, Secs. 54, 55; *Ratray v. Scudder*, 28 Cal.2d 214, 169 P.2d 371, 164 A.L.R. 1356. The trial court found that in each transaction herein, respondent dealt solely with H. J. Dowd, that his representations were false, made with intent to deceive and defraud plaintiff, and that she relied upon his statements and had no knowledge of the true facts. There is evidence to support this finding, and it is therefore immaterial that at other times she had done business with different brokers. H. J. Dowd admitted that by August 1951 he was handling collections on all Mrs. Petzold's notes except those in the hands of the broker Eling. These also were secured from Eling by a letter of authority bearing Elizabeth Petzold's signature, which signature respondent's experts stated was forged. Mrs. Petzold said that for three years prior to October 1952 she had done business exclusively with Dowd.

As to appellant H. Bradford, she is the record title holder of all deeds of trust owned by respondent on August 16, 1951, except those allegedly assigned by her to J. M. Dowd and his wife, Lauretta. Mrs. Bradford admitted that she allowed her name to be used although she had no interest in the transaction, and received for the use of her name \$750 plus \$97 per month from August, 1951 to November, 1952. It is clear from Mrs. Bradford's testimony that she knew the deal was a sham, that she did not expect to receive \$25,000 from her brother, J. M. Dowd, nor had she made any such agreement with him. J. M. Dowd and his wife are now the record title holders of several of respondent's deeds of trust, many of which they do not claim to own, although they reported the income on them as theirs in 1951.

There was abundant evidence that Dorothy Taylor, while she did not deal directly with Mrs. Petzold, was very active in most of the transactions here involved. It will be recalled that the sum of \$20,036.75, the amount of unauthorized withdrawals from respondent's savings accounts, corresponded to the deposits made in her own bank account.

[9-13] The complaint herein alleged that all of the other defendants were acting as agents of H. J. Dowd, the broker and fiduciary, in the transaction here involved. The trial court found that in each of the transactions on which the respective defendants were adjudged liable of conversion of respondent's property they were acting as the agents of appellant H. J. Dowd, and as fiduciary of plaintiff. The evidence amply sustains such findings. Appellants Bradford, J. M. Dowd and Lauretta Dowd cannot, therefore, complain of being held fully liable for the damages resulting to respondent from the transaction of August 16, 1951. An agent is guilty of conversion, even if he acts in good faith and in accord with his instructions, if his principal is guilty of conversion. *Weinberg v. Dayton Storage Co.*, 50 Cal.App. 2d 750, 756, 124 P.2d 155. And the judgment against H. J. Dowd is not subject to any reduction because of any benefit his agents may have received therefrom, for a principal is liable for his agent's fraud even if he receives no benefit therefrom. *Rutherford v. Rideout Bank*, 11 Cal.2d 479, 80 P.2d 978, 117 A.L.R. 383; 2 Cal.Jur.2d 846, sec. 152. Where an agent knowingly participates with his principal in a transaction which is fraudulent, he is equally responsible with the principal for a return of the money. *Stirnus v. Adams*, 50 Cal.App. 730, 734, 195 P. 955. Respondent is therefore entitled to recover against such appellants as have been proved to have united with each other in causing her loss. See, *Revert v. Hesse*, 184 Cal. 295, 193 P. 943; *Dandini v. Dandini*, 120 Cal.App.2d 211, 214, 260 P.2d 1033.

[14] Appellants claim that damages were awarded in accordance with the speculation of the expert witness, Joe

Baum, a certified public accountant who was called as a witness by respondent. Baum made certain calculations based on data supplied to him by counsel for respondent. Using these figures which had been introduced in evidence through testimony of witnesses and exhibits, as a base, he testified as to calculations made therefrom. Appellants say that Baum was not an expert in the field of real property value, or of losses in real property transactions. Furthermore, when an expert's opinion is based not upon his personal observations but upon findings of others, his *opinion* must be excluded. It must be observed that in the instant case, the accountant at no time rendered an *opinion* on values. He accepted as true, the basic figures given to him, and merely stated that, using accepted accounting procedures, certain mathematical results would follow. It was for the trial judge to pass on the validity of those basic figures. Baum used as the basis of his calculation in the note transaction of August 16, 1951, the notes listed as an appendix to that contract and calculated a "projection" taking into consideration the monthly payments of principal and interest that respondent would have received. The trial judge made it clear that the accountant was not figuring damages, but simply supplying mathematical calculations from August 16, 1951 to June 15, 1953, the date this action was commenced.

[15] Appellants say that the sum of \$39,245.40, the claim on notes that were part of the August 16th contract which were not found in the hands of the receiver, was added to the adjusted overall value of the total notes in the contract. The finding of the actual value of these notes and deeds of trust in the sum of \$145,018.08 is exactly the sum of \$105,772.68 and \$39,245.40. Plaintiff's exhibit 60 shows the total claim on the notes as \$107,582.77, which Baum later testified had to be adjusted downward because of three notes which were to be eliminated from the list. Plaintiff's exhibit 120 for identification, which Baum was referring to in his testimony, shows that \$105,772.68 was the adjusted claim under the contract of August 16. He testified that the sum of \$39,245.40

was the total claim on notes in this contract which he did not find in the hands of the receiver. The sum of \$39,245.40 was necessarily included in the sum of \$105,772.68. The notes which he listed as making up the \$39,245.40 total when checked against the list of all notes attached to the contract of August 16th, shows that they were also included in the calculation from which the total of \$105,772.68 was achieved. From the testimony of the accountant in the record it seems clear that the total of \$105,772.68 is the correct figure representing the total claim on this contract.

Respondent in explanation merely refers to the testimony reviewed above, but does not attempt to explain the total, and argues that the correct rule of damages was applied, stating that it is well settled that where money or securities are converted, the owner is entitled *prima facie*, to a recovery of their face value with interest. *Revert v. Hesse*, 184 Cal. 295, 193 P. 943. This rule, however, cannot explain how notes of a face value totalling in the neighborhood of \$100,000 can become more than \$145,000 with the addition of interest for but 22 months. It will be necessary, therefore, to reduce the judgment against the respective defendants by the amount of \$39,245.40.

It appears that the findings of \$3,996, the value of the equity in the Alvarado Street property is supported by the evidence, as the value was stipulated to as \$3,442.51. Later in the trial there was testimony that this figure was several hundred dollars too low.

[16] Appellants attack the measure of damages on the Myrtle Street, Ellert Street and 50 B Manchester Street deals. The damages in these cases appear to be supported by the record. It is the rule that where secret profits are made in real estate transactions by a broker who does not disclose that he is buying the property for himself, he is liable to the principal for all the secret profits realized. 9 Cal.Jur.2d 203, sec. 54. The record shows that H. J. Dowd was asked to bring in all his records on the Myrtle Street property, to show what his operating expenses totalled while he

held the property, as well as the cost of capital improvements, so that these sums could be deducted.

[17] There was substantial evidence to support the findings as to monies collected and not paid over to respondent, and as to the unauthorized withdrawals from bank accounts.

[18, 19] It is contended that the claims of respondent are barred by the Statute of Limitations and by laches, but appellants argue only the point of laches. Although respondent says that appellants did not plead facts in their amendment to their answer they did plead such facts in their answer to the First Amended Complaint, but only in regard to the transaction of August 16, 1951. This, the most recent claim here involved, clearly was not barred by laches. As to all other claims laches was not pleaded, and it is an affirmative defense, and one who relies on such defense must plead facts constituting such laches. *Carlson v. Lindauer*, 119 Cal.App. 2d 292, 309, 259 P.2d 925; *Phoenix Mut. Life Ins. Co. v. Birkelund*, 29 Cal.2d 352, 175 P.2d 5. Appellants have made no showing that they had been damaged by the respondent's failure to sooner discover their misdeeds. See, *Brownrigg v. DeFrees*, 196 Cal. 534, 238 P. 714. Appellants make much of the fact that a suit was brought against the broker, Jarkich, a witness herein, by Elizabeth Petzold in 1950 for \$50,000 in regard to his dealings with her, and that at that time her attorney talked with Dowd in regard to her latest real estate investments. That there was an action against Jarkich by respondent appears only in the affidavit filed on the motion for a new trial. At any rate, we do not see why the fact that respondent suspected one broker of dishonest dealings, compels the inference that she should have then suspected Dowd and have begun an investigation of his dealings with her.

[20] Appellants maintain that the court below pre-judged the case, and that its conduct in this regard viewed cumulatively deprived them of a fair trial. It is true that the court refused Mr. McGuire, counsel for appellants, a continuance when he

entered the trial following the abrupt departure of their prior counsel, who left on a European trip. Prior counsel had moved for a continuance on June 3, 1953, and had been denied it by the presiding judge of the Superior Court. Appellants persisted in trying to get a continuance from the trial judge. Considering the age and very poor physical condition of plaintiff, the court had good reason for not delaying the trial of the matter.

Appellants select a few quotations of remarks of the trial judge from this record of more than 2,000 pages, which are supposed to demonstrate that his mind was closed toward appellants and that he dealt harshly with their counsel. However, a reading of the record discloses that the trial court was equally caustic with the counsel for respondent. In fact, he held him in contempt of court at one time and made him apologize to the court and appellants' counsel. He advised appellant Dowd fully as to his right not to answer questions that might tend to incriminate him because of the criminal proceedings against him which were then pending.

[21] There is no merit in the complaint that more time was needed because the charge of forgery made at the trial could not have been anticipated since it was not raised in the pleadings. However, appellants had their own handwriting expert who testified at length on the same matters as did respondent's experts. Appellants' counsel Albert Picard had been present at the preliminary hearing in the municipal court when Sherwood Morrill, the handwriting expert who testified herein for respondent, testified that certain documents were not signed by respondent. It cannot be said that the trial judge abused his discretion in refusing the continuance in view of the circumstances in this case. *Slaughter v. Zimman*, 105 Cal.App.2d 623, 624, 234 P.2d 94.

Appellants say that the grounds urged in their motion for a new trial demonstrated the propriety of the continuance request, although they do not argue that the court erred in denying a new trial. In the affidavits of newly discovered evidence, it

was alleged that it was discovered that Elizabeth Petzold had filed suit against Jarkich under the name of Elizabeth Seegos, alleging that Jarkich in the past four years had caused certain moneys and securities of hers which he had received for investment purposes to be placed in the name of his wife. Another affidavit was by Marguerite Clydes, a housekeeper who had worked at Elizabeth Petzold's home and who averred that she had seen Mrs. Petzold sign the agreement of August 16, 1951, and also the San Francisco Bank Collection cards. Respondent's brief states that Marguerite Clydes was an incompetent confined to the Napa State Hospital, and that the affidavit was actually made there, although this fact was not disclosed to the judge or counsel for respondent at the time it was placed before the court.

As to the Elizabeth Seegos suit, the fact that it was filed in that name would not have precluded appellants from sooner learning of it, since Seegos was the name of a former husband of respondent, it was the name she had used when confined to San Francisco Hospital, and this alias would have been revealed if a reasonably diligent investigation had been made. There was also the affidavit of Ernestine Panzulo, Mrs. Petzold's daughter. She had testified at the trial for appellants, and it became necessary for their counsel to move to impeach her testimony. No showing was made of due diligence in regard to affiant Joseph Risher. He was a former employee of Dowd's and no reason is given as to why he could not have been called as a witness.

[22-24] There appears to have been no error on the court's ruling in permitting the accountant's schedules to be introduced in evidence, since the court clearly indicated that he would not be bound by them. There was no error in sustaining an objection to a question asked the witness Jarkich which was intended to show that he had made a profit in selling a note to respondent. Jarkich's conduct was clearly not an issue in the case. As to the error alleged in the examination of the witness, Jericoff, whether or not error was com-

mitted, it could not have been prejudicial, since no finding is based upon the testimony to which objection is made.

Accordingly the judgment against each of the respective defendants, namely, H. J. Dowd, Dorothy Taylor, Harriet Bradford, J. M. Dowd and Lauretta Dowd is hereby reduced in the amount of \$39,245.40 and as so reduced, the judgment is affirmed.

Judgment affirmed as modified.

NOURSE, P. J., and DOOLING, J.,
concur.



139 Cal.App.2d 659

Jack O'DEA and Frances O'Dea, his wife,
Plaintiffs and Appellants,

v.

COUNTY OF SAN MATEO, Defendant and
Respondent.

Civ. 16566.

District Court of Appeal, First District,
Division 2, California.

March 2, 1956.

Rehearing Denied March 30, 1956.

Action against county for asserted trespass to real property. The Superior Court, San Mateo County, A. R. Cotton, J., entered judgment for county and landowners appealed. The District Court of Appeal, Devine, J. pro tem., held that under Constitution providing that private property shall not be taken or damaged without just compensation being paid, county which permitted fifteen inch cement culvert to remain ten and one-half months on surface of lot was obligated to compensate owner of lot, even if county had subsurface easement for the culvert.

Judgment reversed and remanded.

I. Evidence — 5(2)

It is not a matter of common knowledge that landowners who have granted an

easement for a subsurface pipe have included surface use of the land as well.

2. Easements ⇨2

Nothing passes as incident to grant of an easement except what is necessary for its reasonable enjoyment.

3. Easements ⇨36(1)

Burden of proving all of elements essential to establish title to easement is on party claiming easement.

4. Eminent Domain ⇨300

In action essentially one of inverse eminent domain, evidence was insufficient to establish that county had acquired easement to maintain culvert on surface of plaintiff's lot, even if county had a subsurface easement.

5. Eminent Domain ⇨2(10)

Under Constitution providing that private property shall not be taken or damaged without just compensation being paid, county which permitted fifteen inch cement culvert to remain ten and one-half months on surface of lot was obligated to compensate owner of lot, and could not escape liability on ground that culvert was an emergency flood control project. West's Ann.Const. art. 1, § 14.

6. Appeal and Error ⇨1171(1, 6)

Ordinarily, judgment will not be reversed simply to provide nominal damages, but reversal will be made where it appears that on another trial, actual damages, even though small, may be recovered.

7. Appeal and Error ⇨1171(1)

On appeal from judgment denying recovery for trespass, where county claimed an easement which may have had effect on value of land and where new trial might result in award of more than nominal damages, reversal could not be refused on theory that only nominal damages were involved.

8. Appeal and Error ⇨1171(1)

A reversal will be made where it appears that on another trial, actual damages even though small, may be recovered.

Keith C. Sorenson, Dist. Atty. of San Mateo County, James M. Parmelee, Deputy Dist. Atty., Redwood City, for respondent.

DEVINE, Justice pro tem.

Plaintiffs husband and wife have appealed a judgment which denied them recovery of damages for an asserted trespass on their property. Their complaint alleged trespass and nuisance, but their claim against the County of San Mateo, they say, is essentially one of inverse eminent domain. They contend that their land was "taken," in that it was used, by the county without compensation having been made as required by the Constitution. Constitution of California, art. I, § 14.

Plaintiffs' residence is in an area known as Broadmoor. Back of their lot is a hillside which had become eroded by floods, and in order to protect plaintiffs' property as well as that of other owners farther down, the county caused a 15 inch cement pipe or culvert to be laid across plaintiffs' lot. This pipe was allowed to remain on the surface for about ten and a half months, after which it was buried along the same line on which it had lain. The complaint of plaintiffs is not for damages occurring after the pipe was interred (although some evidence of such damage got into the record, it was not pleaded, and is not considered on this appeal), but for damages alleged to have happened while the pipe remained on the surface. There was no denial by the county that specific permission to place the pipe was not given by plaintiffs. The defenses are: 1. that there was an easement across the property, and that the county was making use thereof; 2. that the county was acting in a governmental capacity under the police power and is not liable for any damages; and 3. that, in any event, there were no damages.

[1-4] The evidence on which the county relies to show an easement consists of a subdivision map which has a colored strip running across the space depicting plaintiffs' lot, and the letters P.U.E. 5' (probably "public utility easement"), and also the testimony of witnesses that an easement existed. The testimony was objected to on the ground that it was a conclusion of the witnesses.

Fahey, Castagnetto & Gallen, Daly City, for appellants.

The admissibility of the evidence, some of which, at least, did consist of witnesses' conclusions, need not be discussed at length, because there was no showing whatever that if an easement existed, it included the right to keep culverts on the surface of the land. Respondent argues that "It is a matter of common knowledge that such public utility easements are of a general nature and are not limited to land beneath the surface of the ground, or a particular portion thereof." If this were so, the county need never have buried the culvert. It is not a matter of common knowledge that landowners who have granted an easement for a subsurface pipe have included surface use of the land as well. Nothing passes as incident to the grant of an easement except what is necessary for its reasonable enjoyment, *Parks v. Gates*, 186 Cal. 151, 199 P. 40, and the burden of proving all of the elements essential to establish title is on the party claiming the easement. *Costello v. Sharp*, 65 Cal.App. 152, 157, 223 P. 567; *Matthiessen v. Grand*, 92 Cal.App. 504, 509, 268 P. 675. The keeping of the pipe on the surface of plaintiffs' lot cannot be justified by the evidence, as it now stands, of an easement.

[5] The county asserts, and the trial court found, that the county was acting in a governmental capacity to protect the health, safety and property of the residents of the county. This no doubt is true, but it does not follow that the use of plaintiffs' land could be taken, except for a period of emergency, without compensation. The county engineer testified that winter rains prevented the placing of the culvert in the ground when it was first laid but there was no explanation for keeping it on the surface for several months. As was explained in *Short v. Pierce County*, 194 Wash. 421, 78 P.2d 610, 616, landowners may not recover against a county for damages resulting from emergency work of flood control, but may recover for damages accruing long after flood conditions have abated.

The county simply appropriated the use of plaintiffs' land for a time. Such appropriation without compensation is forbidden by the constitutional proscription cited

above. *Reardon v. City and County of San Francisco*, 66 Cal. 492, 6 P. 317; *Stone v. Cordua Irr. Dist.*, 72 Cal.App. 331, 237 P. 554.

The cases of *Gray v. Reclamation Dist.* No. 1500, 174 Cal. 622, 163 P. 1024, and *Archer v. City of Los Angeles*, 19 Cal.2d 19, 119 P.2d 1, do hold, as respondent claims, that a loss sustained through proper exercise of the police power is *damnum absque injuria*, but they do not justify such an appropriation as was taken here. The *Gray* case had to do with damages produced under the police power by temporary flooding (against which landowners could protect themselves) necessarily caused by a vast plan for controlling the water courses of the Sacramento and San Joaquin Rivers. The *Archer* case held that the city was not liable for damages resulting from accelerating drainage, where the improvements followed the natural drainage of the country, and when an individual owner of higher lands would have the right to have acted as the defendant city did.

[6-8] The final subject is that of damages. The court found that no damages had been sustained. It must be conceded that no large element of damage was present. The culvert was placed close to the property line fence, and thus it did not deprive plaintiffs of the use of any large area. It is argued by the county that if plaintiffs were entitled to any award, the damages would be nominal, and that this court should not reverse the judgment simply for the awarding of nominal damages.

It is, indeed, the rule that ordinarily a judgment will not be reversed simply to provide nominal damages. *Holmes v. Snow Mountain Water & Power Co.*, 36 Cal.App. 394, 172 P. 178; *Keister v. O'Neil*, 59 Cal.App.2d 428, 138 P.2d 723.

However, where the defendant has made its defense under a claim of title such as the easement it claims herein, a claim which it still makes and may assert again, and which may have an effect on the value of plaintiffs' property, an award of even nominal damages has some importance; and, moreover, it is not unlikely that on further consideration by the trial court,

an award will be made which, although not large, will exceed that modicum which constitutes nominal damages. A reversal will be made where it appears that on another trial, actual damages, even though small, may be recovered. 5 C.J.S., Appeal and Error, § 1915, p. 1416.

The judgment is reversed and the cause is remanded.

NOURSE, P. J., and DOOLING, J.,
concur.



139 Cal.App.2d 706

The PEOPLE of the State of California,
Plaintiff and Respondent,
v.

George Weldon ROSS, Defendant and
Appellant.
Cr. 5501.

District Court of Appeal, Second District,
Division 2, California,
March 6, 1956.

Defendant was convicted of hit and run driving and misdemeanor offense of manslaughter. The Superior Court of Los Angeles County, H. Burton Noble, J., entered an order granting probation, which for purposes of appeal was deemed a final judgment, and defendant appealed. The District Court of Appeal, Fox, J., held that the evidence sustained conviction as against contention that some one else was driving defendant's automobile at time it struck and killed a pedestrian.

Judgment affirmed.

1. Criminal Law ⇨1023(12)

Order granting defendant probation after conviction for hit and run driving and manslaughter constituted a final judgment for purposes of appeal. West's Ann.Pen. Code §§ 192, subd. 3(b), 1237; Vehicle Code, § 480.

2. Criminal Law ⇨1144(13)

Where the sufficiency of evidence to sustain a finding is challenged on appeal, reviewing court must view the evidence in the light most favorable to successful party in trial court.

3. Criminal Law ⇨1159(2)

A conviction cannot be reversed on ground of insufficiency of the evidence, unless it is made clearly to appear that upon no hypothesis is there sufficient substantial evidence to support conclusion reached in trial court.

4. Criminal Law ⇨260(11)

Reviewing court must assume in support of judgment the existence of every fact which trial court could have reasonably deduced from the evidence, and then determine whether such facts justify the inference of guilt.

5. Criminal Law ⇨260(11)

Trial court must pass upon the credibility of witnesses, resolve the conflicts and inconsistencies in the testimony, and determine the weight to which it is entitled.

6. Automobiles ⇨355(8, 13)

Evidence sustained conviction for hit and run driving and misdemeanor offense of manslaughter, as against contention that some one else was driving defendant's automobile at time it struck and killed pedestrian. West's Ann.Pen.Code, § 192, subd. 3(b); Vehicle Code, § 480.

7. Homicide ⇨31

"Manslaughter" is the unlawful killing of a human being without malice. West's Ann.Pen.Code, § 192, subd. 3(a, b).

See publication Words and Phrases, for other judicial constructions and definitions of "Manslaughter".

8. Automobiles ⇨314

The unlawful killing of a human being committed in the driving of a vehicle and resulting from commission of an unlawful act not amounting to a felony without gross negligence, or from the commission of a lawful act, which might produce death, in an unlawful manner but without gross negligence constitutes "manslaughter," provided the homicide was the proximate result of the operation of a vehicle in such

manner. West's Ann.Pen.Code, § 192, subd. 3(b).

9. Automobiles ⇨353

Evidence that defendant drove automobile through street intersection at night at speed of 40 to 45 miles per hour in utter disregard of presence of other vehicles or pedestrians justified an inference of negligence in operation of automobile within meaning of statute relating to manslaughter committed in operation of a vehicle. West's Ann.Pen.Code, § 192, subd. 3(b).

10. Automobiles ⇨344

Committing in a negligent manner, without gross negligence, a lawful act which might produce death constitutes commission of act in an unlawful manner within meaning of statute relating to manslaughter committed in driving a vehicle, since the act, if committed with usual and ordinary caution and without any unlawful intent, would be excusable under statute. West's Ann.Pen.Code, § 192, subd. 3(b).

11. Automobiles ⇨353

In prosecution for manslaughter based on death of a pedestrian as a result of being struck by automobile driven by defendant, the evidence fortified by statutory presumption that a person takes ordinary care of his own concerns, justified inference that victim was crossing intersection in crosswalk. West's Ann.Code Civ.Proc. § 1963, subd. 4; West's Ann.Pen.Code, § 192, subd. 3(b).

12. Automobiles ⇨344

Motorist, in failing to yield right of way to pedestrian crossing street at intersection in crosswalk, as required by Vehicle Code, committed an unlawful act not amounting to a felony, which proximately resulted in death of pedestrian within meaning of statute relating to manslaughter committed in driving a vehicle. West's Ann.Pen.Code, § 192, subd. 3(b); Vehicle Code, § 560(a)

1. Defendant was granted probation but such an order is deemed a final judgment for purposes of appeal. Pen.Code, sec. 1237.
2. When an attack is made upon the sufficiency of the evidence to sustain a find-

13. Automobiles ⇨355(13)

Evidence that automobile, being driven by defendant through intersection at night at speed of 40 to 45 miles per hour in utter disregard of presence of other vehicles or pedestrians and without yielding right of way to pedestrian crossing street at intersection in crosswalk, struck and killed pedestrian was sufficient to sustain conviction for misdemeanor offense of manslaughter, on theory that death resulted either from commission of an unlawful act, not amounting to a felony, without gross negligence, or from commission of a lawful act, which might and did proximately produce death, in an unlawful manner but without gross negligence. West's Ann.Pen.Code, § 192, subd. 3(b); Vehicle Code, § 560(a).

Marshall Denton, Jr., Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Rudolph Pacht, Deputy Atty. Gen., for respondent.

FOX, Justice.

[1] Defendant was convicted of (1) hit and run driving, Vehicle Code, sec. 480, and (2) manslaughter, a misdemeanor, Pen. Code, sec. 192, subd. 3(b). He appeals from the judgment.¹

[2] As grounds for a reversal, defendant contends (1) the evidence is insufficient to prove² that he was the driver of the car that hit and killed the victim, and (2) that the evidence fails to establish the elements necessary to constitute the offense of manslaughter, a misdemeanor.

On December 31, 1954, between 8:15 and 9:30 p. m. Bud Robinson, while walking across Willowbrook Avenue, in Los Angeles, from east to west at the intersection of 119th Street, was struck by an automobile traveling south on the easterly side of Willowbrook (which is divided into two roadways by streetcar tracks), as a result of

ing we must view the evidence in the light most favorable to the successful party in the trial court. *Leming v. Oilfields Trucking Co.*, 44 Cal.2d 343, 346, 282 P.2d 23.

which he received injuries that caused his death. As Robinson crossed Willowbrook on the south, Ernest D. Jackson passed him in his car. Jackson had made a boulevard stop at Willowbrook at which time Robinson was about half way across the intersection. The car that hit Robinson "just missed the back" of Jackson's automobile immediately before striking Robinson. In order to avoid a collision with this car, Jackson had to quickly accelerate his vehicle so as to make it "jump."

The car that hit Robinson was traveling 40 to 45 miles per hour at the time. It failed to stop after hitting him but instead it proceeded south on Willowbrook and disappeared. Jackson backed his car up and gave chase but lost sight of the vehicle.

After the impact, Robinson was lying next to the tracks about 12 feet from the point of impact. At the time he was hit Robinson was carrying a bag in which were some beer bottles. They were apparently broken in the accident.

At approximately 1:30 on the morning of January 1, 1955, Highway Patrol Officer Foster found defendant's car parked on 114th Street down the street from the home of Gertie Mae Wilson, where defendant claimed to have spent the previous evening. The right front fender and the headlight were damaged and the windshield shattered. When defendant appeared at the Sheriff's Firestone Substation about 3:00 o'clock that morning he "had a small wound right in the middle of his forehead like a puncture wound; or a very small cut; very fresh." Particles of glass were found in defendant's hair and clothing identical with a piece removed from the inside surface of the windshield. A piece of amber-colored glass was removed from the damaged right-front headlight which had the same physical and chemical properties as the broken beer bottles the victim was carrying. Green paint samples taken from the car matched those found in the street at the scene of the accident and also matched smears on the victim's trousers. A fender ornament found on the street at the scene was the counterpart of another on the vehicle. A portion of a headlight guard found at the scene of

the accident matched the one on the left-front side of the car, the one on the right being missing.

Defendant relies upon an alibi to the effect that he had been at a party at Mrs. Wilson's house on New Year's eve when the accident occurred. He had gone there with his wife and another lady in his car. During the evening he looked out and noticed his car was not in front of the house where he had parked it. He made no inquiry, however, about it because he assumed his roomer, Mr. Rashew, had borrowed it as he had done on previous occasions without asking permission since he knew that defendant was in the habit of leaving the keys in a compartment in the car from which a radio had been removed. Rashew did not drive defendant's automobile that night. Defendant and his wife and Mrs. Spruell were away from the Wilson party in defendant's car for about half an hour during the evening, returning between 8:00 and 9:00 o'clock. Because of the asserted disappearance of defendant's car, the Spruells took the Rosses home after the party was over.

[3-5] In passing on the sufficiency of the evidence to sustain a conviction it should be borne in mind that before a reversal may be had, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778; *People v. Frankfort*, 114 Cal.App.2d 680, 689, 251 P.2d 401. We must assume in support of the judgment the existence of every fact which the trial court could have reasonably deduced from the evidence, and then determine whether the facts "justify the inference of guilt." *People v. Deysher*, 2 Cal.2d 141, 149, 40 P.2d 259, 263. It was, of course, for the trial court to pass upon the credibility of the witnesses, resolve the conflicts and inconsistencies in the testimony, and determine the weight to which it is entitled. *Dillard v. McKnight*, 34 Cal.2d 209, 223, 209 P.2d 387, 11 A.L.R.2d 835.

[6] Applying these principles, it is clear that the trial court was amply warranted

in drawing the inference not only that it was defendant's car that hit the victim but also that defendant was the driver of it. In fact, defendant makes no argument that his car was not involved in this accident. Rather, he seeks to escape on the theory that someone else was operating his car at the time. But the fresh wound on his forehead, the shattered windshield, and the presence of fragments of glass from the inside of the windshield in his hair and clothing, serve to identify defendant as the driver. Not without significance was the conduct of the defendant upon discovery that his car was gone. As noted by the trial judge, it was "not the conduct of a man that believes his car was stolen." The judge made the further pertinent comment that "it isn't likely that if the car were stolen the thief would be kind enough to bring it back to the scene of the theft." It is thus plain that the judge did not believe the defendant's story that his car had been stolen and the thief had been operating it at the time of the accident. The judge stated he did not believe certain of the other witnesses. After analyzing the evidence, the judge stated "there isn't any doubt in the court's mind" about defendant's guilt. It cannot be said as a matter of law that the evidence is insufficient to sustain defendant's conviction. *People v. Jones*, 36 Cal.2d 373, 375, 224 P.2d 353.

[7,8] Manslaughter is the unlawful killing of a human being, without malice. It is of three kinds, one of which grows out of the driving of a vehicle. Pen.Code, sec. 192, subd. 3(b). Such an unlawful killing in the driving of a vehicle is further divided into two categories, the distinguishing feature being whether gross negligence is present or absent. (See Pen.Code, sec. 192, subd. 3(a) and (b).) Defendant was found guilty of violating subdivision 3(b) of section 192, Penal Code. This type of manslaughter, committed in the driving of a vehicle, may result from the commission of an unlawful act not amounting to a felony without gross negligence, or from the commission of a lawful act which might produce death in an unlawful manner but without gross negligence, provided the homicide was the proximate result of the

operation of a vehicle in such manner. Pen.Code, sec. 192, subd. 3(b).

[9,10] The evidence shows that the offending automobile went through the intersection at night at a speed of 40 to 45 miles per hour, apparently in utter disregard of the presence of another car and of a pedestrian. It was necessary for the driver of the other vehicle to quickly accelerate his car—to make it "jump"—in order to get out of the way of the on-rushing vehicle. This would indicate defendant either was paying no attention to the traffic or was proceeding with reckless abandon and utter disregard of the consequences of his speed. This evidence justifies an inference of negligence on the part of the operator of the vehicle. Thus defendant was doing a lawful act which might, and actually did, produce death, in an unlawful manner, for "it is implicit in subsection 3(b) that the commission in a negligent manner, but without gross negligence, of a lawful act which might produce death would be the commission of the act in an unlawful manner, since the act, if committed with usual and ordinary caution and without any unlawful intent, would be excusable under section 195" of the Penal Code. *People v. Wilson*, 78 Cal.App.2d 108, 114, 177 P.2d 567, 570.

[11,12] The evidence justifies the inference that the victim was crossing the intersection in the crosswalk. This is fortified by the presumption that "a person takes ordinary care of his own concerns." Code Civ.Proc., sec. 1963(4). Section 560(a) of the Vehicle Code requires that "The driver of a vehicle shall yield the right of way to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at an intersection * * *." This defendant failed to do. He thereby committed an unlawful act (not amounting to a felony), which proximately resulted in Robinson's being hit and killed.

[13] Thus defendant's conviction of violating Penal Code section 192, subdivision 3(b) may be sustained either upon the theory that he committed an unlawful act, not amounting to a felony, without gross

negligence, which proximately caused the death of Robinson, or a lawful act which might (and did) proximately produce death, in an unlawful manner but without gross negligence. Hence the elements necessary to constitute the crime of manslaughter, a misdemeanor, Pen.Code, sec. 192, subd. 3(b), were established.

The judgment is affirmed.

MOORE, P. J., and ASHBURN, J., concur.



139 Cal.App.2d 737

Venus WEEKS and J. D. Weeks, Plaintiffs
and Appellants,

v.

Donald RAPER, Albert D. Raper and
Geneva B. Raper, Defendants and
Respondents.

Civ. 8733.

District Court of Appeal, Third District,
California.

March 7, 1956.

Rehearing Denied March 29, 1956.

Hearing Denied May 2, 1956.

Action to recover for injuries sustained when plaintiffs' automobile was struck by defendants' automobile which was passing it on two lane highway when defendant motorist suddenly turned automobile back into right lane upon seeing white posts marking caved in portion of highway in left lane, and plaintiffs' automobile struck telephone pole. The Superior Court, Napa County, Mervin C. Lernhart, J., entered judgment for defendants on jury verdict, and plaintiffs appealed. The District Court of Appeal, Van Dyke, P. J., held that evidence on issues of whether plaintiff motorist, having knowledge of dangerous condition of highway, had been contributorily negligent prior to time defendant motorist passed her, in permitting her automobile to traverse center line, or in failing to stop, blink lights, or halt when defendant mo-

torist attempted to pass was insufficient for jury.

Judgment reversed.

1. Automobiles ⇨245(15, 49), 246(48, 57)

In action for injuries sustained when plaintiffs' automobile was struck by automobile which was passing it when passing motorist suddenly turned automobile back into right lane upon seeing white posts marking caved in portion of highway in left lane, and plaintiffs' automobile struck telephone pole, evidence on issues of whether passing motorist had been suddenly confronted with dangerous situation from which he could not extricate himself or whether he had been negligent in passing when left side of highway was not clearly visible was for jury, and trial court properly instructed on unavoidable accident and imminent peril. Vehicle Code, §§ 528, 530.

2. Automobiles ⇨146

A motorist who had no knowledge of dangerous conditions of highway which was caved in had right to assume that road ahead was safe. Vehicle Code, §§ 528, 530.

3. Automobiles ⇨245(81)

In action for injuries sustained when plaintiffs' automobile was struck by automobile which was passing it when passing motorist turned automobile back into right lane upon seeing white posts marking caved in portion of left lane of highway, and plaintiffs' automobile struck telephone pole, evidence on issues of whether plaintiff motorist, having knowledge of condition of highway, had been contributorily negligent prior to time defendant motorist passed her, in driving over center line, or in failing to stop, blink lights, or halt when defendant motorist attempted to pass was insufficient for jury.

4. Appeal and Error ⇨1037

Trial ⇨194(15)

In action arising out of automobile collision where there was no evidence that plaintiff motorist did anything affirmatively to cause accident, trial court should have instructed that she was not guilty of contributory negligence, and its refusal to do so constituted prejudicial error.

5. Appeal and Error ⇨832(12)

In action arising out of automobile collision wherein issue of plaintiff motorist's contributory negligence was raised by pleadings, but after evidence was taken and there was no evidence that such motorist had done anything affirmatively to cause accident, plaintiffs sought to withdraw issue from jury by requesting instruction that there was no contributory negligence, plaintiffs' action in submitting instruction on contributory negligence at outset of trial did not constitute inviting error.

6. Appeal and Error ⇨1031(6)

In action for injuries sustained when plaintiffs' automobile was struck by automobile which was passing it when passing motorist suddenly turned into right lane upon seeing white posts marking caved in portion of highway, and plaintiffs' automobile struck telephone pole, error in submission of issue of plaintiffs' contributory negligence when there was no evidence thereof could not be deemed immaterial as theory of verdict could not be determined, and notation "not guilty" appended to verdict did not establish that verdict was based solely on finding that defendant motorist was free from negligence.

Riggins, Rossi, King & Kongsgaard, Napa, for appellants.

Geary, Spridgen & Moskowitz, Santa Rosa, and Francis H. Frisch, Napa, for respondents.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment entered upon the jury's verdict in favor of the defendants in a personal injury action.

The accident which gave rise to this litigation occurred near Napa on January 18, 1953, at approximately 2 o'clock in the morning on a narrow, two lane county highway which had virtually no shoulders. It was dark and misty. Appellant Venus Weeks, accompanied by her husband and mother, was driving west at approximately 35 miles per hour. Respondent Donald Raper, a minor, was proceeding in the same direction at a speed of between 40 and 50 miles per hour. He was traveling alone in

an automobile owned by his parents, respondents Albert and Geneva Raper, which automobile he was using with their knowledge and consent.

Donald had been following and gradually overtaking appellants' automobile for a distance of about half a mile. The two vehicles had rounded two curves and then came into a straight stretch approximately 300 feet distant from the scene of the accident which occurred at a point where the entire left side of the highway for a distance of approximately 80 feet had caved in to a depth of 25 feet. Appellants were thoroughly familiar with this dangerous condition of the highway, which had existed for about a month, but Donald knew nothing of it.

Donald testified that when he entered the aforementioned straight stretch of the highway, appellants' car was then "overriding the centerline" but that it pulled over to the right when he honked and blinked his lights to signal his intention to pass. When his automobile was practically abreast of that of appellants, Donald saw directly in front of his car several white posts which marked the beginning of the caved in portion of the highway. He immediately stepped on the gas and "cut in" as far as he "could to keep from going over the edge". In so doing, his automobile struck that of appellants. The impact was slight, but of sufficient force to cause the appellant Venus Weeks to momentarily lose control of her automobile and strike a telephone pole on the edge of the road. However, she managed to pull back on the paved portion of the highway and continued on her course. Donald did not stop. He said he did not realize that he had hit appellants' automobile; that he had only heard a slight metallic click as he passed, and that when he looked back the lights on appellants' automobile indicated that it was in motion and proceeding normally.

Appellants, who are husband and wife, brought action to recover damages for personal injuries allegedly sustained by the appellant wife and for the loss of consortium suffered by appellant husband as the result of the accident. Upon this appeal from an adverse judgment entered upon

the jury's verdict, the appellants contend that the evidence conclusively established that Donald was negligent and that the appellant wife was not. They complain of the trial court's refusal to so instruct the jury.

[1,2] Appellants argue that Donald was, as a matter of law, negligent in attempting to pass when the left side of the highway was not "clearly visible", Vehicle Code, §§ 528, 530, and that, therefore, the trial court erred in instructing the jury that such conduct was only presumptively negligent and might be shown to be excusable. We do not agree. There is no evidence that the left side of the highway was not "clearly visible" in so far as discerning thereon any person or oncoming traffic, of which there was none. The jury could have found that Donald was not negligent in failing to see the white posts sooner than he did. They were but three feet high and bore no reflectors facing in the direction from which appellants and Donald were coming. There were no barricades, smudge pots, or flares to warn Donald that the left lane of the highway would suddenly terminate at the point of the cave-in. He had no knowledge of such dangerous condition and had the right to assume the road ahead was safe. *Black v. Southern Pac. Co.*, 124 Cal.App. 321, 329-330, 12 P.2d 981. Therefore, the jury could find that Donald, without fault upon his part, was suddenly confronted with a dangerous situation from which he could not extricate himself in time to avert the accident. Consequently, the trial court did not err in giving instructions on unavoidable accident and imminent peril or in submitting the issue of Donald's negligence to the jury.

[3] However, we think the trial court did commit prejudicial error in submitting the issue of contributory negligence to the jury as there was no evidence to support that affirmative defense.

[4-6] The appellant wife cannot be charged with negligence because she had knowledge of the dangerous condition of the highway. She was not bound to anticipate that Donald would endeavor to pass at the time that he did. Neither can a finding of proximate causation be predicated

upon the fact that prior thereto she may have been "over-riding the centerline". There was no evidence as to what extent or for how long she had been so doing. Donald admitted that his lights were on dim and that he could not see more than 300 feet ahead. Even after the appellants' car pulled to the right, he failed to see the white markers until he was abreast of them. Although we have concluded that it was for the jury to determine whether or not such failure constituted negligence, we here observe such fact to illustrate that there is no proof that appellants' prior straddling of the white line so obstructed Donald's view as to prevent his seeing the warning signs before he did. It cannot be said that the appellant wife was contributorily negligent in failing to stop, blink her lights, or honk the horn when Donald signalled his intent to pass. She had virtually no time within which to do so. She was not obliged to aid Donald in driving his car. A finding of contributory negligence cannot be based on her failure to take such action. Indeed any attempt of hers to do so might well have merely confused him into missing the warning of the white marker. Neither can it be said that the jury could have found evidence of contributory negligence from their view of the scene of the accident, which, upon stipulation, was had without the presence of the trial judge. The road had not only since been repaired but had been substantially altered by its relocation to the right. A view of the materially changed highway would not support a finding of contributory negligence. There was no evidence that the appellant wife did anything affirmatively to cause the accident. Therefore, the trial court should have instructed the jury that she was not guilty of contributory negligence. *Ramos v. Linggi*, 125 Cal.App.2d 632, 635-636, 270 P.2d 857. The refusal to do so constituted prejudicial error. *Pierce v. Black*, 131 Cal. App.2d 521, 528-529, 280 P.2d 913. Respondents contend that appellants invited the error by submitting instructions on contributory negligence at the outset of the trial. We do not agree. That issue was raised by the pleadings, but after the evidence was taken, the appellants sought to withdraw the issue from the jury by re-

requesting an instruction that there was no evidence of contributory negligence. Under such circumstances, it cannot be said that appellants invited the error of submitting the question of contributory negligence to the jury. *Williamson v. Pacific Greyhound Lines*, 93 Cal.App.2d 484, 487, 209 P.2d 146. Such error cannot be deemed immaterial as it cannot be determined whether the jury's verdict was based on the theory that the appellant wife was guilty of contributory negligence or that the accident was unavoidable. *Wright v. Sniffin*, 80 Cal.App.2d 358, 363-364, 181 P.2d 675. The fact that appended to the verdict was the notation "Not guilty" does not establish that the jury's verdict was based solely upon a finding that Donald was free from negligence. It might mean no more than that the jury concluded that he was not guilty of causing the damages because appellant wife's own negligence was a proximate cause of the accident.

The judgment is reversed.

PEEK and SCHOTTKY, JJ., concur.



139 Cal.App.2d 411

The ATCHISON, TOPEKA and SANTA FE RAILWAY COMPANY, a corporation,
Plaintiff and Appellant,

v.

STATE BOARD OF EQUALIZATION, a
State Agency of the State of California,
and George R. Relily, James H. Quinn,
Paul R. Leake, Robert E. McDavid, and
Robert C. Kirkwood, as the members of
and constituting said State Board of
Equalization, Defendants and Respondents.

Civ. 16524.

District Court of Appeal, First District,
Division 1, California.

Feb. 24, 1956.

Rehearing Denied March 23, 1956.

Hearing Denied April 18, 1956.

Taxpayer's action for refund of use taxes and interest paid under protest. The

Superior Court, City and County of San Francisco, Melvyn I. Cronin, J., entered judgment in favor of the State Board of Equalization and its members and the taxpayer appealed. The District Court of Appeal, Peters, P. J., held that where the taxpayer, a railroad domiciled in Kansas, bought 93 switch engines which were delivered to it in Iowa, and where it was known at time of purchase that some would ultimately be used in California, 17 engines shipped into California for use in that state in facilitating interstate and intrastate transportation were subject to use tax, though the 17 engines, before shipment into California, were temporarily used in interstate commerce outside the state.

Judgment affirmed.

1. Licenses ⇨19(3)

Whatever was proper interpretation of rule of State Board of Equalization exempting certain property from application of use tax, the rule could not have effect of exempting from the tax any property not exempt under statute or required to be exempted under federal constitution. Revenue and Taxation Code, §§ 6201, 6202, 6241, 6246, 6352.

2. Licenses ⇨15.1(2, 4)

Purpose of use tax is to supplement sales tax by imposing upon those subject to it a tax burden equivalent to that of sales tax and accordingly the use tax is limited to property purchased for use within the state. Revenue and Taxation Code, §§ 6201, 6202, 6241, 6246, 6352.

3. Commerce ⇨40(1)

Where railroad domiciled in Kansas bought 93 switch engines which were delivered to it in Iowa, and where it was known at time of purchase that some would ultimately be used in California, 17 engines shipped into California for use in that state in facilitating interstate and intrastate transportation were subject to use tax, though the 17 engines, before shipment into California, were temporarily used in interstate commerce outside the state. Revenue and Taxation Code, §§ 6201, 6202, 6241, 6246, 6352.

Robert W. Walker, Robert B. Curtiss, Los Angeles, L. W. Butterfield, Chicago, Ill., Peart, Baraty & Hassard, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., James E. Sabine, Asst. Atty. Gen., Ernest P. Goodman, Eugene B. Jacobs, Deputies Atty. Gen., San Francisco, for respondents.

PETERS, Presiding Justice.

The plaintiff brought this action to secure a refund of \$32,348.90 in use taxes and \$9,129.86 interest paid by it under protest on 17 switch engines claimed by plaintiff to be exempt from the tax. The case was submitted to the trial court upon a written stipulation of facts. Judgment was entered in favor of defendants. Plaintiff appeals.

The question presented is whether or not the transactions about to be described were subject to the Use Tax. §§ 6201-6246, Rev. & Tax. Code.

The plaintiff is a Kansas corporation qualified to do business in California. It operates a railroad which transports passengers and freight in and between 12 different states, including California. In 1942 the plaintiff began to purchase 93 switch engines for use in its terminals throughout its system. Pursuant to this program, between January 1, 1943, and December 1, 1945, the engines were purchased by plaintiff and delivered to it in Iowa. The use tax here involved was levied on the purchase price of 17 of these engines that were permanently assigned to and used in California. When these 93 engines were ordered, and at the time they were delivered to plaintiff in Iowa, "plaintiff had not determined at what point or points on its system any particular engines would be used, but plaintiff had purchased said engines for use in its yards upon its railroad at any point or points, in the State of California or elsewhere, whenever and wherever any or all of said engines should be needed to carry on the business of plaintiff." When the engines were purchased

and delivered "plaintiff knew that some of said engines were needed for its operations in the State of California."

The 93 engines, when delivered at Shopton, Iowa, where the plaintiff maintains shops, were adjusted and made ready for use, and thereafter placed in "revenue service"¹ at Shopton to determine if they were ready for operation. After testing at Shopton, the engines were assigned to revenue service at a point where a shortage of power for yard work existed. At some points such shortages were temporary, and, when the temporary shortage ended, the engines were moved to another temporary assignment until they reached their point of permanent assignment. This point for the 17 engines here involved was California. All but one of the 17 engines, after servicing and testing at Shopton, were moved to various places on plaintiff's railroad outside of California, and placed in service in yard work. The one exception was moved directly to California from Shopton, without being used in revenue service at intervening out-of-state points. The times spent by the 17 engines in revenue service outside of California, including the time spent at Shopton, before the engines were sent to California, ranged from 1 to 79 days, averaging about 43 days. The life expectancy of such engines is 25 years.

Each of these 17 engines was moved from the point where it was last engaged in temporary revenue service to its assigned point in California "dead in train," that is, by being coupled into a freight train and hauled on an interstate journey into California. This method of transportation was used because switch engines are not intended to haul trains, and because it was cheaper to haul them "dead in train" than to transport them under their own power.

The 17 engines have remained in California since they first entered the state. Since their arrival in California the engines have been engaged in interstate and intrastate commerce. The parties describe

1. Which is defined at great length by the parties, but need not be defined at length in this opinion. Suffice it to say that the phrase means that the engines

were engaged in switching operations of trains or cars engaged primarily in interstate commerce.

the relative interstate and intrastate work of such engines at some length. It can fairly be said that the greater portion of the work of such engines was in interstate commerce, although a small proportion of the work was exclusively in intrastate commerce. These engines also engaged in some non-revenue service, that is, in the making up of work trains, etc.

It is an admitted fact that no sale, use or excise tax has been paid to any other state with respect to the 17 engines.

In January of 1949 the defendant notified plaintiff that it claimed that there was owing to it \$32,348.90 plus \$9,129.86 interest "with respect to the storage, use or other consumption, during the quarterly periods beginning January 1, 1943, and ending December 31, 1945, in the State of California, of 17 diesel electric switch engines which were purchased by plaintiffs outside this State and brought into this State by plaintiff." Plaintiff paid the taxes and then filed a claim for refund, claiming that the engines were exempt from the tax because used in interstate commerce. The precise allegations of the claim are:

"(1) That each and all of said seventeen Diesel switch engines were purchased for use in interstate commerce, were actually placed in use in interstate commerce prior to their entry into this state, and were thereafter used continuously in interstate commerce.

"(2) That the movement of said engines to California from the points outside of California where they had previously been engaged in interstate commerce, itself constitutes interstate commerce, because they were moving interstate from said points to California and transporting themselves as a shipment in interstate commerce, so that there never was a taxable moment in which said engines, or any of them were used, stored or otherwise consum-

ed in the State of California except as instrumentalities of interstate commerce."

The trial court adopted the stipulated facts as part of its findings, and also found "as inferences drawn by the Court from the stipulated facts and as additional findings" that "the diesel electric switch engines with respect to which the use tax was assessed and collected by the State of California were purchased by plaintiff from a retailer for storage and use in the State of California and were stored and used by plaintiff in the State of California." The court also found that "there was a period of time after the switch engines arrived in the State of California when they were stored and used by plaintiff exclusively in intrastate commerce." The court concluded that the assessment of the tax had been duly and regularly made and that "there was an intrastate storage and use of the switch engines in the State of California to which the use tax validly applied." Plaintiff appeals from the judgment based on such findings and conclusions.

[1] The basic contention of appellant is that the challenged tax has been imposed on the use of engines in interstate commerce and therefore violative of the commerce clause of the United States Constitution. The California Use Tax expressly exempts from its operation any tax prohibited by the Constitution of the United States.² Respondent board has adopted Rule 55, Administrative Code, § 2015, Title 18, to give effect to this exemption. That rule provides: "The use tax applies with respect to any tangible personal property purchased for storage, use or other consumption in this State, the sale of which is exempt from sales tax under this rule * * * except property purchased for use in interstate or foreign commerce, placed in use in interstate or foreign commerce prior to its entry into this State, and there-

2. Section 6352 of the Revenue & Taxation Code provides: "There are exempted from the taxes imposed by this part the gross receipts from the sale of and the storage, use, or other consumption in this State of tangible personal property the

gross receipts from the sale of which, or the storage, use, or other consumption of which, this State is prohibited from taxing under the Constitution or laws of the United States or under the Constitution of this State."

after used continuously in interstate or foreign commerce.”³

The use tax provides that “Every person storing, using, or otherwise consuming in this State tangible personal property purchased from a retailer is liable for the tax.” § 6202, Rev. & Tax.Code. Section 6241 creates a statutory presumption that “tangible personal property sold by any person for delivery in this State is sold for storage, use, or other consumption in this State until the contrary is established.” Section 6246 creates a statutory presumption that “tangible personal property shipped or brought to this State by the purchaser was purchased from a retailer on or after July 1, 1935, for storage, use, or other consumption in this State.”

The general purpose, nature and constitutionality of this tax have long been determined and need not be discussed. *Douglas Aircraft Co., Inc., v. Johnson*, 13 Cal.2d 545, 90 P.2d 572; *Anders v. State Board of Equalization*, 82 Cal.App.2d 88, 185 P.2d 883; *Brandtjen & Kluge v. Fincher*, 44 Cal.App.2d Supp. 939, 111 P.2d 979.

Appellants contend that the tax is imposed on the purchase price of property in interstate commerce because these engines were engaged in interstate use before they entered the state, and such use was not interrupted or terminated when the engines were transferred or used in California. Respondents, on the other hand, contend that there was a “taxable moment” after the journey of the switch engines had ended and before they were placed in interstate commerce in this state that justifies the tax. The answer to these contentions depends upon whether the rules announced in *Southern Pac. Co. v. Gallagher*, 306 U.S. 167, 59 S.Ct. 389, 83 L.Ed. 586 and *Pacific Telephone & Telegraph Co. v. Gallagher*, 306 U.S. 182, 59 S.Ct. 396, 83 L.Ed. 595, or the rules announced in *Union Pac. R. Co. v. Utah State Tax Commission*, 110 Utah 99, 169 P.2d 804, should control this case.

In *Southern Pac. Co. v. Gallagher*, *supra*, the United States Supreme Court upheld the imposition of the California use tax upon “tangible personal property, bought outside of the state by the Southern Pacific Company, an interstate railroad, and installed on importation, or kept available for use, as a part of its transportation facilities.” 306 U.S. at page 170, 59 S.Ct. at page 390. The property consisted of rails, equipment, machinery, tools and office supplies. The court described the property as follows, 306 U.S. at page 173, 59 S.Ct. at page 391: “Few, if any, of the supplies are stored for long term needs. Storage is merely incidental to protection until use, as office supplies in a closet or an extra frog at a section tool house. For construction or reconstruction upon a large scale, special orders are given and arrangements made, so that the material is fabricated for a particular use in the transportation facilities, shipped to its California destination and installed upon arrival. To avoid delay and cost the movement from loading to final placement is as nearly continuous as managerial efficiency can contrive.” The court then cited the rule that a tax upon the privilege of operating in interstate commerce is invalid, but stated that use and storage as defined in the California act are taxable intrastate events, separate and apart from interstate commerce. After discussing several cases the court continued with its discussion of the problem as follows, 306 U.S. at page 176, 59 S.Ct. at page 393: “The principle illustrated by the *Helson* case [*Helson & Randolph v. Kentucky*, 279 U.S. 245, 49 S.Ct. 279, 73 L.Ed. 683] forbids a tax upon commerce or consumption in commerce. The *Wallace* case, [*Nashville, C. & St. L. Ry. Co. v. Wallace*, 288 U.S. 249, 53 S.Ct. 345, 349, 77 L.Ed. 730] and precedents analogous to it, permit state taxation of events preliminary to interstate commerce. The validity of any application of a taxing act depends upon a

3. Of course, whatever may be the proper interpretation of this rule, the rule cannot operate to exempt from the use tax property not exempt under the statute or required to be exempted under the United States Constitution. *La Societe*

Francaise De Bienfaisance Mutuelle v. California Employment Comm., 56 Cal. App.2d 534, 133 P.2d 47; *Goodwill Industries of Southern Cal. v. County of Los Angeles*, 117 Cal.App.2d 19, 254 P.2d 877.

classification of the facts in the light of these theories. In the present case some of the articles were ordered out of the state under specification suitable only for utilization in the transportation facilities and installed immediately on arrival at the California destination. If articles so handled are deemed to have reached the end of their interstate transit upon 'use or storage,' no further inquiry is necessary as to the rest of the articles which are subjected to a retention, by comparison, farther removed from interstate commerce. We think there was a taxable moment when the former had reached the end of their interstate transportation and had not begun to be consumed in interstate operation. At that moment, the tax on storage and use—retention and exercise of a right of ownership, respectively—was effective. The interstate movement was complete. The interstate consumption had not begun. * * * 'Practical continuity' does not always make an act a part of interstate commerce. This conclusion does not give preponderance to the language of the state act over its effect on commerce. State taxes upon national commerce or its incidents do not depend for their validity upon a choice of words but upon the choice of the thing taxed. * * * The prohibited burden upon commerce between the states is created by state interference with that commerce, a matter distinct from the expense of doing business. A discrimination against it, or a tax on its operations as such, is an interference. A tax on property or upon a taxable event in the state, apart from operation, does not interfere. This is a practical adjustment of the right of the state to revenue from the instrumentalities of commerce and the obligation of the state to leave the regulation of interstate and foreign commerce to the Congress."

In the companion case of *Pacific Tel. Co. v. Gallagher*, 306 U.S. 182, at page 186, 59 S.Ct. 396, 83 L.Ed. 595, the facts were as follows:

"The appellant, a California corporation, operates a telephone and telegraph system in interstate and intrastate commerce. The same plant, fa-

cilities and organization are devoted to both interstate and intrastate business. In the necessary operation, maintenance and repair of its system, the appellant purchases outside California large amounts of equipment, apparatus, materials and supplies which are shipped to it in interstate commerce at various points within the state. The tangible personal property which the appellees threaten to tax is of two general classes: specific order and stand-by equipment. * * *

"The specific order equipment is shipped to the appellant at the place of use. Its representative receipts for the goods at the dock or breaks the seal of the railroad car, and its employees unload the goods from the dock or car into its trucks. In most instances the trucks are driven directly to the building where the equipment is to be installed * * *. There is no holding in warehouses. The stand-by supplies which constitute a reserve to meet current requirements are replenished by monthly orders. The appellant's trucks pick them up at the dock or railroad depot and carry them to storage places at points on the system suitable for prompt distribution."

On these facts the court concluded 306 U.S. at page 187, 59 S.Ct. at page 397:

"The appellant exercises two rights of ownership in California—retention and installation—after the termination of the interstate shipment and before the use or consumption on its mixed interstate and intrastate telephone system. We see no material distinction between the contentions of the appellant and those disposed of in *Southern Pac. Co. v. Gallagher*, supra, [306 U.S. at page 167, 59 S.Ct. at page 390]."

The *Gallagher* cases have been consistently followed. In *Curry v. United States*, 314 U.S. 14, 62 S.Ct. 48, 86 L.Ed. 9, an Alabama use tax was upheld on goods purchased by a contractor out of Alabama and brought into the state to be used on a federal cost plus contract. The material was shipped directly to the camp site where

it was installed on the federal project. On the authority of the Gallagher cases it was held that the tax was not one levied on the federal government, but one upon storage and use by the contractor in Alabama. See also *Oklahoma Tax Commission v. Stanolind Pipe Line Co.*, 10 Cir., 113 F.2d 853; *Natural Gas Pipeline Co. of America v. State Commission of Revenue and Taxation*, 163 Kan. 458, 183 P.2d 234; *Mitchell Pub. Co. v. Wilder*, 74 S.D. 343, 52 N.W.2d 732; *Avco Mfg. Corp. v. Connelly*, 19 Conn.Sup. 323, 113 A.2d 364.

Mavar Shrimp & Oyster Co. v. Stone, 221 Miss. 519, 73 So.2d 109, is a rather typical case. There the taxpayer was a canner. Ninety-five per cent of the raw products used by the taxpayer were procured out of Mississippi. The taxpayer used its own boats to import these raw fish products. Repair parts for these boats were purchased outside the state, and were shipped to a wharf in the state where they were immediately placed on the boat in need of repair. Mississippi attempted to impose a use tax on these repair parts. It was held that the tax upon the "using, storing or consuming" of tangible personal property within the state was collectible. The court, in so holding, stated, 73 So.2d at page 111: "In the instant case, the purchased articles were retained in Mississippi upon their delivery, at least momentarily, and the appellant exercised its right of ownership of the articles, by installing them in boats of its choosing. The articles purchased by appellant and handled in the aforesaid manner reached the end of their interstate transit upon 'use or storage' in this State, before they began to be utilized in interstate operations by appellant. Upon delivery of the articles to the wharf at Biloxi, Mississippi, by the common carrier by which they were shipped, the interstate movement of the articles was completed. Beyond question, regardless of the speed with which the articles were installed upon the boats, the interstate consumption of the articles had not begun until they had been installed in their proper place in the boats."

California has followed the rule announced in the Gallagher cases. In Chi-

cago Bridge & Iron Co. v. Johnson, 19 Cal.2d 162, 119 P.2d 945, there was involved the application of the use tax to a foreign corporation engaged in the sale of steel tanks. The company manufactured the tanks in another state and then shipped them "knocked down" to their customers in California. The Supreme Court of California held that the tax applied to the raw materials purchased outside the state used in the tanks assembled in this state. In so holding, the court used the following language 19 Cal.2d at page 170, 119 P.2d at page 949:

"In the instant case the tax was levied on the storage and use of materials which were purchased and fabricated into the tank parts, that storage and use consisting of the time after the materials had arrived and while they were waiting assembly and erection by plaintiff, and the subsequent installation and erection thereof. The interstate transit had ended when the tank parts arrived at their destination near and/or adjoining the customer's premises and awaited assembly insofar as their being subject to the tax was concerned. That was the commencement of the taxable moment; that was the taxable intrastate event which occurred after the interstate transit had ceased.

"Plaintiff endeavors to distinguish the Gallagher cases on several grounds. It asserts that in those cases the purchaser installed the equipment for itself, not as a part of a transaction with another as in the case at bar. But as we have pointed out the plaintiff did install the equipment for itself, that is, the erection of the tank which was in compliance with its contractual obligation so to do. We see no valid distinction between the case at bar and the Gallagher cases where the installation by the Southern Pacific Company of the equipment was made immediately upon its arrival in interstate commerce and immediately upon such installation was used in its interstate activities. Nor does the claim that there were two

transactions in the Gallagher cases, namely, the shipment in interstate commerce of the equipment into California followed by its installation and consumption in interstate commerce, while in the case at bar there is only one continuous transaction, namely, the fulfillment of an order for a tank including its final erection. The interstate shipment had come to an end no less in the case at bar than it had in the Gallagher cases. While it is true that it was stipulated that the requirement in plaintiff's contracts for tanks that they be assembled and installed was essentially connected with the contract and inhered in it, the purchase out of California and the shipment here of equipment and the consumption thereof in interstate commerce in the Gallagher cases was no less a continuing and closely integrated operation. The consumption of the equipment in interstate commerce was an essential and necessary part of and inhered in the entire transaction. The whole plan of the shipment of the equipment was that it be immediately consumed in interstate commerce. No shipment would have been made unless it was to be used in interstate commerce." See also *Atchison, etc., Ry. Co. v. State Board of Equalization*, 131 Cal.App.2d 677, 281 P.2d 99.

Now how do the facts in the instant case compare with those involved in the Gallagher cases? In the Gallagher cases the goods were ordered outside California for use in California in interstate commerce. In the instant case the appellant ordered 93 engines outside the state, knowing that some of them were destined for use in California. Ultimately, 17 of the engines were allocated to such use. In the Gallagher cases, when the parts were delivered to the taxpayer, they were shipped in interstate commerce to California. In the instant case the engines were transferred "dead in train," that is, on their own wheels but not in operation, to California. That is comparable to being shipped in interstate commerce.

The only distinguishing factor between this case and the Gallagher cases is that in

the latter cases the parts were shipped to California without being used prior to shipment. In the instant case the 17 engines were first inspected at Shopton, Iowa, and then placed in temporary, emergency use in interstate commerce before being transported to their ultimate intended destination, California. It is appellant's position that this factor serves to distinguish and make inapplicable to the instant case the rule of the Gallagher cases.

This conclusion is reached by the following reasoning: It is argued that, because the property involved in the Gallagher cases had not, before being sent to California, been used in interstate commerce, the tax there imposed was on "events preliminary to interstate use or consumption." But in the instant case, so it is argued, the 17 engines were used as instrumentalities of interstate commerce before coming to California and were never withdrawn from such commerce. Therefore, there was no intra-state consumption or use, and therefore no "taxable moment" when the engines were not in interstate commerce. The journey from out of the state into California, it is contended, did not change the already exempt status of the engines as instrumentalities of interstate transportation. In support of these conclusions appellant cites *Union Pac. R. Co. v. Utah State Tax Commission*, 110 Utah 99, 169 P.2d 804. The factual situation there involved does resemble the one here involved in many respects. There Utah assessed a use tax on 8 engines purchased by the railroad and used in Nebraska in the switching and hauling of both intra and interstate trains. Some undefined time later, the opinion merely stating "subsequently," these engines were transferred to Utah under their own power, where they were inspected and repaired and then placed in interstate service. The court reversed the tax commission, and held that the engines had been in interstate commerce and were at no time removed from it. Therefore, said the court, no "taxable moment" ever occurred in Utah. One of the concurring opinions attempted to distinguish the Gallagher cases as follows at page 807 of 169 P.2d: "There the materials and ap-

pliances came into the state of California merely as freight, they were not then being used or consumed as instrumentalities in interstate commerce, but were merely being hauled as freight in an interstate movement. * * * Here these engines entered this state installed and equipped and being used and consumed in interstate commerce. The fact that there was a short period of time after they entered this state during which they were not actively engaged in or being used and consumed in interstate commerce because they were temporarily standing still and inactive does not constitute a withdrawal from interstate commerce."

There are a few other state cases holding that similar transactions are not taxable. *Pacific Telephone & Telegraph Co. v. Henneford*, 195 Wash. 553, 81 P.2d 786, decided before the *Gallagher* cases; *Northern Pac. R. Co. v. Henneford*, 9 Wash.2d 18, 113 P.2d 545, decided largely upon the restrictive language of the Washington statute; *Interstate Oil Pipe Line Co. v. Stone*, 203 Miss. 715, 35 So.2d 73, 36 So.2d 142, affirmed 337 U.S. 662, 69 S.Ct. 1264, 93 L.Ed. 1613, decided upon an express provision of the Mississippi statute; see also *Southern Pac. Co. v. Utah Tax Commission*, 106 Utah 451, 150 P.2d 110.

[2] It must be conceded that in many ways the *Union Pacific* case is quite similar to the instant one. One difference is that in the *Utah* case we only know that the engines were first used in Nebraska, and, at some undefined date, "subsequently" removed to Utah. If that means that the engines were purchased for use in and used in Nebraska, and later the railroad decided to transfer them to Utah, the case differs from the instant one. In our case some undisclosed number of engines were intended for use in California but temporarily placed in emergency use in interstate commerce elsewhere before being shipped to California. This is an important distinction. As Justice Traynor, then a professor of law, stated in 24 Cal.L.Rev. 175, 176: "It is the intent of the use tax merely to supplement the sales tax by imposing upon those subject to it a tax burden equivalent to that of the sales tax with the same spe-

cific exemptions in each case. The act accordingly limits the tax to the 'use * * * of property purchased for use * * *' within the state. Problems requiring administrative interpretation must be analyzed in the light of this double condition. Circumstances might compel, for example, the use of property within the state not intended for such use at the time of purchase, and previously used elsewhere. Thus, a family moving into California with furniture it had used for several years would clearly be exempt from the tax. Cases can arise, however, where a formal use elsewhere might disguise an actual intent to use within the state the property purchased. For the most part such an intent would reveal itself in the circumstances of the purchase and the subsequent use of the property. There could be little doubt that the use tax would apply to the use of an automobile purchased in Nevada by a California resident and registered in California shortly thereafter. Since the variety of possible situations could hardly be covered by a rigid rule or regulation, doubtful cases must be submitted to administrative interpretation."

In the instant case the trial court wrote an opinion exhaustively and ably discussing the various problems presented. This problem of interstate use prior to transfer to California was discussed at some length. The court came to the conclusion that the out-of-state use was a mere "formal" use and did not serve to change the rule of the *Gallagher* cases. The court, speaking through the Hon. Melvyn I. Cronin, stated:

"* * * the Supreme Court of the United States has approved the carving out of particular phases of an integral economic process, the labelling of them as 'local,' and sustained state taxation in the face of the argument that the tax violated the commerce clause. In such cases the Supreme Court has the last word.

"Would the rule of *Southern Pacific Co. v. Gallagher* be any different if there had been a formal period of prior interstate use outside the state? I think not. Over-simplifying the prob-

lem, one might imagine the railroad to be a small boy and an instrumentality of inter-state commerce a hoop. Could the small boy then say, 'If I roll my new hoop through Kansas and New Mexico I won't have to pay a tax on it if I play with it in California, which is where I intend to use it personally.' Under the law as now interpreted, the little boy and the railroad would be wrong. * * *

"Accordingly, we are constrained to hold from reason and rule that there was a taxable period after the engines had been hauled into California and before they were actually placed in operations here, sufficient upon which to conclude there existed a genuine intra-state event upon which this tax was imposed; and that the property here involved was not used continuously in inter-state commerce.

"We are satisfied that the case at bar is controlled by the principles expressed in *Southern Pacific Co. v. Gallagher* and *Pacific Telephone & Telegraph Co. v. Gallagher*."

[3] This appears to us to be sound reasoning. In the instant case the interstate use outside the state was intended to be temporary and it was intended that such engines should be ultimately operated, used and consumed in California. After such formal out-of-state use the engines were placed in interstate transit. At the end of that transit, and before being placed in interstate operation, just as in the *Gallagher* cases, there was a period of time between the end of the transit and the beginning of use in California. During that period there was a "storage" and "use" identical with those involved in the *Gallagher* cases. These were intrastate events and subject to state taxation, under the rule of the *Gallagher* cases. This conclusion makes it unnecessary to discuss the other points raised by counsel.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Donald LeRoy JOHNSON and Funzell Smith, Defendants and Appellants.

Cr. 1047.

District Court of Appeal, Fourth District,
California.

March 2, 1956.

Rehearing Denied March 15, 1956

Hearing Denied March 28, 1956.

Defendants were convicted of possession of marijuana. The Superior Court of San Diego County, John A. Hewicker, J., entered judgments of conviction, and an order denying a new trial, the defendants appealed. The District Court of Appeal, Mussell, J., held that where police officer saw automobile being driven in an erratic manner, apparently above the speed limit, weaving from lane to lane, at times practically striking center island and almost striking automobile proceeding in the same direction, and officers stopped the automobile, and it appeared to them that the driver was under the influence of something, and one of the officers found a marijuana cigarette in tray on dashboard of automobile, officers were justified in stopping the automobile, and search of automobile and seizure of marijuana cigarette were reasonable and lawful.

Judgments and order affirmed.

Searches and Seizures — 3(1)

Where police officer saw automobile being driven in an erratic manner, apparently above the speed limit, weaving from lane to lane, at times practically striking center island and almost striking automobile proceeding in the same direction, and officers stopped the automobile, and it appeared to them that the driver was under the influence of something, and one of the officers found a marijuana cigarette in tray on dashboard of automobile, officers were justified in stopping the automobile, and search of automobile and seizure of marijuana cigarette were reasonable and lawful.

West's Ann.Health and Safety Code, § 11500.

Edgar G. Langford, San Diego, J. Perry Langford, Los Angeles, and Adolph Zuber, San Diego, for appellants.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Defendants were charged with the crime of possession of a narcotic (Marijuana) in violation of section 11500 of the Health and Safety Code. Smith admitted two prior felony convictions charged and a jury trial was had which resulted in verdicts of guilty as to each defendant. Motions for a new trial were denied and defendants appeal from the judgments of conviction and from the order denying a new trial.

On May 3, 1955, at approximately 3:00 a. m., two police officers (Kennedy and Bills) noticed a Buick convertible being driven north on Pacific Highway in San Diego in an erratic manner. Officer Kennedy testified that the Buick "appeared to be above the speed limit, following very closely another car on the highway. The Buick would approach the rear of the other car rapidly and then suddenly slam on the brakes as if he were suddenly aware of the car in front of him"; that this occurred several times and the Buick (being driven by defendant Johnson), as it proceeded north on Pacific Highway, was swerving from lane to lane "at times swerving towards the center island, practically striking it." Upon witnessing this erratic driving for about two blocks, the officers stopped the Buick and observed there were four people in it. Defendant Johnson was in the driver's seat, defendant Fonzell Smith was seated directly behind him in the back seat, one Duran was in the front seat beside Johnson, and one Graham was in the rear seat next to Smith. Officer Kennedy testified that he asked defendant Johnson for his operator's license and that Johnson appeared to him to be "under the influence of something. * * * His answers were

somewhat slow, his speech a little slow, his eyes were dilated, and his eyelids were slightly droopy." Johnson was then asked to step from the car and "staggered, swerved a small amount." A field sobriety test was administered to him but it was not completed because Officer Kennedy was of the opinion that Johnson had not had enough to drink to fail a sobriety test. Kennedy further testified, "I felt it was something. I didn't know whether it was alcohol or what. I felt there was something affecting him; he was under the influence of something. However, not strongly enough to fail the 502 test"; that while he was talking to Johnson, Officer Bills remarked "something was wrong here" or words to that effect. Officer Bills talked to Duran and Graham and while Duran was coherent and responsive to questions, Graham was barely able to stand without assistance and his speech was slurred and jumbled. Duran and Graham were told to sit in the police car.

Officer Bills went to Johnson's car, opened the righthand door and got in the front seat with Johnson. While interrogating him, Officer Bills shone his flashlight around the car, examined the glove compartment, and while shining the light upon the dashboard, found a cigarette rolled in brown paper in a plastic tray (this cigarette by chemical and microscopic analysis was later determined to be marijuana, of a type "immature in growth"). Bills showed the brown cigarette to Johnson and he denied knowledge of how it got in the tray, denied ownership of it and denied having ever used marijuana. Smith and the other occupants of the car also denied ownership of the cigarette and stated they did not know how it got in the car. The Buick was then impounded for delivery to the narcotic officers and the defendants were transported to jail where they were booked.

Johnson and Smith were examined by a physician at about 4:45 a. m. on May 3, 1955. The doctor observed that Johnson's behavior was " * * * rather peculiar in that he was drowsy and nodding and his eyes were droopy on the one hand and, on the other hand, a few minutes later he

would perk up as if he weren't tired necessarily, a rather unusual state. I noticed his pupils were a little dilated, checked his pulse and respiration and found them normal. I noticed no marks on his arms and then I had him blow his breath in my face, as I do in these cases. I couldn't smell alcohol and I detected what to me was the odor of * * * breath of a marijuana smoker, like old burnt Manila rope, or the old fashioned Cubab cigarette odor"; that defendant Smith's behavior was essentially the same as that of Johnson except that Smith's pupils were normal in size, he was "nodding, drowsy, apathetic, a very slight weave or ataxia, as I call it, drooping of his lids." The doctor further testified that he felt both Johnson and Smith had been smoking marijuana cigarettes.

A microscopic examination was made of debris removed from the clothing worn by Johnson and Smith and from the floor of the Buick car. It was determined that this material contained marijuana of an "immature in growth" type.

Johnson and Smith testified that on the night of May 2nd they drove around San Diego in the Buick with Graham and Duran; that they then went to Tiajuana and visited several cafes and bars until about 2:30 a. m. on May 3rd; that they then drove back to San Diego and were stopped by the police officers; that they did not smoke marijuana cigarettes in Tiajuana or in San Diego and did not know how the marijuana cigarette got in the car.

Appellants' sole contention is that the trial court erred in admitting in evidence the marijuana cigarette and other material which had been obtained as a result of an unlawful and unreasonable search and seizure of defendant Johnson's automobile. In support of this contention they cite the recent case of *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905. It is unnecessary to here discuss at length the facts and the law stated in the Cahan case in view of the more recent decisions of *People v. Martin*, 46 Cal.2d 106, 293 P.2d 52, and *People v. Blodgett*, 46 Cal.2d 114, 293 P.2d 57.

In the Martin case the defendant was convicted of possession of marijuana found in an automobile in which he was riding and the contention on appeal was that the search of the automobile was unlawful and that the evidence produced thereby was therefore inadmissible. In that case two Oakland police officers (McCann and Price) on patrol duty, at about 11:00 p. m., observed a parked car in a "lover's lane" with two men sitting in the front seat. McCann testified that he "figured we had better check it out" and that when he brought the patrol car around to make a U-turn, "the suspects' car took off" at a high rate of speed; that after pursuing the car for some distance with the red light lit and siren going on the police car, they overtook and stopped the other automobile. The officers ordered the suspects to put their hands in front of them and when they did so, Officer McCann saw a small bag in the middle of the front seat that had been covered by their hands. The officers ordered the suspects out of the car and after searching them for weapons, Officer McCann reached into the car and took the bag. He examined it and concluded that it contained marijuana. Later analysis confirmed this conclusion. The court held that the presence of the two men in the parked automobile on a "lover's lane" at night was itself reasonable cause for police investigation; that the officers could reasonably infer from their sudden flight that the suspects were guilty of some crime and that an investigation by the officers was reasonable; that when Officer McCann saw the bag that was uncovered when the suspects removed their hands, he had a reasonable cause to believe that their possession of it prompted the flight and that it contained contraband; and that the officer was justified in taking it from the automobile.

In the Blodgett case the defendant was convicted of illegal possession of marijuana. Police officers saw the defendant get into a cab which was double parked in front of a hotel at 3:00 a. m. Defendant, on entering the cab, sat on the left side of the rear seat. Two police officers (Barker and Tarabochia) had been observing the cab as

it stood in front of the hotel and decided to investigate. They approached the cab and ordered the occupants to get out. As Officer Barker opened the left rear door he saw the defendant withdraw his left hand from behind the seat at the juncture of the back seat and cushion. After the defendant got out, the officer removed the rear seat and found three marijuana cigarettes where defendant had withdrawn his hand. A search of the automobile was made without a warrant. Defendant contended on appeal that the search of the cab was unlawful and that the evidence obtained thereby was inadmissible. The court held that in view of the hour and the unusual conduct of the occupants of the car, it was not unreasonable for the officers to order them to get out of the car for questioning and that since Officer Barker saw the defendant's furtive action in getting out, he had reasonable grounds to believe that he was hiding contraband and that the search of the cab was therefore reasonable.

In the instant case it was reasonably apparent to the police officers that the defendants were committing or attempting to commit a public offense in their presence. Defendant Johnson's car was being driven in an erratic manner, apparently above the speed limit, weaving from lane to lane, at times practically striking the center island, and almost striking a car proceeding in the same direction. Under these circumstances the officers were fully justified in stopping the defendant's car. After stopping it, it became apparent to the officers that while defendant Johnson was not drunk enough to fail to pass a sobriety test, there was "something wrong", and that he appeared to be under the influence of "something". It was while Officer Bills was seated in the car in the front seat beside Johnson that he noticed the marijuana cigarette in the tray on the dashboard. The seizure of the cigarette and further search of the car was reasonable and lawful under the circumstances shown by the record considered in the light of *People v. Martin* and *People v. Blodgett*, supra.

The judgments and order are affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; CARTER, J., dissenting.

139 Cal.App.2d Supp. 936

Richard D. GOODWIN, d/b/a Goodwin Realty Co., Plaintiff and Respondent,

v.

Robert F. GLICK, Defendant and Appellant.

Civ. A. 8828.

Trial Court No. 151,868.

Appellate Department, Superior Court,
Los Angeles County, California.

Feb. 28, 1956.

Action by real estate broker to recover commission for sale of real estate. The Municipal Court of the Los Angeles Judicial District, Morton L. Barker, J., entered judgment for broker and defendant appealed. The Appellate Department of the Superior Court held that under contract which provided that commission was to be paid to agent who was given sole and exclusive right to sell premises and that agent was authorized to refer listing to Realty Board which was authorized to refer the listing to its members, a Realty Board member who sold the premises was subagent of broker and not of vendor and could not maintain an action against the vendor for commission.

Judgment reversed and appeal from order dismissed.

1. Principal and Agent ⇨88

A subagent may enforce payment of compensation from principal only when authority extends to employment of subagent on behalf of principal and not when authority is restricted to employment of such subagent on behalf of agent and not as agent of or on behalf of principal.

2. Brokers ⇨18, 73

Exclusive listing agreement authorizing broker to refer listing to realty board, members of which were authorized to act as subagents in procuring purchaser, authorized the broker to appoint members of realty board as its agents and not as agents of the vendor and member of realty board who sold property as subagent of broker could not maintain action for commission against vendor.

Harwood Stump, Long Beach, for appellant.

George M. Stephenson, San Pedro, for respondent.

Before SWAIN, Acting P. J., and PATROSSO and KAUFFMAN, JJ.

BY THE COURT.

Plaintiff, a licensed real estate broker, instituted this action for the recovery of a commission in effecting a sale of defendant's property, and recovered judgment for which defendant appeals. The determinative question is whether plaintiff is entitled to maintain the action. The facts upon which the answer to this question depends are undisputed and may be briefly stated.

Defendant executed a written agreement with Petros Realty Company, a licensed real estate broker, by the terms of which he appointed said Company as his "sole and exclusive agent and grant said agent the exclusive right to sell" the property in question for the price and upon the terms and conditions therein set forth, which authority was stated to be irrevocable and to continue for a period of sixty days; defendant agreeing to pay "said agent" a commission of 5% "as and for the compensation of said agent hereunder in the event of a sale or an exchange of said real property by said agent or any other, including myself, while this contract is in force * * *." (Emphasis added.) The agreement contained this additional provision: "It is understood that said agent is a member of the San Pedro Realty Board, and it is further agreed that said agent shall refer this listing to said Board to be by it referred to such of its members as it may deem advisable and that such Board or its members may act as sub-agents in procuring or attempting to procure a purchaser in accordance with this agreement, and in the event a sale or exchange shall be made through said sub-agent, all of the terms of this agreement shall apply to such transaction." Pursuant to said agreement, Petros Realty Company referred the listing to the Realty Board, which in turn referred it to plaintiff. The trial court found that thereafter

the plaintiff sold the property to a purchaser procured by plaintiff. While defendant challenges this finding as unsupported by the evidence, we find it unnecessary to consider the contention in view of our conclusion that plaintiff is in no event entitled to maintain the action, as a consequence of which a reversal is required.

There can be no doubt but that under the terms of the listing agreement Petros Realty Company was authorized to refer the same to the Realty Board, and that the latter in turn was authorized to refer it to plaintiff who was one of its members, but the question presented is whether plaintiff, as a subagent, may maintain an action thereunder against the defendant or whether such action must be maintained by the agent named therein—Petros Realty Company.

[1] Neither the research of counsel nor our own has revealed any decision in the State where this precise question has been considered or discussed, and there is considerable confusion in the authorities elsewhere. Some authorities declare broadly that a subagent appointed by an agent pursuant to authority of the principal may claim his compensation from the latter. *Eastland v. Maney*, 1904, 36 Tex.Civ.App. 147, 81 S.W. 574, 575; *Kinhead v. Hartley*, 1913, 161 Iowa 613, 143 N.W. 591, 595; 3 C.J.S., Agency, § 195, p. 100. Other authorities, however, while recognizing that such a subagent may enforce payment of compensation from the principal, state that this is true only when the authority extends to the employment of a subagent on behalf of the principal and not when the authority is restricted to the employment of such subagent on behalf of the agent and not as agent of or on behalf of the principal. See 2 C.J. p. 779, and cases cited in Note 69. The distinction is fundamental and failure to recognize it probably accounts for the conflict in the decisions upon the subject. As is well said by Tiffany: "It has been often declared that whenever authority to employ subagents is expressed or may be implied, privity of contract between principal and subagent is created by the employment, but such statements must usually

be read in the light of the facts before the court, and cannot be supported as stating a rule unless 'subagent' is used with the restricted meaning of 'substitute' or of 'agent for the principal.' " Tiffany on Agency, 2d Ed., pp. 213-214. Similarly Professor Mechem says: "A distinction needs to be taken here. It is not infrequent to find it one of the functions of an agent to employ other agents for his principal. Thus the local manager of a plant or store normally hires and fires the personnel. This does *not* involve delegation; those so hired are not subagents but simply new or additional agents of the principal, differing from others only in the manner of their appointment. It is not to be supposed, e. g., that the appointing agent is bound by their contracts: they are not his agents.

"By delegation is meant that the agent is permitted to use agents of his own in performing the function he is employed to perform for his principal, delegating to them the discretion which normally he would be expected to exercise personally. These agents are known as subagents to indicate that they are the agent's agents and not the agents of the principal. Normally (though of course not necessarily) they are paid by the agent. The agent is liable to the principal for any injury done him by the misbehavior of the agent's subagents." Mechem *Outlines of Agency*, 4th Ed., sec. 79, p. 50.

We believe that the correct rule is as stated by Tiffany: "Even if the employment is authorized, the right of the subagent to look to the principal will depend upon whether the agent was authorized to employ the subagent upon the principal's behalf and to create privity of contract between them, or was merely authorized to employ a subagent on his own behalf and responsibility. In the first case the subagent can look to the principal but in the latter he can look only to the agent." Tiffany *Op. Cit.*, pp. 444-445.

[2] A reading of the contract before us makes clear, we believe, that the provision therein contained authorizing the agent named to refer the listing to the Realty

Board, which in turn is authorized to refer it to its members, must be construed as an authorization to Petros Realty Company to appoint members of the Realty Board to whom it is referred as its agents and not as agents of the defendant. At the outset it is to be noted that Petros is constituted defendant's exclusive agent vested with the exclusive right to sell—the legal effect of which is to preclude the defendant from appointing any other agent during the period therein specified. *Wilck v. Herbert*, 1947, 78 Cal.App.2d 392, 412-413, 178 P.2d 25, 37. From this it would seem to necessarily follow that any agents appointed by Petros, through the Realty Board, must be regarded as the subagents for Petros and not of defendant, for any other construction would be inconsistent with and in derogation of the exclusive right granted to Petros. Aside from this, however, the agreement expressly provides: "I (defendant) agree to pay said agent five (5) per cent of the selling price * * * as and for the compensation of said *agent* hereunder in the event of a sale or an exchange of said real property by said agent *or any other*, including myself * * *." Here we have clear and unmistakable language that, without regard to whether a sale is effected by the agent named or by another to whom the listing may be referred, the commission is payable to the agent. By this provision defendant unconditionally obligated himself to pay the commission, if earned, to the agent and no one else. In such circumstance, if defendant herein had paid the commission to the plaintiff, such payment would not operate to discharge his liability to the agent for the entire commission. 12 C.J.S., *Brokers*, §§ 68, 96, pp. 157, 233. To permit plaintiff to recover herein, therefore, would be to leave defendant subject to like liability at the suit of the agent named in the agreement. See Annotation 3 A.L.R.2d p. 532.

We find ourselves in accord with the decision in *George A. Allsopp, Inc., v. Honey*, 1946, 134 N.J.L. 105, 45 A.2d 489, wherein under a contract substantially identical in its terms with that before us, it is held that a member of the Realty Board other than

the agent named therein to whom the listing had been referred and who effected a sale of the property was without right to maintain an action for the stipulated commission against the owner.

The judgment is reversed. The appeal from the order of May 6, 1955 is dismissed.



139 Cal.App.2d Supp. 934

SHOWCASE PROPERTIES, Inc., a corporation, Plaintiff and Respondent,

v.

Frank WINER, Defendant and Appellant.

Civ. A. 8822.

No. 229571.

Appellate Department, Superior Court,
Los Angeles County, California.

Feb. 17, 1956.

Action by realty broker against vendor for commission allegedly due broker. The Municipal Court, Los Angeles Judicial District, Mark Brandler, J., entered judgment for broker, and vendor appealed. The Superior Court, Appellate Department, Bishop, P. J., held that, where broker's right to a commission under listing agreement had expired, but provision in escrow instructions provided that purchaser, who had been procured by broker, was to have first refusal on certain additional lots for 48 hour period in event vendor received a bona fide offer to vendor, broker would not be entitled to a commission upon purchaser's subsequent purchase of the additional lots, in view of fact that no offer, other than that of purchaser himself, was ever made to vendor as to such lots.

Judgment reversed.

1. Vendor and Purchaser ⇨18

Provision in the escrow instructions that buyer was to have first refusal on an additional five lots for 48 hour period in

event vendor received bona fide offer to vendor did not give purchaser an outright option, that is, a present right to purchase the property at his pleasure, but gave him a right which would arise only in event someone made to vendor a bona fide offer which was acceptable to vendor.

2. Brokers ⇨50

Where broker's right to a commission under listing agreement had expired, but provision in escrow instructions provided that purchaser, who had been procured by broker, was to have first refusal on certain additional lots for 48 hour period in event vendor received a bona fide offer to vendor, broker would not be entitled to a commission upon purchaser's subsequent purchase of the additional lots, in view of fact that no offer, other than that of purchaser himself, was ever made to vendor as to such lots.

Rothman, Goodman & Hirschberg, Los Angeles, for appellant.

Milton Zerlin, Beverly Hills, for respondent.

BISHOP, Presiding Judge.

The plaintiff, a broker, was given an exclusive right to sell eight lots belonging to the defendant during a period ending September 2. The listing agreement that gave him that right further provided that if a sale was made by October 2 to a party with whom the plaintiff had negotiated before September 2, plaintiff was to receive a commission on the sale. Prior to September 2 a buyer was found by the plaintiff for three of the lots, and plaintiff was paid the commission due it for having procured a ready, willing and able purchaser of the three. The purchaser was not able to buy the remaining five lots on terms satisfactory to the defendant, and October 2 passed without a sale. On November 8, however, the purchaser bought the five remaining lots from the defendant.

The facts so far related do not support the judgment awarding the plaintiff \$2,200. *Ridgway v. Chase*, 1954, 122 Cal.App.2d 840, 847, 265 P.2d 603, 607. This seems obviously so, and as we understand the po-

sition of the parties and of the trial judge, none of them contends that the judgment is to be supported upon the facts related up to this point. If the plaintiff has a cause of action, it is because of this provision inserted, irrelevantly, but validly for all that, in the escrow instructions under which the sale of the three lots was carried out: "As a matter of record only in this escrow * * * it is understood buyer is to have first refusal on [the remaining five lots] for a period of forty-eight hours, in event seller receives a bona fide offer to seller, and should buyer take any or all of lots, he must meet same price and terms as the offer * * *."

[1,2] The trial court interpreted this provision as giving the buyer—plaintiff's purchaser—an option to purchase. With this as a premise, the case of *Zinn v. Ex-Cell-O Corp.*, 1944, 24 Cal.2d 290, 295, 149 P.2d 177, 180, was properly held to apply, warranting a judgment in plaintiff's favor. The terms employed, however, did not give the buyer an outright option, that is, a present right to purchase the property at

his pleasure, but rather a right that would arise only in the event someone made a bona fide offer to the defendant, that was acceptable to him. *Falkenstein v. Popper*, 1947, 81 Cal.App.2d 131, 135-137, 183 P.2d 707, 709. We need not determine in this case whether the plaintiff would have been entitled to his commission, under the principle of *Zinn v. Ex-Cell-O Corp.*, supra, had someone made such an offer, and thereupon the purchaser produced by the plaintiff exercised his right to the "first refusal." No offer, other than that of the purchaser himself, was ever made, and that was not made under any right conferred upon him. See 12 C.J.S., *Brokers*, § 86, p. 199. We see no tenable theory on which the plaintiff has a better claim to a commission under the facts of this case, for the sale of the five lots to the purchaser of the three, than he would have had had the escrow not contained the provision quoted above. That, as we have already noted, is no valid claim at all.

The judgment is reversed.

PATROSSO and SWAIN, JJ., concur.

46 Cal.2d 318

Herbert HISCHEMOELLER, doing business under the name and style of Hismoco (American Co.), a fictitious firm name, Plaintiff and Respondent,

v.

NATIONAL ICE AND COLD STORAGE COMPANY OF CALIFORNIA (a Corporation), Defendant and Appellant.

L. A. 23816.

Supreme Court of California.

In Bank.

March 2, 1956.

Action against warehouseman to recover damages for alleged negligence in storage of chili peppers. The Superior Court, Los Angeles County, Alfred L. Bartlett, J., rendered judgment for plaintiff, and defendant appealed. The Supreme Court, McComb, J., held that where original owner deposited peppers with warehouseman without declaring value and accepted receipts which referred to tariffs which limited liability in absence of declaration of value, and purchaser of peppers accepted from warehouseman transfer memoranda which stated that peppers were stored subject to limited liability and other terms and conditions shown by receipts and rules and regulations on file, and there was no suggestion of sharp dealing or unfair practices on either side, warehouseman was entitled to benefit of limitation of liability provisions.

Judgment reversed.

Opinion, 284 P.2d 81, vacated.

1. Warehousemen ⇨2

Public warehouseman was a "public utility" governed also by Food Warehousemen Act. Public Utilities Code, §§ 216, 239, 2501-2574, 2502, 2507.

See publication Words and Phrases, for other judicial constructions and definitions of "Public Utility".

2. Warehousemen ⇨34(10)

In action against warehouseman for damages for alleged negligence in storage of chili peppers, instruction placing on warehouseman the burden of proving that

plaintiff accepted special contract limiting liability of warehouseman with knowledge of its terms was erroneous. Public Utilities Code, §§ 216, 239, 2501-2574, 2551, 2552.

3. Warehousemen ⇨24(7)

Where a prudent man could and would have read limitation of liability provision on warehouse receipts, he is held to have notice of such limitation, and his recovery is limited thereby, regardless of actual knowledge and understanding of such provision. Public Utilities Code, §§ 216, 239, 2501-2574, 2551, 2552.

4. Public Service Commissions ⇨6.8

Schedules issued by Public Utilities Commission, showing rates and regulations, including limitation of liability, automatically become implied terms of any contract between a public utility and its customer, and fact that customer does not have actual knowledge of such terms is immaterial. Public Utilities Code, §§ 216, 239, 2501-2574, 2551, 2552.

5. Warehousemen ⇨16

One who accepts and retains a warehouse receipt, though without knowledge of its contents, is bound by terms of receipt. Public Utilities Code, §§ 216, 239, 2501-2574, 2551, 2552.

6. Warehousemen ⇨2

A public warehouseman, though a public utility subject to all applicable provisions of Public Utilities Code, was governed primarily by Food Warehousemen Act. Public Utilities Code, §§ 216, 239, 2501-2574, 2502, 2507.

7. Warehousemen ⇨2

In application to warehousemen, the Food Warehousemen Act prevails at any point of conflict with Public Utilities Act. Public Utilities Code, §§ 216, 239, 2501-2574, 2502, 2506, 2507.

8. Warehousemon ⇨24(7)

Where provision limiting liability of warehouseman to agreed valuation is included in schedule of rates and regulations filed with Public Utilities Commission and is not disapproved or changed by Commission, such provision must be observed by both bailor and bailee and no departure can be made from it, unless or until a

change is approved by Commission, and no contract of storage may contain an express or implied term at variance with such provision or any other provision of the tariff. Public Utilities Code, §§ 216, 239, 2501-2574, 2502, 2506, 2507, 2531, 2532, 2534, 2551-2554, 2556(b), 2557.

9. Warehousemen ⇌24(7)

Where original owner deposited chili peppers with warehouseman without declaring value and accepted receipts which referred to tariffs which limited liability in absence of declaration of value, and purchaser of peppers accepted from warehouseman transfer memoranda which stated that peppers were stored subject to limited liability and other terms and conditions shown by warehouse receipts and rules and regulations on file, and there was no suggestion of sharp dealing or unfair practices on either side, warehouseman was entitled to benefit of limitation of liability provisions. Public Utilities Code, §§ 216, 239, 2501-2574, 2502, 2506, 2507, 2531, 2532, 2534, 2551, 2552, 2556(b), 2557, 2574.

James D. Garibaldi, Los Angeles, Gavin, McNab, Schmulowitz, Sommer & Wyman, Nat Schmulowitz, Peter S. Sommer and Ronald P. Klein, San Francisco, for appellant.

McBain & Morgan, Newell & Chester, Newell, Chester & Gibson, and Robert M. Newell, Los Angeles, for respondent.

McCOMB, Justice.

Plaintiff sues defendant warehouseman for damages resulting from negligence in the storage of certain dried chili peppers. The case was tried before a jury and verdict rendered for plaintiff in the sum of \$23,112.30. Defendant has appealed.

[1] Defendant is a public warehouseman and as such a public utility. (Pub.Util. Code, §§ 216, 239.) It is also governed by the Food Warehousemen Act (Pub.Util. Code, §§ 2501-2574), which defines food warehousemen as public utilities (§§ 2502, 2507). Section 2551 requires the filing with

the Public Utilities Commission (formerly Railroad Commission) of "schedules showing all rates and charges, which are in force for warehousing and storage services of every description, including sorting, handling, weighing, elevating, and packing charges, and all charges directly or indirectly connected with such services, together with all rules which in any manner affect or relate to rates or charges, and showing plainly when they became effective. The rate shall be uniform in their operation and shall apply with equal force and effect to all persons or corporations dealing with the food warehouseman." Section 2552: "Every food warehouseman doing business in the State shall print and keep open to public inspection at each building, structure, warehouse, elevator, or plant maintained by him in this State copies of the schedules filed with the commission pursuant to Section 2551."

Defendant has filed, and kept open to public inspection as required schedules covering its rates and other charges. One of them is Cold Storage Warehouse Tariff No. 12, C.R.C. No. 87, which contains a rule 70-B reading as follows: "Limited Liability.—For the purpose of fixing storage rates and the maximum limit of the warehousemen's liability, the value of merchandise stored shall be conclusively deemed not to exceed, per ton of 2000 lbs.—

for potatoes and onions.....	\$ 50.00
for all other vegetables and for fruits and fish ¹	100.00
for frozen packaged processed foods	200.00
for butter, eggs and cheese.....	500.00
for all other merchandise.....	200.00

unless the person to whom the warehouse receipt is issuable declares, when such merchandise is offered for storage, that it is of greater value and such greater value is noted on the warehouse receipt by the warehouseman, in which case the value shall be conclusively presumed not to exceed that so declared. The specified tariff storage rates are minimum rates which apply where no value is so declared

1. "Chili peppers fall in this category."

and noted, or where, if declared, it does not exceed the otherwise presumed limit; and where such declared value exceeds such otherwise presumed limit, an additional rate will be added and charged equivalent to one-quarter of one per cent of the amount of such excess for each month or part thereof. The warehouseman's liability is limited to and shall in no event exceed whichever is smaller of the actual value, or, as the case may be, such presumed or declared limit of value in respect of which the storage rate is so fixed and payable. Such presumed or declared value as an agreed limit, and likewise such limitation of liability, applies separately and proportionately on a weight basis to each part of the stored merchandise; and liability, if any, for any partial loss of or injury to any part thereof shall not exceed that portion of such limited liability with respect to such part, proportionate to the actual loss of or damage thereto.

"The option of declaring such increased value rests with the customer and the warehouseman may not insist upon it." Cold Storage Warehouse Tariff No. 2-D, C.R.C. No. 86, also on file, provided a minimum storage rate of 25 cents per hundred pounds of chilies for the first month and 12½ cents per month for each succeeding month, provided same were in lots of 10,000 pounds or over (as was the case here).

The peppers were originally stored in 1949 by Gonzales and Blanco, who declared no value, and then received two "Memorandum Acknowledgments" on which defendant acknowledged receipt from them of the peppers "To be placed in Cold Storage Subject To Limited Liability and other Terms and Conditions as Shown By Warehouse Receipt and/or Rules and Regulations on File with the Railroad Commission of the State of California." It is a fair inference that conforming warehouse receipt was issued to Gonzales and Blanco. In January 1950 plaintiff, who had had considerable experience with certain types of warehousing, arranged for Security-First National Bank of Los Angeles to finance the deal and purchased the chilies,

still in warehouse, from Gonzales and Blanco. Upon authorization from the sellers defendant issued to plaintiff two documents entitled "Transfer Memorandum," which bore these words at the bottom: "This Merchandise is Stored Subject to Limited Liability and other Terms and Conditions as shown by Warehouse Receipt and/or Rules and Regulations on File in This Office and with the Railroad Commission of the State of California."

At plaintiff's request defendant issued the warehouse receipts to Security-First National Bank of Los Angeles as pledgee for Hismoco (American Co.)²

The document certifies that defendant has received the goods "subject to all of the terms and conditions contained herein and on the reverse hereof." At the bottom of the face of the receipt is this: "* * Note. Rates for storage, handling and other services are as fixed by law in Tariffs filed with the Railroad Commission of California and in our office, notwithstanding omission to state same here or erroneous statement thereof." Also: "The Party Accepting This Receipt Thereby Agrees To Its Conditions." On the reverse side are "Standard Terms and Conditions" which include the following: "These goods are stored and handled subject to the rules, regulations, rates and charges as published in our warehouse schedules on file with the Railroad Commission of California and in our office, and such amendments thereto as may hereafter be filed." Also: "Rates are subject to limited liability as provided by the Tariffs on file with the Railroad Commission and in this office." Neither plaintiff nor the bank made any declaration of value of the peppers at any time.

They were inspected by plaintiff before his purchase in January 1950 and every two or three months during 1950 and found to be in good condition, at least as late as September 1950. When withdrawn from storage in January and February 1951, the chilies were moldy and damaged. They were sold for \$5,131.10, resulting in a loss of \$23,112.30, the amount of the verdict.

2. This was plaintiff's trade name.

Defendant insisted throughout the trial that its liability was limited, as a matter of law, to \$100 per ton of 2,000 pounds, because no higher value was declared and no greater rate than 12½ cents per hundred pounds was charged to or paid by plaintiff. Plaintiff, on the other hand, tried the case upon the theory that such a limitation of liability, based upon an agreed value, does not bind the bailor unless he voluntarily accepts a warehouse receipt so declaring and does it with full knowledge and understanding on his part. The trial judge accepted this thesis as correct and instructed the jury accordingly.

Defendant contends that the trial judge committed prejudicial error:

First: In instructing the jury as follows: "While a contract of storage between a warehouseman and the owner of property being stored may, under proper circumstances, contract to limit the amount which the owner may recover from the warehouseman in the event the latter should be liable for loss or damage to the property, such special contract of limitation must be freely and fairly made between the parties and it must appear that the owner of the property accepted the contract with knowledge of its terms, such knowledge being a necessary condition to the owner's assent to the limitation.

"It follows that with respect to any special contract limiting liability on which the defendant in this action may rely, the defendant has the burden of proving that the plaintiff accepted such special contract limiting liability with knowledge of its terms. Should defendant fail in this burden, then its defense based upon such special contract must also fail."

[2] This instruction was erroneous because it required actual notice by plaintiff of the warehouse receipt, etc., and placed the burden on defendant to prove the fact. There was no evidence of unfair dealing or anything departing from the ordinary course of business conducted by businessmen.

Second: In refusing to give defendant's

requested instruction reading: "If you find that when the non-negotiable warehouse receipt (Plaintiff's Exhibit 1) was received by the plaintiff from the Security-First National Bank of Los Angeles, the circumstances were such that a prudent man could and would have read the limitation of liability on the document, then you are instructed that in law the plaintiff had notice of the limitation of liability.

"If you find that when the non-negotiable warehouse receipts (Plaintiff's Exhibit 1) and the transfer memorandum (Defendant's Exhibit A) were received by plaintiff's agents acting for him the circumstances were such that a prudent man could and would have read the limitation of liability on these documents, then you are instructed that in law the plaintiff had notice of the limitation of liability."

[3] The requested instruction was a correct statement of the law covering defendant's secondary theory of the case and should have been given. (Merrill v. Pacific Transfer Co., 131 Cal. 582, 587, 63 P. 915; Curtis v. United Transfer Co., 167 Cal. 112, 114, 138 P. 726.)

Plaintiff did not make the original deposit of the chilies. He bought them from Gonzales & Blanco, who had warehoused them at the minimum rate; he paid the minimum amount, made no inquiry about the storage charge or any other phase of the existing bailment, and requested issuance of new receipts to his pledgee after receiving a "Transfer Memorandum" expressly referring to limited liability. He made no examination of any pertinent document, received the warehouse receipts from the bank when he paid off the loan in September 1950, and held the same until January 31, 1951, making periodic inspection of the peppers, but paying no attention whatever to the terms of his contract. If he was ignorant at all times as to the terms of the documents it was a case of conscious ignorance for which he can blame no one but himself or his own agents.

The trial judge gave an instruction,³ which plainly told the jurors that actual

3. "In order that the terms of another document can be incorporated by refer-

ence into a contract so as to bind the parties to that contract, the reference

knowledge and understanding on plaintiff's part of the clauses limiting liability were essential to any such limitations. This was erroneous.

[4] Defendant claims the schedules with their rates and regulations and limitations of liability issued by the Public Utilities Commission automatically became implied terms of any contract made between a public utility and its customer. Also that absence of actual knowledge of these terms on the part of the customer is legally inconsequential.

This contention is correct. In *Gardner v. Basich Bros. Construction Co.*, 44 Cal.2d 191, 193 [1a], 281 P.2d 521, 522, Mr. Justice Spence, speaking for this Court, said: "However, as stated in *Gardner v. Rich Mfg. Co.*, 68 Cal.App.2d 725, 730 [158 P.2d 23, 25], the prescribed rules and rate regulations 'become a part of every contract between a highway contract carrier and the

shipper.'" Again at page 194 [1b] of 44 Cal.2d, at page 522 of 281 P.2d: "The prescribed rate provisions and regulations are deemed a part of every such contract, and the parties are deemed to have contracted with such provisions in mind, for otherwise the state's rate-making policy expressed in the Highway Carriers' Act would not be effectual. (*Gardner v. Rich Mfg. Co.*, supra, 68 Cal.App.2d 725, 729-730, 158 P.2d 23.)"

In *Gardner v. Rich Mfg. Co.*, 68 Cal. App.2d 725 (hearing denied by the Supreme Court), at page 730 [2]-[3], 158 P.2d 23, at page 25, it is said: "The schedule of minimum rates thereby established and prescribed and the rules and regulations governing the same became a part of every contract between a highway contract carrier and the shipper. (Citing cases.) The tariff applicable, on the facts, to any particular shipment cannot be changed by an

to said other document must be called to the attention of the party to be charged therewith and such party must consent thereto and the terms of the incorporated document must be known to or easily available to the contracting parties.

"While a contract of storage between a warehouseman and the owner of the property being stored may, under proper circumstances, contract to limit the amount which the owner may recover from the warehouseman in the event the latter should be liable for loss or damage to the property, such special contract of limitation must be freely and fairly made between the parties and it must appear that the owner of the property accepted the contract with knowledge of its terms, such knowledge being a necessary condition to the owner's assent to the limitation.

"It follows that with respect to any special contract limiting liability on which the defendant in this action may rely, the defendant has the burden of proving that the plaintiff accepted such special contract limiting liability with knowledge of its terms. Should defendant fail in this burden, then its defense based upon such special contract must also fail. * *

"Did the defendant's breach of contract proximately cause any loss or damage to the plaintiff?

"If you answer that question in the negative, the plaintiff would still be entitled to a verdict but would not be en-

titled to any compensatory damages. If you answer the last question in the affirmative, you will then find what loss or damage the defendant's breach of contract caused the plaintiff and return a verdict in his favor for the amount thereof. * * *

"Was that negligence the proximate cause of damage to the plaintiff's goods?

"If you answer that question in the negative, plaintiff is not entitled to recover on that issue, but if you answer it in the affirmative, you then will find what damage plaintiff thus has been caused to suffer and return a verdict in his favor for the amount thereof. * *

"If under these circumstances you should find that the plaintiff is entitled to a verdict, it will then be your duty to award plaintiff such amount of damages as will compensate him for the loss or damage suffered by him as a proximate result of the defendant's breach of contract or negligence, if any.

"The measure of such loss in the case at bar is the difference between the reasonable market value of the plaintiff's chilies as of February 1, 1951, and the reasonable net salvage value of the chilies to the plaintiff.

"In determining the reasonable net salvage value of the chilies, you should deduct from the reasonable gross salvage the reasonable costs actually incurred by the plaintiff, if any, in reconditioning the chilies."

agreement between the parties (citing cases), and the carrier or its assignee is entitled to collect the proper rate. (13 C.J.S., Carriers sec. 393, pp. 873-875; see, also, note, 83 A.L.R. 245 et seq., and cases there cited.) Otherwise, the statute would be ineffectual for the purpose for which it was enacted." (See also *S. Toepfer, Inc., v. Braniff Airways, D.C.*, 135 F.Supp. 671, 672.)

Both sides rely somewhat upon *George v. Bekins Van & Storage Co.*, 33 Cal.2d 834 [205 P.2d 1037], which arose under the Uniform Warehouse Receipts Act (now comprising Civ.Code, §§ 1858.01-1858.85). It was an action to recover the value of certain furniture which was destroyed by fire while stored in defendant's warehouse. The warehouse receipt expressly limited liability to \$10 per 100 pounds in the absence of a greater value declared in writing; and there was no such declaration. It appeared further that the storage was originally arranged by telegrams and that later the plaintiffs, upon receiving from defendant a warehouse receipt, signed and returned a written acceptance of same. The receipt stated in bold type and on its face the limitation of liability to \$10 per 100 pounds. The court held the limitation to be valid and binding and reduced the judgment accordingly. Having held that this valuation clause was a proper permissive provision under section 3 of the act, the court said (33 Cal.2d at page 847, 205 P.2d at page 1046) that "The validity of such valuation clauses does not depend on the relationship between the actual value and the stipulated value, or on whether the carrier or bailee has knowledge that the actual value is greater than the stipulated value." Again at page 848 [17]-[19] of 33 Cal.2d, at page 1046 of 205 P.2d: "The question remains whether plaintiffs agreed to the stipulated value of their goods in this case. When goods are delivered to a warehouseman for storage and no warehouse receipt is issued at the time of delivery, an implied contract of storage arises containing those terms required by law. If this contract is to be superseded by the contract contained in the subsequently issued warehouse receipt, it is necessary that the bailor agree to the written contract as proposed by

the bailee. * * * Plaintiffs signed and returned to defendant a written acceptance of the warehouse receipt and contract. By so doing they accepted defendant's offer to store the goods at a rate based on the value clearly stated on the face of the receipt." It was further held (33 Cal.2d at page 848, 205 P.2d at page 1046) that "* * * it is immaterial on the facts in this case that neither [plaintiff] read the contract they accepted." And (33 Cal.2d at page 849 [20], 205 P.2d, at page 1047 [18]) "By issuing its warehouse receipt defendant proposed the terms to plaintiffs on which it would continue to store the goods. Plaintiffs accepted this offer, and defendant's continued performance of the contract as bailee was adequate consideration to support the limitation clause."

[5] At page 850 of 33 Cal.2d, at page 1047 of 205 P.2d it is said: "In the present case, however, the rates were in fact determined by the declared value and had the declared value not been agreed to by plaintiffs the rates would have been increased in accord with the statement to that effect in the warehouse receipt. (See *Bassi v. Springfield Fire, etc., Ins. Co.*, 57 Cal.App. 707, 712 [208 P. 154].)" The judgment was modified by reducing same from \$3,126.15 to \$501.40, a value based on \$10 per 100 pounds. Since the warehousing of secondhand household goods is excluded from the Public Utilities Act (Pub.Util. Code, § 239(b)), this case did not discuss the act or any of the other statutes regulating warehouses as public utilities. It does stand for the proposition that one who accepts and retains a warehouse receipt without bothering to know its contents is bound by its terms. The case is in no respect inconsistent with defendant's contentions herein.

[6,7] Although defendant is a public utility within sections 216 and 239 of the Public Utilities Code, and hence subject to all its applicable provisions, it is governed primarily by the Food Warehousemen Act (Pub.Util.Code, §§ 2502, 2507) which, at any points of conflict prevails over the Public Utilities Act. (Pub.Util.Code, § 2506.) Section 2551, above quoted, requires the filing of schedules showing all

rates and charges of every kind, together with all rules which in any manner affect or relate to rates or charges and concludes as follows: "The rates shall be uniform in their operation and shall apply with equal force and effect to all persons or corporations dealing with the food warehouseman." The commission may make such changes therein as it deems proper. (§ 2553.) And, unless it does so "* * * no change shall be made by any food warehouseman in any rate or charge" except by permission of the commission. (§ 2554.) Section 2556 (b) provides that no such warehouseman shall "Demand, collect, or receive, directly or indirectly from any person or corporation, any different sum for warehousing or storage services than the rates and charges filed with the commission." The statute applies not only to the warehouseman but also to the customer, the bailor. "No person, or corporation shall solicit, accept, receive, or attempt to obtain from any food warehouseman any rate or charge not filed with the commission." (§ 2557.) Section 2531 forbids all forms of discrimination; section 2532 makes it "* * * unlawful for any person or corporation to solicit, accept, receive, or attempt to obtain from any food warehouseman any rebate, discount, deduction, concession, refund, or remittance, or to solicit, accept, receive, or attempt to obtain from any food warehouseman, any preference, or advantage, either in rates or charges, or in service or facilities afforded." Section 2534 reads: "Every contract, expressed or *implied*, made by any person or corporation in violation of the provisions of this article or of Article 3 of this chapter, is illegal and utterly void and no recovery thereon shall be had." (Emphasis added.) Lastly, section 2574 declares it a misdemeanor to violate or procure, aid or abet any violation of the statute.

[8] These statutory provisions compel the conclusion that the principles announced in *Gardner v. Rich Mfg. Co.*, supra, 68 Cal.App.2d 725, 158 P.2d 23, are controlling here. Plaintiff urges that the *George* case, supra, holds that in the absence of delivery of a warehouse receipt at the time of receiving the goods "an implied contract of storage arises containing those terms re-

quired by law." It is contended that this would not read an agreed valuation into the contract because its inclusion in the tariff was optional with the warehouseman. This overlooks the fact that that provision, once included in the schedule and not disapproved or changed by the commission, must be observed by bailor and bailee and no departure can be made from it unless or until a change is approved by the commission. Moreover, under section 2534 no contract may contain an express or implied term at variance with that or any other provision of the tariff. It was specifically held in *Kings Laboratories, Inc., v. Yucaipa Valley Fruit Co.*, 18 Cal.App.2d 47 [62 P.2d 1054], that a contract for storage of fruit at a rate less than that authorized by the commission violates the Food Warehousemen Act and is illegal and void. (See also to the same effect, *John Breuner Co. v. Western Union Tel. Co.*, 108 Cal.App. 243 at page 250, 291 P. 445; *Butler v. Bell Oil & Refining Co.*, 70 Cal.App.2d 728, 730 et seq., 161 P.2d 559; *American Railway Express Co. v. Daniel*, 269 U.S. 40, 46 S.Ct. 15, 70 L.Ed. 154.) Any statements in *Scott's Valley Fruit Exch. v. Growers Refrig. Co.*, 81 Cal.App.2d 437, 184 P.2d 183; *McQueen v. Tyler*, 61 Cal.App.2d 263, 142 P.2d 466; and *Fitch v. Carpenter*, 70 Cal.App.2d 827, 161 P.2d 824, contrary to the rule announced in *Gardner v. Basich Bros. Construction Co.*, supra, and which are relied on by plaintiff, are expressly disapproved.

[9] The facts in the present case disclose an ordinary business transaction between businessmen. There is no suggestion of sharp dealings or unfair practices on either side. Plaintiff bought what he paid for, and paid for what he bought. There appears to be no good reason for denying defendant the benefit of the limitation of liability set forth in the contract.

The judgment is reversed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice (concurring).

I agree with the result reached in the majority opinion for the reasons expressed by Mr. Justice Ashburn, pro tem., of the

Second Appellate District, Division Three, *Hischemoeller v. National Ice and Cold Storage Co.*, 284 P.2d 81. In so doing, I expressly withhold any approval of the majority opinion in *George v. Bekins Van & Storage Co.*, 33 Cal.2d 834, 205 P.2d 1037. I pointed out in my dissent in the *George* case that plaintiffs there received their warehouse receipt which contained the limitation on liability notice over a month from the time the contract of bailment became effective; that the warehouse receipt subsequently received by plaintiffs modified the original contract of bailment; that such modification was void and ineffectual because unsupported by consideration. The *George* case is not, and should not be, authority for the case under consideration since here plaintiff's predecessors in interest received "Memorandum Acknowledgments" at the time of the bailment. These documents contained a notification that the peppers were accepted subject to limited liability on the part of the bailee as provided for in the rules and regulations on file with the Railroad Commission. There was no attempt here to alter, or modify, the original contract of bailment.



46 Cal.2d 330

STATE COMPENSATION INSURANCE
FUND et al., Plaintiffs and Appellants,

v.

F. Britton McCONNELL, as State Insurance
Commissioner, etc., Defendant and
Respondent;

Industrial Indemnity Company, Intervener
and Appellant.

S. F. 19164.

Supreme Court of California,
In Bank.

March 2, 1956.

Rehearing Denied March 28, 1956.

Action by State Compensation Insurance Fund and insurance companies for declaratory relief, injunction and mandamus, to prevent certain order changing

present system of rating workmen's compensation insurance premiums from becoming effective. The Superior Court, City and County of San Francisco, William T. Sweigert, J., sustained the validity of the order and all plaintiffs appealed. The Supreme Court, McComb, J., held that the order was valid.

Affirmed.

Opinion, 285 P.2d 29, vacated.

Carter and Shenk, JJ., dissented.

1. Workmen's Compensation ⇨1063

Purpose of ruling whereby State Commissioner of Insurance seeks to modify existing minimum workmen's compensation premium rates by use of "premium discount plan" and "retrospective rating plan" is to introduce principle of expense graduation by size of risk as means of reflecting in rates a finding that insurance company's expense involved in handling individual risks represents smaller percentage of premium in case of larger risks than in case of smaller risks. West's Ann.Ins.Code, §§ 11730-11742, 11730, 11732, 11734, 11737, 11738; West's Ann.Const. art. 20, § 21.

2. Workmen's Compensation ⇨1063

Sections of Insurance Code providing that Commissioner shall approve or issue as adequate for all admitted workmen's compensation insurers a classification of risks and premium rates uniform as to all insurers affected do not restrict Commissioner to mere grouping of hazard in each with corresponding rate for each such classification, and expense is not only relevant but essential factor to be considered as well as losses. West's Ann.Ins.Code, §§ 11732, 11734.

3. Workmen's Compensation ⇨1063

Insurance Commissioner's introduction of premium discount plan providing for graduated discount from premium produced by manual rate for workmen's compensation insurance is not invalid attempt to fix premium rather than rate as authorized by statute, since discount from manual rate becomes in effect a modifying factor in rate-making process. West's Ann.Ins.Code, §§ 11732, 11734.

4. Workmen's Compensation ⇨1063

Under workmen's compensation insurance statute defining merit rating and authorizing use of experience rating as factor in raising or lowering rate, experience of particular insured which may be used as factor is not limited to past experience of insured and current experience during policy year may be used as provided in retrospective rating plan. West's Ann.Ins.Code, §§ 11730-11732, 11734.

5. Workmen's Compensation ⇨1063

Legislature did not intend, by use of words "classification of risks and premium rates" in statutes relating to powers and duties of Insurance Commissioner in classification of risks and premium rates for workmen's compensation insurance, to freeze any particular method into the act, notwithstanding that uniform interpretation of such words prior to and since 1914 by persons in the business has been risk groupings by occupation, businesses and industries by degree of hazard with corresponding rate for each classification. West's Ann.Ins.Code, §§ 11730, 11732, 11734.

6. Statutes ⇨234½

A statute, expressed in general terms and in words of present or future tense, will be applied, not only to situations existing and known at time of enactment, but also prospectively to things and conditions which come into existence thereafter. West's Ann.Ins.Code, §§ 11730-11742.

7. Statutes ⇨219

While not determinative, the interpretation of a statute by an officer administering it as a specialist is entitled to great weight. West's Ann.Ins.Code, §§ 11730-11742.

8. Workmen's Compensation ⇨1063

Insurance Commissioner had power to authorize "interstate rating" by plan contemplating rating of premiums for workmen's compensation insurance based upon premiums paid by California employers in other states, notwithstanding contention that rating was not uniform because State Compensation Insurance Fund was permit-

ted by statute to engage only in intrastate business while its competitors could engage in either intrastate or interstate business. West's Ann.Ins.Code, §§ 11732, 11734.

9. Workmen's Compensation ⇨1063

Insurance Commissioner's regulation providing workmen's compensation insurance rating plans which would be specified in each policy and provide for discounts on premiums, not rebates, was not violative of statutes prohibiting rebates. West's Ann.Ins.Code, §§ 750, 751, 11738.

10. Insurance ⇨184

A "discount" as used in Insurance Code sections and related statutes prohibiting rebates is not a "rebate" or "refund" but a method of computing rate. West's Ann.Ins.Code, §§ 750, 751, 11738.

See publication Words and Phrases, for other judicial constructions and definitions of "Discount", "Rebate" and "Refund".

11. Workmen's Compensation ⇨1063

Under insurance statute providing that a refund by reason of a participating provision in a compensation policy may only be made from surplus, "participating" refers to right to share in earnings and not to price paid for insurance. West's Ann.Ins.Code, § 11738.

See publication Words and Phrases, for other judicial constructions and definitions of "Participating".

12. Workmen's Compensation ⇨1063

Under insurance statute providing that refund by reason of participating provision in a workmen's compensation policy may only be made from surplus, refunds to participants should come only from surplus, but there are other types of refunds which need not come from surplus, as e. g., refund of unearned premium on cancellation. West's Ann.Ins.Code, § 11738.

13. Workmen's Compensation ⇨1063

Under insurance statute providing that refund by reason of participating provision in a workmen's compensation policy may only be made from surplus, premium discounts and retrospective rating are merely formulae for determining amounts of price

ultimately to be paid for insurance and are not "refunds". West's Ann.Ins.Code, § 11738.

14. Workmen's Compensation ⇨1063

On hearing before Insurance Commissioner to determine effect of proposed change of classification or system upon adequacy or inadequacy of workmen's compensation insurance rates, nature and purpose of arithmetical calculations of Commissioner as contained in exhibit were such that consideration of them by Commissioner did not constitute irregularity as consideration of exhibit which was not part of record, nor could consideration of such calculations have prejudiced objecting carriers. West's Ann.Ins.Code, § 11734.

15. Workmen's Compensation ⇨1063

Insurance Commissioner properly delegated to Inspection Rating Bureau the functions of revising and constructing tabular plans in connection with promulgation of premium discount plan and retrospective rating plan for workmen's compensation insurance premium rating, especially where rating values would have to be ultimately embodied in policy or endorsement approved by Commissioner. West's Ann.Ins.Code, §§ 11750.1-11758.

16. Workmen's Compensation ⇨1063

In connection with promulgation of premium discount plan and retrospective rating plan for workmen's compensation insurance premium rating, Insurance Commissioner's delegation of authority to Inspection Rating Bureau authorizing it to accept verification of certain data from rating organizations in other states, or, in lieu thereof, from individual insurance carriers, was proper. West's Ann.Ins.Code, §§ 731, 11658, 12921.5.

17. Workmen's Compensation ⇨1063

Under Government Code sections requiring certain administrative regulations to be filed with Secretary of State but excepting regulations establishing or fixing rates, prices or tariffs, Insurance Commissioner's premium discount plan and retrospective rating plan for workmen's compensation insurance premium rating were regulations fixing and establishing insurance premium rates within meaning of excep-

tion. West's Ann.Gov.Code, §§ 11371(b), 11380.

18. Insurance ⇨10

Whether effective date of regulation was controlled by sections of Government Code providing that regulations required to be filed with Secretary of State become effective 30 days after such filing, or by statute providing that effective date of rates issued by Insurance Commissioner shall be date fixed by him, the ruling was not invalid because made effective approximately 11 days after promulgation, where plans established by ruling were not compulsory but elective. West's Ann.Gov.Code, §§ 11380, 11422; West's Ann.Ins.Code, § 11736.

19. Workmen's Compensation ⇨1063

Insurance Commissioner's ruling providing premium discount plan and retrospective plans for workmen's compensation insurance premium rating was sufficiently clear and intelligible although subject matter was admittedly technical and complicated. West's Ann.Ins.Code, §§ 11730-11742.

20. Workmen's Compensation ⇨1063

Insurance Commissioner's ruling providing for premium discount plan and retrospective plans for workmen's compensation insurance premium rating is designed not for laymen but for guidance of insurance specialists, and such orders should be upheld if they are susceptible of reasonable interpretation and use in industry and should not be invalidated by court merely because their construction may be difficult or because of possibility of differing interpretations. West's Ann.Ins.Code, §§ 11730-11742.

21. Workmen's Compensation ⇨1063

Insurance Commissioner's ruling providing for premium discount plan and retrospective plans for workmen's compensation insurance premium rating was not invalid as incomplete when issued merely because in it the Commissioner gave certain directions to Inspection Rating Bureau for revision of certain tabular plans and for construction of various tabular plans, all as related to the retrospective rating plan, without need of further specific approval by him. West's Ann.Ins.Code, §§ 11730-11742.

22. Workmen's Compensation ⇨1063

Insurance Commissioner's ruling providing for premium discount plan and retrospective rating plans for workmen's compensation insurance premium rating does not violate constitutional and statutory policies pertaining to workmen's compensation system and State Compensation Insurance Fund. West's Ann.Ins.Code, § 11775; West's Ann.Const. art. 20, § 21.

23. Workmen's Compensation ⇨1063

In view of constitutional and legislative policy that Workmen's Compensation Insurance Fund should be fairly competitive with other insurers and be neither more nor less than self-supporting, Insurance Commissioner has no power to adopt rating system which would violate this policy or prevent Fund from adequately performing its functions. West's Ann.Ins. Code, § 11775; West's Ann.Const. art. 20, § 21.

24. Workmen's Compensation ⇨1063

Statute setting up rating mechanism for liability insurance and authorizing certain features of rating plans but expressly excluding workmen's compensation insurance from provisions of act merely meant that Legislature was separating control and operation of workmen's compensation insurance from that of other types of insurance and was not to be interpreted as prohibiting Insurance Commissioner from using such features in a system of workmen's compensation insurance premium rating. West's Ann.Ins.Code, §§ 754, 1850 et seq., 11730-11742.

Donald Gallagher, Loton Wells, McFarland, Laumeister & Ferdon, San Francisco, Edward R. Young and John F. O'Hara, Los Angeles, for plaintiffs and appellants.

Edmund G. Brown, Atty. Gen., and Harold B. Haas, Deputy Atty. Gen., for respondent.

Robert Minge Brown, San Francisco, Sidney L. Weinstock, Weinstock, Anderson & Chase, and McCutchen, Thomas, Matthew, Griffiths & Greene, San Francisco, James B. Donovan, New York City, amici curiae on behalf of respondent.

McCOMB, Justice.

Plaintiffs (State Compensation Insurance Fund and six California insurance companies) filed an action against defendant (the California Insurance Commissioner) for declaratory relief, injunction and mandamus, to prevent a certain order changing the present system of rating workmen's compensation insurance premiums from becoming effective.

Another California insurance company, Industrial Indemnity Company, intervened as plaintiff.

From a judgment sustaining the validity of the order, all plaintiffs appeal.

Questions

First: Did the defendant insurance commissioner have the power to promulgate and adopt Ruling 67 changing the method of rating premiums for workmen's compensation insurance?

Yes. Reduced to its bare rudiments, Ruling 67 provides for two new rating systems: (1) the "Retrospective" plans, and (2) a "Premium Discount Plan." Within the general retrospective scheme there are three separate plans, "D," "A," and "B." Thus, we have four plans to consider.

1. The Retrospective Plans:

All three retrospective plans have this in common: Final determination of premium cost is delayed, being computed retrospectively *after the expiration of the insurance and on the basis of paid and actual loss experience during the insurance period.* Each insured's premium is determined on an individual basis, without reference to other employers or to particular fields or occupations. (However, in each retrospective plan, a sort of "tentative" premium is paid initially, and then adjusted at the end of the insurance period to the actual premium.)

Plan D: Plan D provides for retrospective determination of premium for employers who produce \$5,000 or more in annual premium from operations in *all states*. Determination may be on an annual or three-year basis. The unique feature of Plan D is that the employer may combine premiums from other lines of liability insurance with

his workmen's compensation premium in order to become eligible for this plan. (This multiline provision is not in either Plan A or B.) In brief, Plan D may be chosen if annual premium is over \$5,000, based on premiums from all states, including other types of liability insurance. (Test: \$5,000 total, multistate, multiline.)

Plan A: Plan A provides for retrospective determination of premium for employers who produce \$1,000 or more in workmen's compensation premium *in all states*. (Workmen's compensation only; not a multiline plan.) The standard (or tentative) premium in Plan A is always the maximum premium, and the minimum premium is higher than in Plan B. (Test: \$1,000 total, multistate, workmen's compensation only.)

Plan B: Plan B provides for retrospective determination of premium for employers who produce \$1,000 or more in workmen's compensation premium *in all states*. (Workmen's compensation only; not a multiline plan.) In this plan, the standard (tentative premium) is lower than the maximum, and the minimum premium is lower, correspondingly, than the minimum premium in Plan A. These maximum-minimum levels are the chief differences between Plans A and B. (Test: \$1,000 total, multistate, workmen's compensation only.)

How retrospective plans work: Retrospective rating is defined in Appendix B to Ruling 67 as "a plan or method which permits adjustment of the final premium for a Risk on the basis of its own loss experience subject to Maximum and Minimum limits." In tabular plans A and B, the maximum and minimum premiums are fixed in relation to the standard (tentative) premium, which in Plan A is the maximum and in Plan B is much lower. In Plan D, the selection of maximum and minimum limits is left (within limits) to agreement between the buyer and seller. Within the limits of the maximum and minimum, Ruling 67 provides formulae reflecting loss experience and costs used in determining the final cost of the insurance. The appropriate formula is applied at the end of the insurance period, and the result is an adjustment of the

standard premium to reflect the actual loss and cost experience during the insurance period. This adjustment results in the retrospective rate.

2. Premium Discount Plan:

This plan provides for graduated expense loading determined through a *scale of discounts graduated according to the annual amount of the employer's premium*. To qualify for this plan, the employer must have premiums from workmen's compensation in excess of \$1,000. This total may include premiums paid in all states to one insurer, but may not include other lines of liability insurance. (Multistate, but not multiline.) Then, the discount is applied to the California portion of the premium. This discount is received no matter how small the California portion may be; that is, the California portion need not be over \$1,000. Furthermore, the discount is granted irrespective of loss experience.

"The California portion of the total workmen's compensation standard premium of the policy or group of policies combined in accordance with this Rule shall be subject to the following discounts:

Total Workmen's Compensation Standard Premium	Discounts Applicable to California Portion
First \$ 1,000	None
Next 4,000	7.1%
Next 95,000	12.2%
Over 100,000	13.7%

"The foregoing premium discounts shall not be applicable to any standard premium subject to retrospective rating." (Rule VII (2) Underwriting and Auditing Procedure of the California State Insurance Commissioner.)

In Statutes 1913, chapter 176, a compulsory workmen's compensation system and the State Compensation Insurance Fund were established by the Legislature, without any express constitutional authority therefor. To give legality to an already accomplished fact, article XX, section 21, California Constitution, authorizing the Legislature to "create, and enforce a complete system of workmen's compensation," was adopted in 1918. Pursuant thereto, we now

have Insurance Code, sections 11730 to 11742, covering "State Rate Supervision."¹

By Ruling 67, the commissioner seeks to modify existing minimum workmen's compensation premium rates by putting into effect two new rating plans, one of them called the "Premium Discount Plan" and the other the "Retrospective Rating Plan."

[1] The purpose of both rating plans is to introduce into the California workmen's compensation insurance minimum rate structure the principle of "expense graduation by size of risk" as a means of reflecting in premium rates the commissioner's finding that an insurance company's expense involved in handling individual risks represents a smaller percentage of the premium in the case of larger risks than in the case of smaller risks.

The present system, under which minimum premium rates are loaded by the commissioner for expense on a flat percentage basis without reference to possible variation of expense by size of risk, involves a redundancy of the expense item in the case of the larger risks. The commissioner has concluded that the proposed modifications of the rating structure will maintain adequate minimum rates and at the same time reduce existing expense redundancy, and, further, that their effect will be to promote competition between all types of workmen's compensation insurance carriers and to reduce rates charged to the public.

1. Important here are the following:

Section 11730: "The term 'merit rating,' as used in this article, includes 'schedule rating,' in which the rate is varied according to physical conditions, and also includes 'experience rating,' in which the experience of the particular insured is used as a factor in raising or lowering his rate."

Section 11732: "The commissioner shall approve or issue, as adequate for all admitted workmen's compensation insurers, a classification of risks and premium rates relating to workmen's compensation insurance. He may also approve or issue a system of merit rating. Such classification and system shall be uniform as to all insurers affected."

Section 11734: "The commissioner may change any such classification or system previously approved or issued if

The two plans, although similar in purpose, seek to accomplish the purpose in different ways and may be considered separately.

In the case of the Premium Discount Plan, the commissioner seeks to accomplish the purpose by providing that all workmen's compensation policies involving premiums in excess of \$1,000, computed at the regular manual rates, shall be subject to a graduated discount in favor of the insured upon the California portion of the premium.

Plaintiffs contend that this Premium Discount Plan exceeds the powers granted to the commissioner by the California Workmen's Compensation Insurance Minimum Rating Law.

[2] Insurance Code sections 11732 and 11734 provide that the commissioner shall approve or issue as adequate for all admitted insurers a classification of risks and premium rates, uniform as to all insurers affected. The commissioner is not restricted by these sections (as contended by plaintiffs) to a mere grouping of hazard in each with a corresponding rate for each such classification. Rate-making involves a consideration, not only of the particular hazards of various occupations, but also of losses (pure premium) and of expense (expense loading). This is especially true where, as under our statute, the rate must be adequate. Expense is, therefore, not only a relevant, but an essential factor to be considered.

he first holds a hearing to determine the effect of the proposed change upon the adequacy or inadequacy of rates. Such changes shall also be uniform as to all insurers affected."

Section 11737: "If the commissioner approves or issues such a system of merit rating, insurers may apply it to any risks subject thereto, but shall show basis rates no less than the rates under the classification approved or issued by the commissioner. Any reductions from the basis rates on account of the application of such system of merit rating shall be clearly set forth in the insurance contracts or policies or indorsements attached thereto."

Section 11738 gives statutory backing to the participating companies, permitting refunds "from surplus accumulated from premiums * * *."

It is true that the commissioner in the past has always reflected this expense factor in the rate by means of a flat percentage loading. But, there is nothing in the statute which, expressly or impliedly, restricts him to that mode of considering and reflecting the expense factor.

The commissioner concluded in making up the Premium Discount Plan that a flat percentage expense loading produces redundancy in rates beyond the requirements of adequacy. He may thus make such modification of the flat percentage loading as to him seems necessary to correct the redundancy.

[3] In the Premium Discount Plan, the commissioner has seen fit to do this by the device of providing for a graduated discount from the premium produced by the manual rate. Plaintiffs' argument to the effect that in so doing the commissioner fixes a premium, rather than a premium *rate*, is based upon form rather than substance.

The discount from the manual rate becomes in effect a modifying factor in the rate-making process.

Turning now to the Retrospective Rating Plan, this plan involves different features. Although it applies the principle of expense graduation by size of risk, it does so as part of a plan of merit rating issued under the merit rating provisions of the Insurance Code.

Sections 11732 and 11734 provide that the commissioner may approve or issue a system of merit rating. Insurance Code, section 11730, defines merit rating as including schedule rating "in which the rate is varied according to physical conditions," and experience rating "in which the experience of the particular insured is used as a factor in raising or lowering his rate."

[4] The Retrospective Rating Plan has been issued as a form of experience rating. Plaintiffs contend, however, that it is not experience rating within the meaning of Insurance Code, section 11730, because under that section, the experience of the particular insured which may be used as a factor in raising or lowering the rate means, according to plaintiffs' interpreta-

tion, the *past* experience of the insured, and does not permit use of *current* experience during the policy year as provided in the Retrospective Rating Plan.

The statute, which expressly defines the term "experience rating" without any such restriction, should not be so narrowly construed and the Retrospective Rating Plan is, therefore, a form of experience rating within the power of the commissioner to issue. In this connection it is significant that in 1938, a former commissioner issued a Retrospective Rating Plan based upon the same principle and still in effect except as modified by the present plan, which embodies additional features.

[5] The uniform interpretation prior to and since 1914 of "classification of risks and premium rates" by persons in the business has been risk groupings by occupation, businesses and industries by degree of hazard with a corresponding rate for each classification.

It is claimed that what the Legislature intended by the use of these words was to freeze that method into the act. There is not any such intention in the act. It is obvious that the Legislature had no intention to freeze any particular method of classification because in section 11734 it expressly provided he "may change any such classification or system * * *." See *First Industrial Loan Co. of California v. Daugherty*, 26 Cal.2d 545, 550 [159 P.2d 921], as to powers of an administrative officer to make changes reasonably necessary to effectuate the purpose of the statute governing him.

[6] It is a general rule of statutory construction that a statute, expressed in general terms and words of present or future tense, will be applied, not only to situations existing and known at the time of the enactment, but also prospectively to things and conditions that come into existence thereafter. Legislation must be given elastic operation if it is to cope with changing economic and social conditions. (2 Sutherland, *Statutory Construction*, 3d ed., § 5102, pp. 509-510.)

[7] Over the years of the existence of the Fund, with the knowledge of the in-

insurance trade, the hazard of the particular employment has not been the sole basis of classifying risks and rates. Size limits as to eligibility based on the cost of administering plans and size of the organization have also been considered. For example, minimum payrolls of packing houses and department stores and others have been considered. In 1946 the insurance commissioner approved the principle of graduation of expense by size of risk as applied to premium discount and retrospective rating plans. In 1951 he applied an additional charge on risks earning a premium under a certain amount. This is called "expense constant." While not determinative, the interpretation of a statute by an officer administering it as a specialist is entitled to "great weight." (See *Whitcomb Hotel, Inc., v. California Employment Commission*, 24 Cal.2d 753, 756 [151 P.2d 233, 155 A.L.R. 405].)

[8] The plans set up by Ruling 67 contemplate rating of premiums for workmen's compensation based upon premiums paid by the California employers in other states, under Plan D for other types of liability insurance as well as workmen's compensation, in the other plans for the latter type insurance only.

It is contended that the commissioner had no power to authorize this "interstate rating," since it was not uniform because plaintiff State Compensation Insurance Fund is permitted by statute to engage only in *intrastate* business, while its competitors may engage in either *intrastate* or *interstate* business.

This contention is untenable. Under Insurance Code sections 11732-11734, the commissioner is not limited in his process of reflecting the expense factor to the consideration of only expense as reflected in California premiums. Even under the flat percentage loading system, the commissioner has always based his findings as to the proper expense loading of a premium upon all available statistical evidence, statewide, nationwide, or both. There is nothing in our statute to prevent similar consideration in working out a premium discount which is merely a modification of the flat percentage loading.

[9, 10] It is also contended that Ruling 67 violates Insurance Code sections 750, 11738 and related statutes which prohibit rebates. Sections 750 and 751 prohibit rebate of the premium "payable on an insurance contract" or "not * * * specified * * * in the policy * * *." Here the rating plans, if used, would be specified in each policy and provide for discounts, not rebates. A discount is not a rebate or refund but a method of computing rate. (See *Associated Indem. Corp. v. Oil Well Drilling Co.*, [Tex.Civ.App.] 258 S.W.2d 523, 532; *Tex.*, 264 S.W.2d 697.)

[11-13] Section 11738 provides that "A refund by reason of a participating provision in a compensation policy" may only be made from surplus. "Participating" refers to the right to share in earnings and does not refer to the price paid for insurance. Refunds to participants should only come from surplus, although there are other types of refunds which obviously do not have to come from surplus, thus, refund of unearned premium on cancellation. Premium discount and retrospective rating do not refund anything. They are merely formulae for determining amount of price of insurance ultimately to be paid. The various opinions of the attorney general and counsel for the commissioner dealt with attempts, by guaranteeing dividends, to contract for rates lower than the minimum prescribed by the commissioner. Here the rating plans as applied (including the discounts) constitute the minimum rates.

Second: Did defendant violate procedural requirements?

No. There was not any irregularity or abuse of discretion in the procedure followed by the commissioner.

(a) Outside Evidence.

[14] It is contended that Exhibit 42 relating to retrospective rating only, and containing arithmetical calculations increasing the excess loss premium factor in the rating plans to reflect certain information obtained after the hearing from other files and records in the commissioner's office, was considered by the commissioner without the presence of plain-

tiffs, and that thereby the hearing contemplated by section 11734 was denied.

The plans included in Ruling 67 are the result of studies that have been made since 1946, at which time a former California commissioner had rejected similar proposals, not upon the ground of any lack of legal power, but solely for the stated reason that there was insufficient statistical data at the time.

Since then, studies were made under the sponsorship of the National Association of Insurance Commissioners to accumulate further statistical data relative to the principle of graduation of expense by size of risk. The results of these studies were the subject of the hearings held by the defendant, California Insurance Commissioner, prior to the issuance of the present Ruling 67.

Among other things there was evidence before the commissioner to the effect that similar plans were in operation and working satisfactorily in other states. He points out that 35 states have a premium discount plan and 45 states have a retrospective rating plan similar to Plan D herein involved.

Plaintiffs further contend that Exhibit 42, which consists of some arithmetical calculations made by the commissioner concerning excess loss premium for purposes of the Retrospective Rating Plan, was not properly a part of the record. However, the nature and purpose of these calculations were such that their consideration by the commissioner did not constitute an irregularity. Nor could their consideration possibly have prejudiced plaintiffs.

Particularly is this so, because all interested parties were given every opportunity to introduce material for the consideration of the commissioner and the effect of the material in Exhibit 42 was to *increase* the permissible minimum rates. Plaintiffs being in no way prejudiced by the commissioner's action, may not complain. (See *Eastern-Columbia, Inc., v. County of Los Angeles*, 61 Cal.App.2d 734 [143 P.2d 992].)

(b) Delegation of Authority.

[15, 16] The functions of revising and constructing tabular plans which the com-

missioner delegated to the Inspection Rating Bureau (a rating organization licensed by the state) were proper in view of the Bureau's functions and relationship to the commissioner as recognized by Insurance Code sections 11750.1-11758, especially where such rating values would have to be ultimately embodied in a policy or endorsement approved by the commissioner. (Ins.Code, § 11658.)

It is further contended that the commissioner improperly delegated authority to the Inspection Rating Bureau by authorizing it to accept verification of certain data from rating organizations in other states or, in lieu thereof, from individual insurance carriers.

This is in conformance with long and necessary practice in similar and related matters (see also Ins.Code, § 731; Ins. Code, § 12921.5) and does not constitute an improper delegation of the commissioner's statutory powers.

(c) Promulgation of Ruling 67.

[17] It is claimed that Ruling 67 was never validly promulgated by the commissioner. Government Code sections 11371, subdivision (b), and 11380, requiring certain administrative regulations to be filed with the Secretary of State, expressly except regulations establishing or fixing rates, prices or tariffs. Both the Premium Discount Plan and the Retrospective Rating Plan are regulations fixing and establishing insurance premium rates within the meaning of this exception. They were promulgated reasonably and in conformity with long-established practice in the insurance industry.

(d) Effective Date.

[18] It is urged that the commissioner abused his discretion in making the effective date of Ruling 67 approximately 11 days after promulgation, in view of the fact that the ruling had to be filed with the Secretary of State (Gov.Code, § 11380) and section 11422, Government Code, provides that a regulation required to be filed with the Secretary of State becomes effective 30 days after such filing.

Section 11736, Insurance Code, states that the effective date of rates issued by

the commissioner shall be the date fixed by him. It is not too important which of these sections controls here for the reason that the plans established by Ruling 67 are not compulsory. They are elective and become applicable if the insured and insurer so agree by appropriate provision in the policy contract. No insurer was required to adopt any of these plans on or after either effective date. If an insurer makes no election under Ruling 67, its rates continue under the existing system.

(e) The Ruling was Sufficient, Clear and Complete.

[19, 20] Plaintiffs make the further claim that Ruling 67, particularly Appendix B, is not sufficiently clear and intelligible. Although the subject matter is admittedly technical and complicated, it is legally sufficient. It must be borne in mind that the material in question is designed not for laymen but for the guidance of insurance specialists. Such orders should be upheld if they are susceptible of reasonable interpretation and use in the industry and should not be invalidated by a court merely because their construction may be difficult or because of the possibility of differing interpretations.

[21] It is further argued that Ruling 67 was incomplete when issued because in it the commissioner gave certain directions to the California Inspection Rating Bureau for the revision of Tabular Plans A and B and for the construction of various tabular plans, all as related to the Retrospective Rating Plan, without need of further specific approval by him. However, such future revision of the commissioner's Tabular Plans A and B would not make

Appendix B any less complete as it stood at the time of issuance.

There is substantial evidence to the effect that the use of the flat percentage expense loading has produced rates that are excessive in the larger premium brackets, a portion of which has been returned by way of dividends. The statute requires adequate minimum rates. There is nothing in the statute requiring the freezing into the rate structure particular factors merely because they have been used in the past. The rating law which authorizes the commissioner within the limits herein discussed in prescribing fair and equitable minimum rates based on the cost to insurers of furnishing the insurance in no wise prohibits him from recognizing the existing gradation of expense by size of risk without allowing excessive premiums to enable certain insurers to pay high dividends.

[22] *Third: Does Ruling 67 violate the constitutional and statutory policies pertaining to the workmen's compensation system and particularly, the State Compensation Insurance Fund?*

No. In 1911 the Legislature enacted the Roseberry Act, which was an elective rather than a compulsory compensation act. (Stats. 1911, chap. 399.) Section 21, article XX, California Constitution, adopted the same year, expressing a basic policy concerning workmen's compensation, did not expressly provide for state compensation insurance.²

Following receipt of the message and the report mentioned in the footnote, the Legislature passed the Boynton Act (Stats. 1913, chap. 176) making workmen's com-

2. In Governor Hiram W. Johnson's First Biennial Message to the Legislature, January 6, 1913, he called attention to "the rapacity of insurance companies" concerning insurance for industrial accidents, and recommended that a state insurance fund be provided. In the First Report of the Industrial Accident Board (created by the Roseberry Act) to Governor Johnson, in recommending that a state compensation fund be provided, it was pointed out that employers were not "electing" the compensation provisions of that act, mainly because of the "adverse rates

made against compensation by the liability insurance companies." To make compensation compulsory on all employers and leave them "at the mercy of a combination of insurance companies" whose rates for California were made in New York City, would be an injustice to the employers. Nor, it was felt, would a state monopoly of insurance meet the situation. What was needed was for the state to "invade the sphere of private enterprise only to the extent that is needful in order to obtain justice for its people." It then stated that to be self-

pensation compulsory and creating the State Compensation Insurance Fund. In 1918 the present section 21 of article XX was adopted expressly providing authority for the creation of such fund, which had already been operating since 1913.

[23] Section 11775 of the Insurance Code provides: "The fund shall, after a reasonable time during which it may establish a business, be fairly competitive with other insurers, and it is the intent of the Legislature that the fund shall ultimately become neither more nor less than self-supporting. For that purpose loss experience and expense shall be ascertained and dividends or credits may be made as provided in this article." In view of this constitutional and legislative policy, the commissioner would have no power to adopt a rating system which would violate this policy or prevent the fund from adequately performing its functions.

It is true that the Fund may not be able to participate in the interstate and multiline features of the plan because it has no authority to write insurance outside of the state or in other lines. Theoretically, it can join with multiline and multistate companies. However, as a practical matter it will not be able to do so. It must be remembered that during its entire existence it has not been able to write insurance on an interstate basis, as do many carriers, yet it has never been claimed that the rate structures existing heretofore applying to both the Fund and to intrastate and interstate carriers were invalid, and during all this period the Legislature has not concerned itself with this difference between the power of the Fund and of interstate companies. The competitive advantage of multistate companies, if any such advantage exists, has not injured the Fund to date. While there has been no experience with the competition of multiline companies, the evidence as to whether such competi-

tion would seriously affect the Fund is conflicting. The trial court resolved that conflict in favor of the Ruling.

It is contended that Ruling 67 will result in the Fund getting only the business of policyholders having less than \$1,000 of annual premium, the expense ratio of which business is higher than where the premiums are large, and that this small business, combined with the state agency business,³ would not be sufficient to permit it to compete with the other carriers. Sixty-eight per cent of all workmen's compensation business in California has been written by the California companies (including the Fund, which writes 24.78 per cent of the business) in competition with companies doing an interstate business. It would appear that the Fund has held its own with both local and multistate companies.

The general expense level recognized by the commissioner in Ruling 67 was in excess of 40 per cent (36.55 per cent expense loading plus \$10 expense constant for small risks). The expense level of the Fund is less than 14 per cent. This leaves the Fund an average margin of 24 per cent with which to meet the competitive effect of a discount plan which permits discounts ranging from 7.1 per cent to 13.7 per cent as to a portion only of business. State Fund dividends have averaged around 25 per cent of premium in recent years and in the case of some risks dividends up to 70 per cent have been paid. At least four states⁴ having State Funds have approved these rating plans.

The commissioner determined that the effect of the use of the plans provided by Ruling 67 on "participating" insurance carriers, including the Fund, will be not any injurious interference with their ability to compete for workmen's compensation insurance business but merely the correction of an accidental competitive advantage enjoyed by them up to this time as a result

supporting a state fund would have to do about 12 per cent of the business, "after which the opportunity of private enterprise to do a prosperous business in that field will be dependent upon its ability to do business more efficiently than the State can do it."

3. About 10 per cent of the Fund's business is from state, municipal and district agencies which are required by law to insure with the Fund.

4. Michigan, New York, Maryland and Pennsylvania.

of the continued use in California of the flat percentage loading formula with its inherent rate redundancy. The trier of fact, in effect, came to the same conclusion. Whether, as claimed by plaintiffs, the plans will result in loss by the Fund of most of its business where the annual premiums exceed \$1,000 and practically all of its business where the annual premiums exceed \$5,000, or will not, as claimed by defendant, and in effect as found by the court, is a matter that can be determined definitely only by application of the plans.

[24] The fact that the McBride-Grunsky Act (Stats.1947, chap. 805, Insurance Code, §§ 754, 1850 et seq.) in setting up a rating mechanism for liability insurance expressly authorized many of the features of the plans included in Ruling 67, but expressly excluded workmen's compensation insurance from the provisions of the act, can in no way be construed to mean that the Legislature intended that those features could not be used by the commissioner in a system of workmen's compensation insurance rating. It merely meant that the Legislature was continuing the historic procedure of completely separating the control and operation of workmen's compensation insurance from that of all other types of insurance.

It apparently is contended that in order to be "fairly competitive with other insurers" the Fund must be in all respects in the same situation as its competitors and that because the Fund, by law, is restricted to California workmen's compensation insurance only, it cannot be in the same situation as multistate and multiline insurers. We have pointed out that historically the Fund has more than held its own with the competition of the multistate insurers, and that that competition from the beginning has been considered not to interfere with the Fund being fairly competitive. For the same reason competition with multiline insurers does not in itself interfere therewith.

The judgment is affirmed.

GIBSON, C. J., and TRAYNOR, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

Contrary to the holding of the majority, I believe the rating system here involved (Rule 67 of the Insurance Commissioner) violates the clear statutory mandate that any rating system must be uniform.

The statute provides that classification of risks and premium rates "shall be uniform as to all insurers affected" (emphasis added), Ins.Code, § 11732, and any "change" in classification or rating system "shall * * * be uniform as to all insurers affected." Emphasis added; id., § 11734. Also under the law the state fund must be "fairly competitive with other insurers" and shall be neither more nor less than self-supporting. Id., § 11775. It is conceded that the fund may write only workmen's compensation insurance and that only in connection with operations of an employer in this state; however under both plans as embodied in the commissioner's rule 67, there is taken into consideration multistate business, that is, business written in states other than California. In one plan, in addition, there is considered multiline business, that is, insurance in other fields such as third party liability insurance. Inasmuch as the fund cannot engage in those types of business the rule cannot operate uniformly as to it. The basis upon which premiums must be calculated are entirely different. The fund is not in a position to be fairly competitive. The fund would be excluded, by the limitations on its powers, from a substantial portion of the workmen's compensation insurance market and hence rates so based are not uniform. Uniformity must mean equality of opportunity. To permit the system of rates and classifications to be based on business of a character forbidden to the fund plainly discriminates against the fund and other insurers not engaged in multistate or multiline insurance business. With such discrimination there can be no uniformity which is required by the statute.

I would therefore reverse the judgment.

SHENK, J., concurs.

Rehearing denied; SHENK and CARTER, JJ., dissenting.

George J. LYNN, Plaintiff and Appellant,
v.

Sherman P. DUCKEL, Defendant and Respondent.*

Civ. 16597.

District Court of Appeal, First District,
Division 1, California.

March 2, 1956.

Rehearing Denied March 30, 1956.

Hearing Granted April 25, 1956.

Property owner's action to enjoin the city and county from closing an alley and for damages. The Superior Court, City and County of San Francisco, Preston Devine, J., denied the relief sought and the property owner appealed. The District Court of Appeal, Bray, J., held that the closing of the alley could only be done by the board of supervisors and then only in the manner prescribed by law, and that even if the property owner had acted illegally in grading the alley without a permit, he was not thereby precluded under the clean hands doctrine from asserting his right to protect and preserve his easement for ingress and egress.

Judgment reversed.

1. Appeal and Error ⇨766

Failure of appellant to follow rule on appeal requiring that statement of any matter in record be supported by appropriate reference to the record was ignored by District Court of Appeal in interests of justice. West's Ann.Rules on Appeal, rule 15.

2. Municipal Corporations ⇨703(1)

Public has right to use duly established public alley or street for any purpose for which it is reasonably adapted.

3. Dedication ⇨19(2)

By placing on record map dividing area into lots, blocks, streets and alleys, owners of property shown on map offered for dedication to public such streets and alleys for purposes for which streets and alleys are customarily used.

4. Dedication ⇨35(1), 37

Acceptance of offer to public of dedication of land for streets and alleys is
* Opinion vacated 299 P.2d 236.

made either formally by municipality, or by user.

5. Dedication ⇨35(3)

Improvement of streets and alley entrances by municipality may be evidence of acceptance of dedication for public use.

6. Dedication ⇨37

Use of portion of alley may constitute acceptance, as to a portion, of dedication to public use.

7. Dedication ⇨44

In action for mandatory injunction and damages, evidence compelled finding that alley which was sole means of vehicular access to plaintiff's property was dedicated to limited vehicular use for which adapted, as well as for pedestrian use.

8. Municipal Corporations ⇨703(1)

A pedestrian and a vehicle have equal right to use of a public street.

9. Municipal Corporations ⇨703(1)

Within rule that a pedestrian and a vehicle have equal right to use of a public street, a public alley is a "public street". Streets and Highways Code, § 8304.

See publication Words and Phrases, for other judicial constructions and definitions of "Public Street".

10. Municipal Corporations ⇨657(2)

Permanent closing of alley to vehicular use could not be done by official of City and County of San Francisco but could only be done by Board of Supervisors and then only in manner prescribed by law, even if use of alley for both vehicular and pedestrian traffic was dangerous. Streets and Highways Code, §§ 8304, 8320.

11. Municipal Corporations ⇨669

Owner of property abutting on a public street has easement for ingress and egress and may maintain an action for protection and preservation of that easement and for damages. Streets and Highways Code, § 8320.

12. Equity ⇨65(2)

Even if owner of property abutting on public alley acted illegally in grading alley without a permit, he was not thereby precluded, under clean hands doctrine, from

asserting his right to protect and preserve his easement in the alley by enjoining city and county from closing the alley. Streets and Highways Code, §§ 8304, 8320.

John J. Dailey, San Francisco, for appellant.

Dion R. Holm, City Atty., George E. Baglin, Deputy City Atty., San Francisco, for respondent.

BRAY, Justice.

Plaintiff appeals from a judgment denying him a mandatory injunction and damages.

Questions Presented.

1. Is any portion of Argent Alley dedicated to vehicular use?
2. Did defendant have authority to close Argent Alley to vehicular use?
3. Does the doctrine of "clean hands" apply?

Evidence.

Defendant is Director of Public Works of the City and County of San Francisco. Plaintiff's property, purchased by him in 1951, is located on 23rd Street midway between Market Street and Corbett Avenue. The rear or back yard fronts on Argent Alley. Twenty-third Street is unimproved and probably too steep to improve for vehicular traffic, hence plaintiff's only method of getting into his property by vehicle is to use Argent Alley, which beyond plaintiff's property becomes too steep for vehicular use. The alley connects Market Street with Corbett Avenue. The alley is 10 feet wide and at its entrance¹ there is a dwelling house abutting on one side and a retaining wall on the other. In 1951 the sidewalk at the alley entrance was about 3½ to 4 feet above the level of Market Street, and was depressed towards the street 10 to 12 inches. There is an asphalt ramp from the sidewalk to the curb, which curb is 6 inches high and is unbroken in line. Thence a "triangular apron" or "cement plug" extends this ramp over the curb

and into Market Street for some 2 feet. The grade from the street level to the property line is approximately 19 per cent and from the property line up the alley a short distance is about 10 per cent. It is then about level to a point halfway up the alley where the grade becomes too steep for vehicular use. There is a pedestrian stairway on one side of the alley from there to Corbett Avenue. Plaintiff's property fronts on the level portion.

Some time prior to 1923 a map was placed of record showing many lots, blocks, streets and alleys, including this block 2800, Argent Alley, and the surrounding streets. About 1923 or 1924 the city and county graded and paved Market Street for many blocks, including block 2800. It also constructed a concrete sidewalk approximately 9 feet wide along this block. It was at this time that the before-mentioned ramp and the apron leading from the street was constructed by the same contractor who built the sidewalk. The cost was paid by the city and county. At the time this work was done the plan called for constructing a concrete stairway from the street to the sidewalk, in front of the alley. However, instead, the apron and ramp were constructed and the stairway was built to the south of the alley and in front of private property. At that time one Zion owned the property at one corner of the alley and Market Street, as well as the property behind it now belonging to plaintiff. Mrs. Zion testified that her husband spoke to the engineering department of the city about making the change from the proposed stairway to the ramp so that they could use the alley for vehicles. For 15 years (from 1924 to 1939) the Zion family ran their automobile into the alley to their property, and at times trucks used it to deliver groceries and other merchandise to the Zion home. From 1939 to November 1, 1951, the alley was used only by pedestrians, as there was no one living in the alley who owned a car.

After purchasing the property in 1951, plaintiff remodeled the house, obtaining the necessary permits. The alley was then un-

1. "Entrance" as used herein means the Market Street entrance.

sightly and difficult to go over in a vehicle or even to walk over because of trash and material which had been thrown into it. In November, plaintiff requested a permit from the city engineer's office to clean up the alley, but was told a permit was not necessary. Plaintiff hired a laborer to do the work. A city official inspected the work while it was going on and approved. Plaintiff then employed a bulldozer for one day to grade the alley. The dirt removed was deposited on plaintiff's lot and an adjoining lot, leveling off depressed areas. Several days of rain followed and the neighbors complained to defendant that the alley was so muddy and slippery that it was almost impossible to walk through it. Defendant went out to look at it and then told plaintiff the alley was for pedestrian use only. Plaintiff was ordered to restore the soil taken from the alley. He agreed instead to bring in crushed rock, which he did, covering the entire area of the alley (up to the stairway) to a thickness of 8 to 12 inches. The neighbors complained of the trucks and bulldozers going into the alley, so defendant sent a crew out to remove the apron from the street to the curb. Plaintiff put it back. Defendant then had his crew remove the paved ramp from the curb to the sidewalk. They reconstructed the sidewalk and set a 4 inch pipe in concrete in the center of the entrance to the alley so that it could no longer be used by a vehicle. Plaintiff later brought this action to have the alley opened up for vehicular use and for damages.

Findings.

[1] The court found, among other matters, that for 15 years prior to 1939 "Zion and family ran their automobile up this ramp into Argent Alley and thence into Zion's side yard * * *. Trucks

delivering groceries and other merchandise to Zion's home also used the ramp and alley during this period * * *. From 1939 until November 1, 1951, Argent Alley was used exclusively by pedestrians, including children on their way to and from school," and that Argent Alley "is a duly established public alley" and is not and never has been "part of the vehicular highway system of the State of California or of the City and County of San Francisco." It is now and "since it was established has been, unsuited to use by vehicular traffic or to combined use by vehicles and pedestrians." The change from stairs to ramp was made, not through a change in official plans, but for the Zions' benefit. This change created a depressed area in the sidewalk hazardous to pedestrians. Plaintiff's action in removing the soil was without authorization and in violation of the San Francisco Public Works Code. Defendant's action was taken to preserve Argent Alley as a pedestrian way and to "eliminate the dangerous condition resulting from plaintiff's unauthorized effort to transform it into a roadway for use of vehicles. Use of Argent Alley by both pedestrians and vehicles is dangerous to pedestrians and constitutes a dangerous condition of public property." 2

1. Vehicular Use.

[2-7] Defendant admitted and the court found that Argent Alley is "a duly established public alley." Just what is meant by the statement that the alley never has been a "part of the vehicular highway system" of the state and San Francisco is not clear. A duly established public alley (or street) is one which the public has the right to use for any purpose for which it is reasonably adapted. When many years ago a map was placed of record dividing

2. Defendant contends that plaintiff has not attacked the findings and has failed to set forth in his brief all of the material evidence with respect thereto, and that therefore under the rule of *Tessyman v. Fisher*, 113 Cal.App.2d 404, 407, 248 P.2d 471, and *Kruckow v. Lesser*, 111 Cal.App.2d 198, 200, 244 P.2d 19, he has waived his right to attack the findings. These contentions are incor-

rect. However, plaintiff did fail to follow Rule 15, Rules on Appeal: "The statement of any matter in the record shall be supported by appropriate reference to the record." Our task in determining this appeal has been made considerably heavier because of this failure. While in the interests of justice we have chosen to ignore this defect, we have not enjoyed doing so.

the area into lots, blocks, streets and alleys, the owners of the property shown on it offered for dedication to the public such streets and alleys for the purposes to which streets and alleys are customarily used. Acceptance of such offer is made either formally by the municipality, or by user. There is no direct evidence of a formal acceptance, although the improving of the streets and alley entrances may be evidence of such acceptance. However, here the evidence is undisputed that for over 15 years, with the knowledge of the city, the portion of the alley usable by vehicles was so used. There is and can be no contention that the whole of the alley must be so used in order to constitute an acceptance of a portion. Moreover, the city improved the entrance to the alley so that it could be so used. The fact that the change in the work making it so usable was at the request of an interested citizen and the fact that the plan was not changed on its face, cannot affect the undenied fact that the work was done by a contractor under a contract with the city (not with the property owner) and that the work was paid for by the city. Defendant testified that the depression in the sidewalk was "*put in by the city at Mr. Zion's request.*" (Emphasis added.) Moreover, no change was made in the work as done from 1923 to 1951—approximately 28 years. If the finding that the alley is not a part of San Francisco's vehicular system means that it has not been dedicated to the limited vehicular use for which it is adapted, then such finding is completely inconsistent with the admitted fact and the finding that the alley is "a duly established public alley," and, moreover, is unsupported by the evidence.

It is important to remember that when Argent Alley was offered for dedication it was probably during the horse and buggy days and at a time when its use jointly by pedestrian and vehicular traffic could not possibly have been dangerous. The fact, if it be such, that in later years it has become dangerous would, of course, not change the fact that it was dedicated for vehicular use as well as for pedestrian use. Defendant places emphasis on the fact that there are

6 other 10 foot alleys in this general area, which are used only for pedestrian stairways. However, each of those alleys is so steep as to be inaccessible to vehicular use, and at no time has been so used. The fact that other areas have not been and cannot be devoted to vehicular use has no bearing on the situation as to Argent Alley.

2. Defendant's Authority.

Argent Alley being demonstrated to have been dedicated for both pedestrian and vehicular use, the question then is whether the evidence supports the court's finding that it has become dangerous to the general public to be so used, and if so, whether defendant has the authority to prevent that use.

[8-10] The court found: (1) That the depressed area in the Market Street sidewalk was hazardous to pedestrians on Market Street. It is doubtful if this finding is sustained. For 28 years that depression existed and there is no evidence of any injury having occurred or of anyone slipping on it. As shown in the evidence there are many similar conditions along Market Street in that area where the sidewalks are similarly depressed to provide entrances from the street to home garages. It is a matter of common knowledge that in a hilly city like San Francisco such sidewalk depressions occur on many streets and likewise at the entrances to many service stations and garages. Assuming the finding to be supported, such fact did not justify defendant in making it impossible for the sidewalk at the entrance to the alley to be crossed by vehicles. As we have pointed out, Argent Alley was dedicated for and used by both vehicular and pedestrian traffic. This, of course, requires that the entrance into the alley be not obstructed. If necessary, the city could eliminate the sidewalk crossing the entrance to the alley, as is the situation at the intersection of streets and alleys all over the city. (2) The court found that the alley is unsuited for vehicular traffic or for combined use of vehicles and pedestrians. Again, here, it is doubtful if this finding is supported. It is clearly usable and has been used up to plaintiff's property for both kinds of traffic. The

mere fact that the alley is narrow and that on the few times per day a vehicle would be using it, there is little clearance between a vehicle and the walls of the alley for pedestrians, does not make the alley unsuitable for use by either. Assuming that the use by both vehicles and pedestrians is dangerous, we can find no authority in defendant to determine which of the uses causing the danger is to be eliminated. A pedestrian has no greater right to the use of a public street (and a public alley is a public street—see Streets and Highways Code, § 8304) than a vehicle and vice versa. See McQuillin, *Municipal Corporations*, 3d Ed., vol. 11, p. 7, § 30.157. The defendant might just as well have determined that pedestrians should not use the portion of the alley and leave it entirely to vehicles. We are not dealing with a temporary closing of the alley to vehicle use because of an imminent danger. We are dealing with what constitutes a complete closing of the alley to vehicular use. This cannot be done by an official; it can only be done by the board of supervisors and then only in the manner prescribed by law. See *City of Los Angeles v. Fiske*, 117 Cal.App.2d 167, 255 P.2d 445; *Beals v. City of Los Angeles*, 23 Cal.2d 381, 144 P.2d 839. While these cases deal with closing a street as a whole (Streets and Highways Code, § 8320 provides for the vacation by a city council of "any street or part of any street" and § 8304 defines "street" as including "alley") the same rule necessarily applies to the closing of a street or alley to vehicular use, such being, in effect, a limited permanent closing. We have been cited to no authority (and we have been unable to find any) authorizing the permanent closing of a public thoroughfare to vehicular traffic by an officer rather than the legislative body of the municipality.³

In *Stevens v. City of Dublin*, Tex.Civ.App.1914, 169 S.W. 188, it was held that even the city legislative body could not by ordinance close the portion of the street in front of a school because its use was dan-

gerous to the school children. Quoting from McQuillin, section 893: "'* * * to justify the interposition of this authority in behalf of the public, it must appear: First, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. * * *'" At page 191.

In *Commissioners' Court v. Kaiser*, Tex.Civ.App.1929, 23 S.W.2d 840, the county commissioners, by ordinance, closed the road in front of a school, to vehicular and other uses for a 7 hour period each school day, because of danger to the school children. In denying this power to the commissioners the court said at pages 841, 842: "It is well settled that one who buys property abutting on a street or roadway acquires a property interest in the street which entitles him to its use free from obstruction. * * * The power to discontinue a public road conferred by the cited statute is restricted to abandonment by the county of its maintenance as such public highway, and does not include the right to deny its use to the owners of property situated thereon."

3. Clean Hands.

[11, 12] The court found that plaintiff's grading of Argent Alley was without a written permit and in violation of the San Francisco Public Works Code, and because thereof, plaintiff did not come into court with "clean hands." While there is no express allegation in defendant's answer that plaintiff did not have "clean hands," his conduct in grading the alley without a permit was alleged as the cause of the alleged dangerous and defective condition. In the transcript we can find no claim being made that plaintiff, because of his alleged illegal conduct, came into court with unclean hands. However, the court found that he did. We deem it unnecessary to determine whether this constituted suffi-

3. Defendant's brief, except as it discusses the doctrine of "clean hands" hereafter mentioned, is limited entirely to his con-

tention that Argent Alley never was anything but a pedestrian way.

cient raising of the doctrine in the trial court to permit its consideration here⁴ for the reason that we do not believe the doctrine is applicable in this type of case. The owner of property abutting on a public street or alley has a private right or easement for ingress and egress and may maintain an action for the protection and preservation of that easement and for damages. See *Clough v. W. H. Healy Co.*, 53 Cal. App. 397, 200 P. 378; *Strong v. Sullivan*, 180 Cal. 331, 181 P. 59, 4 A.L.R. 343. "Any obstruction to the use of the street which impairs or destroys these easements is a private injury, special and peculiar to the owner of the lot, and different and distinct from the injury to the general public and from that which such owner suffers as a part of the general public." *Williams v. Los Angeles Ry. Co.*, 150 Cal. 592, 594, 89 P. 330, 331; see also *Beals v. City of Los Angeles*, supra, 23 Cal.2d 381, 384, 144 P.2d 839, holding that an easement in an alley cannot be *taken* or *damaged* without payment of compensation. We fail to see how the mere fact that plaintiff acted illegally in grading the alley should deprive him of the right to protect and preserve his easement. Moreover, at the same time he is preserving his easement he is also protecting and preserving the rights of the general public, for the public has a right to use so much of the alley for vehicular purposes as is usable therefor. Had plaintiff left the alley in the muddy condition in which he first placed it before defendant ordered him to restore its condition, the use of the alley by the public generally might have been impaired. But he graveled it so that it is as usable, if not more so, than when he first tampered with it. It might be that plaintiff is liable for a violation of the city ordinance, but under the doctrine of "clean hands" the defendant here, and the city itself, were not injuriously affected by plaintiff's action.

"It is settled that the act upon which equity may refuse relief to a plaintiff because he does not come into court with clean hands must prejudicially affect the rights of the person against whom the relief is sought so that it would be inequitable to grant such relief. *Pomeroy's Equity Jurisprudence*, 5th ed., vol. 2, p. 95, § 399; *Germo Mfg. Co. v. McClellan*, 107 Cal.App. 532, 290 P. 534. In speaking on this subject the Supreme Court, in *Bradley Co. v. Bradley*, 165 Cal. 237, 131 P. 750, 752, said:

"It is not every wrongful act nor even every fraud, which prevents a suitor in equity from obtaining relief. His misconduct must be so intimately connected to the injury of another with the matter for which he seeks relief, as to make it inequitable to accord him such relief. It must have been conduct which, if permitted, inequitably affects the relationship between the plaintiff and the defendant, * * *." *Wiley v. Wiley*, 59 Cal.App.2d 840, 842, 139 P.2d 950, 951; see also *Bradley Co. v. Bradley*, 165 Cal. 237, 242, 131 P. 750; *Tobola v. Wholey*, 75 Cal.App.2d 351, 358, 170 P.2d 952. We fail to see how the conduct of plaintiff so prejudicially affected the rights as between him and the city and the defendant purporting to act for the city, as to justify a court of equity in refusing to grant him relief against the unauthorized acts of defendant.

We deem it unnecessary to express an opinion on the question of whether defendant's action was precipitated by plaintiff's alleged illegal conduct and that such conduct, although not denying him the right to assert his rights, might or might not justify a denial of damages.

The judgment is reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.

4. *Stone v. Lobsien*, 112 Cal.App.2d 750, 758, 247 P.2d 357; *Scannell v. Murphy*, 82 Cal.App.2d 844, 849, 187 P.2d 790, and *Watson v. Poore*, 18 Cal.2d 302, 311, 115

294 P.2d—29½

P.2d 478, seem to imply that a finding by the trial court on the subject is sufficient even though the doctrine is not pleaded.

139 Cal.App.2d 792

Margaret MURPHY, Administratrix of the Estate of Frank J. Murphy, deceased, and Bernadette Murphy, by her Guardian ad litem, Margaret Murphy, Plaintiffs and Appellants,

ATCHISON, TOPEKA & SANTA FE RAILROAD, a corporation, Ernest Davis and Houston Alexander, Defendants and Respondents.

Civ. 21190.

District Court of Appeal, Second District,
Division 1, California.

March 12, 1956.

Action for death of a truck driver sustained in a railroad grade crossing accident. Judgment of nonsuit in the Superior Court of Los Angeles County, Wilbur C. Curtis, J., and the plaintiffs appealed. The District Court of Appeal, Fourt, J., held that the question of the decedent's contributory negligence was for the jury.

Judgment reversed.

1. Trial $\hookrightarrow$ 139(1), 142, 143

On a motion for nonsuit at close of plaintiff's case, motion must be denied if there is any substantial evidence which, with aid of all legitimate inferences favorable to plaintiff, tends to establish averments of complaint, and rule applies, even though there is a conflict in evidence, and some of it tends to sustain plaintiff's case, or different conclusions can reasonably be drawn from the evidence of the plaintiff.

2. Appeal and Error $\hookrightarrow$ 927(3)

On appeal from a judgment of nonsuit, an appellate court must view the evidence in the light most favorable to the appellant, disregarding all inconsistencies and drawing only those inferences from the evidence which can reasonably be drawn which are favorable to the appellant.

3. Negligence $\hookrightarrow$ 122(1)

Burden of proving contributory negligence is upon the defendant.

4. Negligence $\hookrightarrow$ 136(9)

Contributory negligence is not established as a matter of law unless only rea-

sonable hypothesis is that such negligence exists, that reasonable men could have drawn that conclusion and none other, that where there are different inferences that may be drawn, one for and one against, the one against will be followed, and before it can be held as a matter of law that contributory negligence exists, evidence must point unerringly to that conclusion.

5. Railroads $\hookrightarrow$ 350(13)

Where there is evidence that driver of a motor vehicle struck at a railroad crossing has exercised some care, question whether the care exercised was sufficient is a matter for the jury.

6. Railroads $\hookrightarrow$ 350(13)

In action for death on a railroad grade crossing of a truck driver who drove upon tracks after permitting a freight train to pass and was struck by a speeding passenger train approaching on another track, question of the driver's negligence should have been submitted to the jury.

John H. Carter, Los Angeles, and Melvin M. Belli, San Francisco, Ben C. Cohen, Alfred Lubin, Beverly Hills, of counsel, for appellants.

Richard L. Oliver, Pollock & Pollock, Hirson & Horn, Herbert Resner, John M. Ennis, Los Angeles, Irving H. Green, Beverly Hills, and Henry A. Plattner, Los Angeles, amici curiae.

Robert W. Walker, J. H. Cummins, Los Angeles, for respondents.

FOURT, Justice.

This is an action for wrongful death brought by appellants against respondents. At the conclusion of appellants' case respondents made a motion for a nonsuit which was denied without prejudice. At the conclusion of the entire case respondents renewed their motion for a nonsuit and made a further motion for a directed verdict. The court denied the motion for a directed verdict and granted the motion for a nonsuit on the ground that the decedent was, as a matter of law, guilty of contributory negligence. This appeal followed.

The fatal accident occurred in broad daylight at a point where Phelan Road crosses

the railroad tracks in the small town of Hesperia, which is located about nine miles from Victorville in San Bernardino county, California. The respondent company operates and maintains its railroad tracks through the town of Hesperia, running in a general northerly and southerly direction. At Phelan Road there is a double set of tracks. The grade of Phelan Road, going west, was four percent ascending; the railroad grade toward the south was one percent ascending. Crossarm signs and a highway stop sign were constructed on each side of the tracks.

The decedent, who was traveling in a westerly direction on Phelan Road, was driving a Sterling tractor, pulling a Fruehauf trailer, silver in color. The top of the cab was 8 feet above the ground. The trailer was 35 feet long, made of stainless steel. The top of the trailer was $12\frac{3}{4}$ feet from the ground.

As the decedent approached the east set of tracks at Phelan Road, a freight train operated by the respondents was traveling on the easterly set of tracks in a southerly direction. The freight train was about a mile long and was traveling approximately 15 to 20 miles per hour. The decedent brought his truck to a stop 6 to 12 feet from the easterly set of tracks and waited for the freight train to pass. When the rear car, or caboose, of the freight train cleared the crossing an eastbound automobile, driven by Edward M. Floyd, crossed the tracks. The decedent started to proceed across the tracks at a speed of about 5 to 10 miles per hour. Floyd testified that as he started to cross the tracks he saw respondents' passenger train approaching from the south, going in a northerly direction on the westerly set of tracks, about 350 feet from the crossing, at a speed of approximately 80 miles per hour; that he heard no whistle or bell; that the freight train made considerable noise. The Floyd car was about 150 feet east of the tracks when the accident occurred.

Johnny Howell, a witness, traveling in a westerly direction, brought his automobile to a stop behind the decedent's truck. He testified that the passenger train first came into his line of vision when both the

caboose of the freight train and the front end of the passenger train were 100 to 150 feet south of the crossing. Howell, Floyd and two other witnesses testified that prior to that time they did not hear any whistle, bell or other warning signal coming from the passenger train.

The truck of the decedent proceeded onto and across the westerly set of tracks. The front of the passenger train hit the back dual wheels of the tractor and the front end of the trailer and continued northerly for a distance of about a half mile before coming to a stop. After the train and the truck came to a stop, decedent was lying in front of his truck; he was dead at that time. The truck was traveling about five to ten miles per hour when it was struck. The passenger train was traveling on the left set of the double tracks, known in railroading as "left hand running". The passenger train did not reduce its speed at any time before the impact. The engineer testified that he was traveling down grade at about 80 miles per hour; that his train was about 200 to 250 feet from the crossing when the engine passed the caboose of the freight train. The engineer was familiar with the Phelan Road crossing and knew that the town of Hesperia was to his left. He stated that he first saw the decedent's truck when his engine was about 750 feet from the crossing. He had an uninterrupted view after the caboose passed the engine of the passenger train.

Alexander Wood, a model engineer, stated that the passenger locomotive was a three-unit diesel and that the seat of the engineer would be 9 feet from the rail head. Using a model which he had constructed to scale, he testified that the maximum distance that a truck driver could see south on the northbound track, where his truck was on the east rail of the southbound track, was 110 feet. Putting the caboose at a point 40 feet south of the crossing and placing the tractor in a position where its front was on the second rail of the east tracks, a maximum distance that a driver of a tractor could see south on the track and on to any position of the northbound track, was 100 feet. Putting the caboose just clearing the crossing and the

front of the tractor 10 feet from the east rail, a truck driver would not have any range of vision of any portion of the northbound track. The caboose would have to be at least 30 feet down the track for the truck driver to have any range of vision along the northbound track.

Witnesses testified that within six months to a year before the accident of July 22, 1952, they had observed trains going in one direction on one track and passing another train going in the opposite direction on another track at the Phelan Road crossing. In the fall of 1951, Floyd and his brother made a vehicular check of the vehicles crossing Phelan Road crossing from 9 a.m. to 12 noon on a Saturday, and counted three hundred vehicles.

Appellants contend that the trial court erred in finding that decedent was guilty of contributory negligence as a matter of law and in granting the motion for nonsuit.

[1] It is the rule that a motion for nonsuit at the close of plaintiff's case must be denied if there is any substantial evidence which, with the aid of all legitimate inferences favorable to the plaintiff, tends to establish the averments of the complaint, that is to say, where the plaintiff's evidence is sufficient to support a judgment on the verdict. This is the rule even though there is a conflict in the evidence and some of it tends to sustain the plaintiff's case, or different conclusions can reasonably be drawn from the evidence of the plaintiff. *Kirk v. Los Angeles Ry. Corp.*, 26 Cal.2d 833, 837, 161 P.2d 673, 164 A.L.R. 1; *Sunset Milling & Grain Co. v. Anderson*, 39 Cal.2d 773, 779, 249 P.2d 24.

[2] On an appeal from a judgment of nonsuit an appellate court must view the evidence in the light most favorable to appellant, disregarding all inconsistencies and drawing only those inferences from the evidence which can reasonably be drawn which are favorable to appellant. *Kirk v. Los Angeles Ry. Corp.*, supra, 26 Cal.2d at pages 837-838, 161 P.2d 673; *Merlino v. Southern Pac. Co.*, 132 Cal.App.2d 58, 60, 281 P.2d 583.

Respondents do not question that it was established there was negligence on the

part of the railroad. They state in their brief that "[s]olely for the purposes of respondents' brief, negligence is admitted", and concede that the sole question for determination is whether as a matter of law decedent's negligence was a contributing cause of the accident.

[3, 4] With respect to the question of contributory negligence, the rule was aptly stated in *Anthony v. Hobbie*, 25 Cal.2d 814, 818, 155 P.2d 826, and quoted with approval in *Kirk v. Los Angeles Ry. Corp.*, supra, 26 Cal.2d 833, 838, 161 P.2d 673, and *Merlino v. Southern Pac. Co.*, supra, 132 Cal.App.2d 58, 67, 281 P.2d 583, 590, thus: "The burden of proving contributory negligence is upon the defendant. 19 Cal.Jur. 697-699. True, contributory negligence may be found by the trier of fact from the plaintiffs' own evidence. But cases in which it can be said that the negligence of plaintiff contributes proximately to the accident as a matter of law are rare. The rule has been stated in various ways in a legion of cases, that contributory negligence is not established as a matter of law unless the only reasonable hypothesis is that such negligence exists; that reasonable or sensible men could have drawn that conclusion and none other; that where there are different inferences that may be drawn, one for and one against, the one against will be followed; and that before it can be held as a matter of law that contributory negligence exists, the evidence must point unerringly to that conclusion. (Citing cases.)" See also, *Herbert v. Southern Pac. Co.*, 121 Cal. 227, 229, 53 P. 651.

[5] It is also the rule that where there is evidence that the driver has exercised some care, the question whether the care exercised was sufficient is a matter for determination by the jury. *Koch v. Southern California R. Co.*, 148 Cal. 677, 680, 84 P. 176, 4 L.R.A.,N.S., 521; *Startup v. Pacific Electric Ry. Co.*, 29 Cal.2d 866, 871, 180 P.2d 896; *Lloyd v. Southern Pac. Co.*, 111 Cal.App.2d 626, 635, 245 P.2d 583; *Merlino v. Southern Pac. Co.*, supra, 132 Cal.App.2d at page 69, 281 P.2d 583.

[6] Applying the foregoing rules to the instant case, we are of the opinion that

the trial court erred in granting the motion for nonsuit and that the question of decedent's contributory negligence should have been submitted to the jury. The evidence is uncontradicted that decedent brought his truck to a complete stop 6 to 12 feet from the easterly set of tracks. The engineer of the passenger train saw the decedent's truck 750 feet from the crossing. The train was traveling 80 miles an hour and did not reduce its speed prior to the collision. Four witnesses testified that either there was no bell, whistle or horn sounded by the passenger train, or that they heard no such bell, whistle or horn. When the caboose of the freight train had cleared the track, Floyd, who was waiting at the westerly tracks for the freight train to pass and had an unimpeded view of the westerly tracks, drove his automobile across the tracks. Clearly it was a question of fact for the jury to determine whether decedent, under the circumstances existing at the time, took the precautions which the situation demanded for his own protection.

The judgment is reversed.

DORAN, Acting P. J., concurs.



130 Cal.App.2d 807

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Luis OLGIN, Defendant and Appellant.

Cr. 5500.

District Court of Appeal, Second District,
Division 1, California.

March 12, 1956.

Defendant was convicted of unlawful possession of heroin, and he filed petition for writ of error coram nobis. The Superior Court, Los Angeles County, Charles W. Fricke, J., entered order denying petition, and defendant appealed. The District

Court of Appeal, Doran, Acting P. J., held, inter alia, that contentions that evidence was illegally obtained or that evidence was insufficient to support charge are not reviewable by writ of error coram nobis.

Order affirmed.

See also, 290 P.2d 77.

1. Criminal Law §997(15)

In proceeding for writ of error coram nobis to review conviction, petitioner's contention that fair trial and complete hearing had been denied was unsupported by record. West's Ann. Health & Safety Code, § 11500.

2. Criminal Law §997(6)

Writ of error coram nobis is limited writ, available only where no other remedy exists and is aimed at reaching errors of fact extrinsic to record.

3. Criminal Law §997(2)

Writ of error coram nobis cannot be used to review errors of fact or law that can be reviewed on appeal.

4. Criminal Law §997(15)

In proceeding for writ of error coram nobis to review conviction, petitioner's contention, urged in trial court but not included in brief on appeal, that his attorney had failed to file notice of appeal was unsupported by record.

5. Criminal Law §997(4)

Contentions that evidence in criminal prosecution was illegally obtained and that evidence was insufficient to support charge are not reviewable by writ of error coram nobis.

Luis Olgin, in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

DORAN, Acting Presiding Justice.

This is an appeal by defendant from an order denying a petition for a writ of error coram nobis.

Defendant was charged with the violation of section 11500 of the Health and Safety Code. It was alleged that defendant "did

wilfully, unlawfully and feloniously have in his possession a preparation of heroin". It was also alleged that defendant had been convicted of five felonies, "grand larceny, in the State of Colorado; burglary, in the State of Nevada; and possession of narcotics, petty theft with a prior conviction of a felony, and receiving stolen property; the latter three felonies having been committed in the State of California. It was likewise alleged that the defendant had served terms of imprisonment for the five above-named felonies." A trial by jury was waived. Defendant admitted the five felony convictions. "The matter was presented on behalf of the People by the reading of the testimony of the preliminary examination. Defendant was sworn, as was one additional witness, and the matter was submitted to the trial judge who found defendant guilty as charged in the information."

Thereafter, "defendant's motion to strike the prior convictions was denied". An application for probation also was denied and judgment was pronounced. No appeal was taken from the judgment.

"Subsequently, and on May 17, 1955, defendant filed in the superior court, a document denominated 'Petition For A Writ Of Error Coram Nobis And For The Order To Show Cause Why The Writ Should Not Be Granted:'.

"The matter came on for hearing on May 18, 1955, and on that date the court denied the petition and the order to show cause and directed that the purported notice of appeal attached to the petition was not to be filed or considered as a notice of appeal because it was premature.

"Thereafter, and on June 14, 1955, a 'Notice Of Appeal From The Whole Thereof' was filed with the clerk."

"In the petition filed in the superior court Olgin stated that when he was sentenced and committed to Chino he instructed his attorney to appeal and to put his transcript in his personal property for the purpose of protecting his appeal; that thereafter he had no means of knowing whether his appeal had been perfected and that the statutory period for filing the written no-

tice of appeal elapsed on his arrival at San Quentin.

"He alleged that a constructive filing of the written notice of appeal was accomplished by the instruction to his attorney to place his transcript in his property; that since his attorney refused to protect his rights he had no other remedy to review the judgment, except by writ of error coram nobis.

"He then alleged that he had no knowledge that the narcotics alleged in the charge as to him were that of 'co-defendant' Edward Baker and that 'mere discussion of Narcotics pricing' did not constitute incrimination on the part of the petitioner.

"He stated that the scope of the petition was to 'correct many serious errors of law and facts' and he sought to have the court below declare the judgment as being void in excess of the court's jurisdiction and he requested an order to produce him in court to show cause if he had any grounds why he should not be discharged from custody.

"He likewise stated (without being specific or supporting the charge with proof) that 'the very facts, evidence, and witnesses which should have been produced in open Court trial was concealed, suppressed, and denied by extrinsic fraud unknown to petitioner, and the Courts at the time of trials, whereas, if these laws and facts had been produced in an open Court trial, petitioner would have been completely extricated from the entire false imprisonment.' He thereupon requested that he be discharged from custody and that the writ be granted forthwith."

[1] No affidavits were filed in support of defendant's contentions. The petition set forth no facts but was, in effect, a series of conclusions and an argument. Appellant's contention that a fair trial and a complete hearing in the superior court were denied, lacks support in the record.

[2, 3] The writ of error coram nobis is a limited writ, available only where no other remedy exists, aimed at reaching errors of fact extrinsic to the record. It cannot be used to review errors of fact or of law that can be reviewed on appeal. (See 12 Cal.

Jur.2d 551 et seq.) People v. Devora, 105 Cal.App.2d 457, 233 P.2d 653; People v. Lewis, 64 Cal.App.2d 564, 149 P.2d 27.

Petitioner ordered released from custody.

[4] Appellant urged in the trial court that the attorney failed to file a notice of appeal. This point is not included in the brief on appeal. However, the contention lacks support in the record and the law. People v. Bible, 135 Cal.App.2d 65, 286 P.2d 524.

[5] It is definitely established as a matter of law in a long line of decisions that the writ of coram nobis is narrow in scope and only available in certain cases. Arguments that evidence was illegally obtained or that the evidence is insufficient to support the charge are not included.

In the light of the record appellant's contentions cannot be upheld. The order is affirmed.

FOURT, J., concurs.

Habeas Corpus ☞30(3)

Record established that petitioner, who had received sentence of \$15 fine or three days in jail for driving 49 miles an hour in 35-mile zone, and who paid fine in dimes, and whose sentence was then changed to three days imprisonment in jail without alternative of a fine, was entitled to be released from custody on writ of habeas corpus. Vehicle Code, § 510.

Arthur F. Larrabee, Los Angeles, for appellant.

Roger Arnebergh, City Atty., Donald M. Redwine, Asst. City Atty., Philip E. Grey, Deputy City Atty., Los Angeles, for respondent.

DORAN, Acting Presiding Justice.

The applicant herein appeared in the municipal court charged with the violation of section 510 of the Vehicle Code.

The petition for the writ recites, "That on August 26, 1955, Arthur Shivell, the applicant herein was arraigned upon a charge of violation of section 510, Vehicle Code, to wit: traveling alleged 49 miles per hour in an alleged 35 mile zone. That the applicant plead guilty, and was fined \$15, or 3 days, and that he forthwith paid into the hands of the clerk of said court the sum of \$16 as and for payment in full of said fine. That the said clerk received into his hands without objection, the said entire sum of money, in payment thereof, which said sum was in silver coins of the United States, to wit: dimes, which said applicant had received in the course of a business operated by him, to wit: a coin-operated music machine route. That the said clerk said he would count the coins, to which the applicant agreed. That the said clerk was then and there assisted by two other clerks, who carried on all clerkly duty whilst he was engaged as hereinafter set forth, and although in all, said applicant was thus detained upward of one hour, he did not busy



139 Cal.App.2d 837

Application of Arthur SHIVELL, for a Writ of Habeas Corpus. Cr. 5616.

District Court of Appeal, Second District,
Division 1, California.

March 14, 1956.

Hearing Denied April 11, 1956.

Proceeding in the matter of the application for a writ of habeas corpus. The District Court of Appeal, Doran, Acting P. J., held that record established that petitioner, who had received sentence of \$15 fine or three days in jail for driving 49 miles an hour in 35-mile zone, and who paid fine in dimes, and whose sentence was then changed to three days imprisonment in jail without alternative of a fine, was entitled to be released from custody on writ of habeas corpus.

himself with any other clerkly duty. That at a later part of the period, the clerk broke the wrappers in which the coins had been carried by said applicant, and commenced to count them, but that he did not complete counting them, although he was not busied at anything else. Seeing this, the said applicant twice volunteered, for the convenience and accommodation of the clerk, to take the coins to the bank, which was in the same block, to be exchanged into paper bills, but that the clerk refused to permit him to do so. That said applicant himself, later, counted the coins in the courtroom, and that there was, as there had been, the entire sum of \$16 which was at all times in the hands of the clerk. That at the end of said period, the said clerk went to the judge and whispered to him, and that, at said time, the coins were in possession of the said clerk, in loose form, at the clerk's counter.

"That after the clerk had whispered to him, the two had whispered together and then the said judge upbraided the said applicant, stating that the applicant had falsely represented to the clerk that he had received the coins from the bank. That the applicant was not permitted to address the court, or to make any statement, but that the judge stated he would look into the matter, and that the applicant was now in the custody of the bailiff. That he was put into the prisoners room, where he remained for upward of 1/2 hour. That from the prisoners room, he was taken again into the courtroom before said judge, who took testimony from two of the clerks respecting said coins, directed solely to the question, whether or not the said applicant had said to the said clerk that he had received the coins from the bank. That the judge would not permit the said applicant to address the court, nor to ask any questions, nor to make any objections, nor to produce any evidence in his own behalf, nor to examine or cross-examine any of said clerks, and would not permit him to relate what had occurred, but stopped him from giving any testimony except his negative answer, and continued to admonish the applicant at each attempt to object, to keep still, to shut up. Then he

stated that he believed the clerk, and that on that ground he vacated and set aside the aforesaid sentence of \$15 or 3 days, and sentenced said applicant to 3 days imprisonment without alternative of fine, in the City Jail. That the said applicant was then, upon his argument and objection to these proceedings, given a stay of execution until September 1, 1955, for business reasons, but that applicant was held approximately five hours, until bail of \$105 was furnished on his behalf, in cash.

"That on August 31, 1955, the applicant moved said judge to set aside said sentence and to reinstate the original sentence. That the motion was denied, and that the applicant forthwith filed notice of appeal to the Appellate Department of the Superior Court, from the said second sentence and from the orders denying his motions. That thereafter the said applicant in propria persona duly filed a proposed statement on appeal, listing six grounds of appeal, and relating in substance, the material facts which had occurred in said courtroom, August 26, 1955.

"That at a hearing to settle the Statement on Appeal, held October 7, 1955, the said judge refused to allow full statement of the material facts which had occurred in said courtroom on August 26, 1955, to be included in the statement on appeal which was to be engrossed, and refused to state or to permit the applicant to know what matter he intended to put into the statement of facts in the statement on appeal which he, himself, would write and engross. That the judge further refused to include in the engrossed Statement on Appeal, the applicant's grounds of appeal.

"That the Statement on Appeal thereafter received by said applicant contained assertions as fact, which were not true, and of which no mention had been made by anyone in the presence of the applicant, on August 26, 1955, and which were not the subject of any statements in the presence of the said applicant on that date. That these were to the effect that the applicant had refused to allow the clerk to count the money which the said applicant had given to him, but that the applicant had demanded

that the clerk accept the money as rolled, without counting it, and that the applicant had refused to wait for the money to be counted, thereby leaving the false impression that the said coins had remained in a rolled or wrapped condition, and that each and every such statement, assertion or inference was incorrect, and that, in other respects, the statement of facts contained in said Statement on Appeal was *garbeled* and incorrect and incomplete. That the said applicant duly sent to the said judge, objections and exceptions to said Statement on Appeal, and asked hearing thereon before engrossment, but that the judge denied the said objections and exceptions, and thereafter, without notice, engrossed said incorrect, *garbeled* and incomplete Statement on Appeal. That said engrossed Statement on Appeal altered and changed the applicant's grounds of appeal, and eliminated material grounds therefrom.

"That because of the incorrect, *garbeled* and incomplete statement of facts therein, and the elimination of the first ground of appeal as proposed, that material and *indispensable* facts were *withheld* from consideration by the said Appellate Department, and that as a result, the said Court, by a split decision, affirmed said judgment and sentence, with a dissenting opinion by the Honorable Frank G. Swain, a Judge of said Court, January 31, 1956. That the remittitur was transmitted to the said Municipal Court, February 9, 1956. That the said applicant was committed to the said City Jail by the said judge of the Municipal Court, February 15, 1956."

Petitioner, in person, appealed to the appellate department of the superior court which, by a split decision, affirmed the judgment.

It is pointed out by applicant that, "The statement on appeal which was engrossed by the court, notwithstanding the objections and exceptions which were timely made within five days, and before they Statement on Appeal was signed by the trial court, contained an incorrect and garbled and incomplete statement of facts, and contained matter which had not been mentioned by anyone on August 26, 1955, in the presence

of the accused, and which incredibly portrayed the accused as having refused to permit the clerk to count the money, of insisting that he accept the coins wrapped, and of refusing to wait, when all of the physical facts which might have been adduced, showed to the contrary, and which also inferred that the coins had remained wrapped, when they had been out of wrappers for a considerable time, and which inferred that the accused had retained the coins in his possession, when, *in fact they had been in the hands of the clerk for the entire period, and were in the hands of the clerk when the statement of facts in the statement on appeal recounts that the court revoked the sentence of \$15 or 3 days, and imposed the 3-day jail sentence.*

"The Appellate Department of the Superior Court was thus presented with a record which, as an appellate court, it could not go beyond, nor inquire into, nor vary." (Italics included.)

It is argued by applicant that, "The taking of any action by the trial court is a denial of due process and unconstitutional when such action is based upon; (A) secret testimony, (B) unsworn testimony, (C) failure to allow accused to make objection, or to examine or cross-examine, (D) or to allow accused to present evidence in his own behalf, (E) or to receive evidence in mitigation or aggravation except as provided in Secs. 1203 & 1204, Penal Code, or (F) evidence of any factors which bear no relation in time, place, or nature to mitigation or aggravation of the offense charged, or (G) failure to allow accused to have counsel of his own choice, and who will actually represent him, or (H) allowing accused or his counsel a reasonable time to prepare to defend a new charge, or (I) failing to vacate and set aside the plea of guilty when the trial court of its own motion, vacates a sentence and of its own motion, adds a new charge to the one on which the plea has been made."

That, "The minutes of the trial court show on their face that the sentence of fine was made and entered before the new sentence was imposed, and that upon such entry, the trial court lost jurisdiction in the

cause, under the facts of this case." In re Gottschalk, 47 Cal.App. 260, 190 P. 649; People v. McAllister, 15 Cal.2d 519, 102 P.2d 1072.

From a review of the record it is evident that petitioner should be released from custody. It is so ordered.

FOURT, J., concurs.



139 Cal.App.2d 810

Application of Edward J. DEVLIN
for a Writ of Habeas Corpus.

Cr. 3208.

District Court of Appeal, First District,
Division 1, California.

March 13, 1956.

Hearing Denied April 11, 1956.

Habeas corpus proceeding to determine whether petitioner had been placed in jeopardy once on charges for which county sought to place him on trial. The District Court of Appeal, Peters, P. J., held that where, after one of jurors was dismissed for good cause, the 11 other jurors were dismissed and trial was set for defendant before new jury, fact that defendant was to be tried before new jury would not place him in double jeopardy.

Writ discharged.

1. Jury § 75(1)

Even in absence of statute, trial court in a criminal prosecution possesses power to dismiss juror for "good cause."

2. Criminal Law § 184, 867

Jury § 149

The trial court has power to discharge jury in criminal action for misconduct or disqualification of one or more of its members which is of such character as to render discharge necessary in order to prevent frustration of the ends of justice, and such

discharge will not support plea of former jeopardy. West's Ann.Pen.Code, §§ 1089, 1123.

3. Jury § 75(2)

Where juror in criminal case, after being chosen, was charged with a felony and expressed wish to be relieved because he did not feel that he could fairly perform his duties as a juror, the trial court had discretion to determine that this was "good cause" for juror's discharge. West's Ann.Pen.Code, § 1123.

4. Criminal Law § 184

Where, after one of jurors was dismissed for good cause in criminal prosecution, the other 11 jurors were dismissed and trial was set for defendant before new jury, fact that petitioner was to be tried before new jury would not place him in double jeopardy. West's Ann.Pen.Code, §§ 1089, 1123, 1141.

Alfred J. Hennessy, Julien R. Bauer, San Francisco, for petitioner.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Arlo E. Smith, Deputy Atty. Gen., Thomas C. Lynch, Dist. Atty., Jack Berman, Deputy Dist. Atty., San Francisco, for respondents.

PETERS, Presiding Justice.

This is a proceeding in habeas corpus to determine whether petitioner has been once in jeopardy on the charges for which the county seeks to place him on trial.

The petitioner was indicted, charged with the commission of several felonies. He pleaded not guilty. His trial commenced on October 17, 1955. On that date 12 jurors were duly and properly selected, impaneled and sworn. The trial was then continued by consent to October 18, 1955. On that day only 11 jurors appeared. The 12th juror, one Vernon Bartholomew, had been arrested on a felony charge on his way to court. The trial court suggested to counsel that the case, by stipulation, proceed to trial with 11 jurors. To this, petitioner's counsel objected, claiming that Bartholomew, in spite of his arrest, was competent to act as a juror. The trial court by con-

sent continued the case until October 20th. On that day, outside the presence of the other 11 jurors, the trial court interrogated Bartholomew and his counsel as to the reason why Bartholomew had not been present on October 18th. Bartholomew, directly or through his counsel, informed the court that he had been arrested on October 18th on a felony charge and was presently out on bail. Bartholomew then asked permission to make a statement. He stated that because of his arrest "I do not feel in good conscience, that I can fairly and impartially discharge my duties as a juror. I believe that the events which have occurred may influence my own deliberations and may have a distracting effect upon the deliberation of my fellow jurors. I therefore respectfully request the Court to relieve me of my duties as a juror in connection with this pending case." Petitioner's counsel resisted the dismissal of the juror, claiming that Bartholomew was fully competent, and that good cause had not been shown for his discharge. The trial court dismissed Bartholomew as a juror, then dismissed the other 11 jurors, and set October 27th as the day petitioner should be tried before a new jury. In the meantime, petitioner's counsel was permitted to enter a plea of once in jeopardy. On October 27th petitioner's counsel moved to dismiss the proceedings on the ground that petitioner had been once in jeopardy. The motion was denied, and petitioner, who was then in jail pending trial, instituted the present proceeding to test the validity of his restraint.

In support of the petition it is argued that after a jury has been impaneled and sworn a juror can only be discharged for "good cause," and that the circumstances here involved, as a matter of law, do not constitute "good cause." It is true, of course, that after a jury has been impaneled a juror can be dismissed only for "good cause," but it is quite clear that, under the circumstances here involved, the trial court acted well within its discretion in determining that "good cause" existed.

[1] Even in the absence of statute the trial court possesses the power to dismiss a

juror for "good cause." The general rule is stated as follows in 38 A.L.R. 706:

"* * * the general modern rule is that the court may discharge a jury without working an acquittal on the defendant, in any case where the ends of justice, under the circumstances, would otherwise be defeated. * * *

[2] "Thus the cases are practically unanimous in holding that it is within the power of the trial court to discharge the jury in a criminal action for any misconduct or disqualification of one or more of its members which is of such a character as to render the discharge necessary in order to prevent the frustration of the ends of justice, and that in such case, the discharge will not support a plea of former jeopardy."

This general rule is codified in this state.

Section 1123 of the Penal Code provides, in part: "If before the jury has returned its verdict into court, a juror becomes sick or upon other good cause shown to the court is found to be unable to perform his duty, the court may order him to be discharged." If there is no alternate that may sit for him in the case of such a discharge, "the jury shall be discharged and a new jury then or afterwards impaneled, and the cause may be again tried."

Section 1141 of the Penal Code provides: "In all cases where a jury is discharged or prevented from giving a verdict by reason of an accident or other cause, except where the defendant is discharged during the progress of the trial, or after the cause is submitted to them, the cause may be again tried."

[3] Petitioner relies on the case of *People v. Howard*, 211 Cal. 322, 295 P. 333, 71 A.L.R. 1385. In that case, during a murder trial, one of the jurors disclosed to the court that she knew some of the defense witnesses and was prejudiced against them. The juror was discharged and an alternate juror was substituted. On appeal, after conviction, the defendant contended that he had been deprived of a common-law jury trial. At that time section 1089 of the Penal Code provided that an alternate juror could be substituted for a reg-

ular juror if "a juror die, or become ill, so as to be unable to perform his duty." There was no other statutory cause for the discharge of a juror. The Supreme Court held that while it might have been a procedural error to discharge the juror and to substitute the alternate, the error was not prejudicial. At the time the Howard case was decided section 1123 of the Penal Code provided for the discharge of a juror when "a juror becomes sick, so as to be unable to perform his duty." Both sections 1089 and 1123 have now been amended to allow an alternate to be substituted or a juror dismissed if "a juror becomes sick or upon other good cause shown to the court." Thus, under existing law a juror may be discharged, without jeopardy attaching, if "good cause" for the discharge exists. What constitutes "good cause" by necessity, rests largely in the discretion of the trial court. Certainly, when a juror in a criminal case, after being chosen, is himself charged with a felony and expresses the wish to be relieved because he does not feel that he can fairly perform his duties, the court has discretion to determine that this is "good cause."

There is nothing in the cases cited by petitioner contrary to these views. The cases cited are *People v. Ruef*, 14 Cal.App. 576, 114 P. 48, 54, *People v. Young*, 100 Cal.App. 18, 279 P. 824, and *People v. Schmitz*, 7 Cal.App. 330, 94 P. 407, 419, 15 L.R.A., N.S., 717. These cases dealt with the propriety of the exercising of peremptory challenges, or held that a juror could not compel his own discharge. None of the cases dealt with what constitutes "good cause" within the discretion of the court.

After the filing of this petition a supplementary petition was filed directed to the authorities in Santa Clara County, it appearing that petitioner is now in custody on another charge in that county. Since the original custody was lawful, this subsequent custody is also lawful.

[4] The writ heretofore issued is discharged, and the supplementary petition for a writ is denied.

BRAY and FRED B. WOOD, JJ., concur.

139 Cal.App.2d 597

CALIFORNIA KITCHENS, INC., a California Corporation, Plaintiff and Respondent,

v.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, an unincorporated association; Los Angeles County District Council of Carpenters, an unincorporated association; Earl E. Thomas, Individually, and as Secretary-Treasurer of Los Angeles County District Council of Carpenters, an unincorporated association; Los Angeles Local 721, Cabinet Makers and Millmen, an unincorporated association; Beverly Hills Local No. 1052, an unincorporated association; Redondo Local No. 1478, an unincorporated association; Van Nuys Local No. 1913, an unincorporated association; John Doe Hogan, Individually, and as Business Agent of Beverly Hills Local No. 1052, John Doe McCulloch, Individually, and as Business Agent of Redondo Local No. 1478; Doe I to Doe L, Inclusive; John Doe Gambiano, Individually, and as an officer and agent of United Brotherhood of Carpenters and Joiners of America, Defendants.

Los Angeles District Council of Carpenters; Sacramento-Yolo-Amador District Council of Carpenters, Beverly Hills Local No. 1052; Earl E. Thomas; and Victor J. La Chapelle, Appellants.

Civ. 20905.

District Court of Appeal, Second District,
Division 2, California.

Feb. 29, 1956.

Rehearing Denied March 22, 1956.

Action for an injunction restraining defendants from interfering with the distribution and installation of cabinets distributed by the plaintiff for installation and from directing any person to refuse to handle such cabinets or interfere therewith. Judgment for plaintiff in the Superior Court, Los Angeles County, Philbrick McCoy, J., and defendants appealed. The District Court of Appeal, Moore, P. J., held that where the plaintiff was engaged in interstate commerce, and complaint alleged acts by defendants constituting violation of the Taft-Hartley Act, the National Labor Relations Board had exclusive authority to enforce the Act by injunctive process ex-

cluding the Superior Court from exercising jurisdiction until the Board declined to act.

Order reversed.

1. Labor Relations ⇌510

Complaint by distributor charging that union and members thereof acted in concert to engage in boycotts and intimidations, and thereby cause the distributor's customers to cease the purchase of cabinets made by it and were about to forbid their members to handle such cabinets and enforce their demands by strike and work stoppages, alleged violations of the Taft-Hartley Act, a matter within the exclusive authority of Labor Relations Board precluding the state courts from exercising jurisdiction in regard thereto. National Labor Relations Act, § 7, as amended by the Labor Management Relations Act, 1947, 29 U.S.C.A. § 157; National Labor Relations Act, § 10(a-c, e) as amended by the Labor Management Relations Act, 1947, 29 U.S.C.A. § 160(a-c, e).

2. Labor Relations ⇌510

Whether facts established amount to an unfair labor practice against an employer engaged in interstate commerce is a question for the National Labor Relations Board which the Superior Court could not decide until the Board had refused to take jurisdiction. National Labor Relations Act, § 7, as amended by the Labor Management Relations Act, 1947, 29 U.S.C.A. § 157; National Labor Relations Act, § 10(a-c, e) as amended by the Labor Management Relations Act, 1947, 29 U.S.C.A. § 160(a-c, e).

3. Labor Relations ⇌510

The state may not enjoin under its own labor statute conduct which has been made an unfair labor practice under federal statutes. National Labor Relations Act, § 7, as amended by the Labor Management Relations Act, 1947, 29 U.S.C.A. § 157; National Labor Relations Act, § 10(a-c, e) as amended by the Labor Management Relations Act, 1947, 29 U.S.C.A. § 160(a-c, e).

4. Labor Relations ⇌510

While a state court may not prohibit the exercise of rights which the Labor Re-

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lations Act protects, they are free to act upon such controversies as arise over which Congress has not given specific exclusive primary jurisdiction to the Labor Relations Board. National Labor Relations Act, § 7, as amended by the Labor Management Relations Act, 1947, 29 U.S.C.A. § 157; National Labor Relations Act, § 10(a-c, e) as amended by the Labor Management Relations Act, 1947, 29 U.S.C.A. § 160(a-c, e).

5. Labor Relations ⇌510

A state court may enforce rights guaranteed by the Cartwright Act, in labor disputes after the National Labor Relations Board has declined to act but it has no power to determine that the Board would refuse jurisdiction which is a matter within the Board's exclusive jurisdiction. West's Ann.Bus. & Prof.Code, §§ 16700-16758, 16750, 16757; National Labor Relations Act, § 7, as amended by Labor Management Relations Act, 1947, 29 U.S.C.A. § 157.

6. Constitutional Law ⇌70(3)

The fact that injustices might result during the period prior to a decision by the National Labor Relations Board in a labor dispute to assume or reject jurisdiction during which time a state court has not the power to act is a problem for Congressional consideration and not for judicial action.

Arthur Garrett, Los Angeles, Charles Scully, San Francisco, and James M. Nicolson, Los Angeles, for appellants.

Zimmerman, Kelly & Thody, Joseph P. Kelly, Jr., and W. Alan Thody, Los Angeles, for respondent.

MOORE, Presiding Justice.

This is an appeal from the order granting a preliminary injunction against the defendants, restraining them and each of them from interfering with the sale, distribution and installation of "Bilt-Well" cabinets, distributed by respondent for installation on behalf of the purchasers thereof at specified places and from causing, ordering or directing any person to refuse to handle such cabinets or hampering, in any manner, any person from handling or installing them.

Respondent is a California corporation. April 1, 1954, it purchased the assets of the Kitchen Division of Stanthony Corporation of Delaware. Included among such assets was an exclusive franchise for the distribution and sale in California of "Bilt-Well" kitchen cabinets, a product of Carr, Adams & Collier Company of Dubuque, Iowa. Also included in the purchased assets were firm orders and commitments from four certain California concerns.

Immediately after having acquired such assets, respondent accepted orders for 176 of the cabinets from B.R.S. Corporation to be used in a tract of 22 houses in Los Angeles County; 5,600 cabinets for 700 houses in the same tract. Appellants or their agents visited the tract twice daily for a week concerning the use of Bilt-Well cabinets and finally effected a cancellation of the order of the B.R.S. Corporation.

Because of the activities of appellants, Harold Hensgen & Associates cancelled its order for 750 Bilt-Well cabinets. An officer of that company notified respondent that he was uncertain whether Harold Hensgen could use the cabinets because of union trouble and exhibited an unsigned letter to an officer of one of the unions which the Hensgen firm was asked to sign; it said the Bilt-Well cabinets would not be used on a tract of 68 houses until the local or a district representative had approved them.

Respondent had oral orders for 27 Bilt-Well cabinets to be installed in a model home at Pan-Pacific Auditorium at Los Angeles and for 1,680 cabinets for 168 houses to be erected by Kenbo Construction Company.

Respondent engaged Erwin Weber to install cabinets in the "model home" of the Kenbo Construction Company at the Pan-Pacific Auditorium "Home Show." Weber testified that Mr. Eisenmayer, president of respondent company, told him that Eisenmayer had an agreement with Earl Thomas, one of the appellants, covering the installation of the Bilt-Well cabinets in the Kenbo Model home, but on May 10, 1954, Weber was expelled from the Auditorium by an

agent of appellant Local No. 1052 on the charge that the cabinets did not carry the union label. Such events caused a cancellation of the orders for the 27 and the 1,680 Bilt-Well cabinets.

In addition to the successful interference by appellants as shown above, respondent had orders for 444 cabinets to be installed in a tract being developed at Lancaster. Also respondent received purchase orders for 927 Bilt-Well cabinets for 103 houses in Larchmont Village Inc., near Sacramento, and a commitment for 26,100 cabinets for 2,900 prospective homes there. While appellants did not succeed in causing a rescission of any of the orders mentioned in this paragraph, witness Brock for appellants testified that his company, M. J. Brock & Sons, was held up for a period of time by appellants' interference.

Secretary-treasurer Thomas of Los Angeles District Council of Carpenters deposed that "defendants desire to protect the workingmen of Southern California engaged in the cabinet-making industry from being degraded into a condition of peonage by the activities of plaintiff corporation and others and to that end have requested the employers and contractors mentioned in paragraph IX of the complaint not to use cabinets produced at sub-standard wage scales, including Bilt-Well cabinets." Appellant La Chapelle admitted that he had advised Larchmont Village Inc. twice that the lack of a union label on the Bilt-Well cabinets might cause complaint.

Respondent urges three propositions, namely, (1) the superior court had exclusive jurisdiction; (2) no labor dispute existed; (3) the amended complaint declares a valid cause of action. Conceding, arguendo, that a valid cause of action is stated, the facts will disclose that a labor dispute did exist while the law leaves no doubt that the superior court did not have exclusive jurisdiction of the subject matter or any jurisdiction unless the N.L.R.B. had first declined to entertain the complaint.

The controversy brings to the fore two statutes that bear upon the subject of a labor dispute. One is the Cartwright Act, a California statute adopted in 1907. Deer-

ings General Laws, Act 8702; Business and Professions Code, §§ 16700-16758. While, at first glance, it appears to have been designed primarily to prevent the organization of trusts for the control of markets for merchandise, its definition of a trust may, not unreasonably, include any contract "to carry out restrictions in trade or commerce"; to prevent competition in "manufacturing, sale or purchase of merchandise" etc. Section 16,757 provides that it is sufficient to prove that a trust or combination exists and that defendant belonged to it or acted for it. Any court having jurisdiction in the county where the defendant resides may entertain an action arising under the act. Bus. & Prof. Code, § 16750.

The other statute concerned is the "National Labor Relations Act" as amended by the "Labor Management Relations Act, 1947" sometimes known as the "Taft-Hartley Act" and herein referred to as "N.L.R.A.", 29 U.S.C.A. § 157. By its provisions it enlarged the functions of the National Labor Relations Board, herein referred to as "N.L.R.B." The N.L.R.A. was enacted following the World War II when the maintenance of the peace and serenity of the industrial and commercial life of the entire nation was second only to the cessation of battles and the winning of the peace. While the N.L.R.A. makes provision for protecting the activities of labor unions, section 7, it proscribes unfair labor practices such as encouraging the "employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods * * * or to perform any services, where an object thereof is" to require an employer "to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor or manufacturer * * *." N.L.R.A. as amended, 29 U.S.C.A. § 158(b) (4) (A). Respondent denies that appellants induced or encouraged any employees to engage in a concerted refusal to handle Bilt-Well cabinets. It asserts that the Union's dealings were entirely with the employers. It appears however, that the amended complaint alleges that defendants made threats

to the contractor "that if it attempted to install said Bilt-Well cabinets, all union men would be immediately ordered off the job so that all work would cease"; and the injunction forbids defendants to threaten any contractors "that, if they, or any of them, attempt to install Bilt-Well cabinets, all union men will immediately be ordered off the job or jobs." It is immaterial whether the union personally instructed the individual employee not to handle Bilt-Well cabinets or whether the supervisors were instructed to direct the employees to abstain from installing such cabinets. The results are the same. In either event, the employees were affected. Furthermore, the question with reference to the dispute as to whether the employees or employers were coerced is one for the N.L.R.B. first to determine. If it should decide that the dispute does not affect the employees, under the N.L.R.A., then the state court may assume jurisdiction.

Respondent has cited and quoted excerpts from numerous decisions, *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 75 S.Ct. 480, 99 L.Ed. 546; *Hill v. State of Florida*, 325 U.S. 538, 65 S.Ct. 1373, 89 L.Ed. 1782; *Garner v. Teamsters, etc., Local Union*, 346 U.S. 485, 74 S.Ct. 161, 98 L.Ed. 228, 244; *Allen-Bradley Local No. 1111, United Electrical, etc., of America v. Wisconsin Employment Relations Board*, 315 U.S. 740, 62 S.Ct. 820, 86 L.Ed. 1154; *Algoma Plywood & Veneer Co. v. Wisconsin Emp. Relations Board*, 336 U.S. 301, 69 S.Ct. 584, 93 L.Ed. 691, for the purpose of showing that "the commerce clause does not itself preclude a state from regulating those matters which not being themselves interstate commerce, nevertheless affect the commerce"; that the "National Labor Relations Management Act * * * leaves much to the states", *Garner v. Teamsters, etc., Local Union*, supra [346 U.S. 485, 74 S.Ct. 164]; the state was allowed to enjoin mass picketing and property damage; the mere enactment of the National Labor Relations Act did not exclude state regulation of the type which Wisconsin has exercised, namely, injunction against mass picketing, threats of bodily injury and property damage to employees, obstruction of streets, blocking of entrance

to and egress from a factory, picketing employees' homes, *Allen-Bradley Local No. 1111, United Electrical, etc., of America v. Wisconsin Employment Relations Board*, supra; that certain decisions "clearly interdict any rule by the Board that every type of concerted activity is beyond the reach of the states' adjudicatory machinery", *International Union, etc., of Local 232 v. Wisconsin Employment Relations Board*, 336 U.S. 245, 69 S.Ct. 516, 523, 93 L.Ed. 651; that the N.L.R.A. does not prevent the states from enforcing their own policies in matters not governed by the federal law. *Algoma Plywood & Veneer Co. v. Wisconsin Emp. Relations Board*, supra. Respondent contends that appellants combined and conspired illegally to restrain trade and commerce in Bilt-Well cabinets and directed their activities against contractors; that "there is no language in the N.L.R.A. as amended, which either prohibits or protects the concerted activities of the appellants here."

In *Milwaukee Boston Store Co. v. American Federation of Hosiery Workers*, 269 Wis. 338, 69 N.W.2d 762, 773, it was held that the "type of secondary picketing which is proscribed by the federal act is that which involves coercion or restraint of the employees of a secondary or neutral employer with the object of persuading such employees to take concerted action. * * *

The economic pressure exerted by defendants' picketing was directly upon the Boston Store and not indirectly through its employees * * * the proscriptions of section 8(b) (4) of the National Labor Relations Act 'are expressly limited to the inducement or encouragement of concerted conduct by the employees of the neutral employer'. Therefore, the National Labor Relations Board would have had no power to assume jurisdiction or prohibit such secondary picketing by the defendants herein." By that and other decisions, respondent contends that the N.L.R.B. did not have jurisdiction over the controversy between it and appellants but that, on the contrary, the cited California statute confers exclusive jurisdiction over the matters alleged against appellants.

[1,2] It is not to be denied that the argument of respondent, supported as it is by respected authority, commands most serious consideration, but certainly not an obsequious approval. In view of the number of the cabinets sold to contractors in California and the commercial value thereof, it cannot be denied that N.L.R.B.'s exclusive primary jurisdiction entitled it to determine whether the transactions involved establish that the free flow of interstate commerce would have been affected, *N.L.R.B. v. Washington-Oregon Shingle Weavers' Dist. Council*, 9 Cir., 211 F.2d 149, 151, thereby conferring exclusive jurisdiction upon the N.L.R.B. The complaint charged that appellants acted in concert to engage in boycotts, coercion, threats and intimidations and thereby caused respondent's customers to cease the purchase of Bilt-Well cabinets and were about to forbid their several members to handle such cabinets and to enforce their demands by strikes and work stoppages. Such acts constitute violations of the Taft-Hartley Act (N.L.R.A.) which was enacted to prevent boycotts and kindred acts. Inasmuch as the Congress conferred upon the N.L.R.B. the exclusive authority to enforce such statute by injunctive processes, 29 U.S.C.A. § 160(a) (b) (c) (e), state courts are thereby divested of jurisdiction to function with regard to acts inhibited by the N.L.R.A. Also, because the act guarantees employees the right to engage in activities for their mutual aid and protection, the N.L.R.B. has jurisdiction to hear and determine such grievances as those alleged in respondent's complaint, *N.L.R.B. v. Washington-Oregon Shingle Weavers' Dist. Council*, supra, 211 F.2d at page 152, and by the same token the superior court is without power to entertain the charges prior to a refusal of jurisdiction by the N.L.R.B. Whether an unfair labor practice was pursued by appellants is not within the competence of the state court. In the Weavers' case, supra, the Sound Shingle Company received a carload of shingles from a Canadian concern. A union-shop steward suggested that the shingles bore no union label, called the employees off and forbade the employees of

the factory to which the shingles had been shipped to work on the Canadian shingles. There was no evidence that the work stoppage at the company's plant was designed for any purpose other than "to compel the Company to cease using unfair shingles produced by another." The N.L.R.B. was held entitled to a judgment enforcing its order which was entered because the union was attempting to force an employer to cease using the products of another producer, an act prohibited by N.L.R.A. § 8(b) (4) (A). Whether the facts established amounted to unfair labor practice is a question which the superior court could not decide. Such questions, having been preempted by the national statute, are withdrawn from the state's cognizance until the N.L.R.B. has refused to take jurisdiction.

[3] The vicissitudes of *Weber v. Anheuser-Busch, Inc.*, supra, 348 U.S. 468, 75 S.Ct. 480, 485, 99 L.Ed. 546, are illuminating on the question of the exclusive power of the N.L.R.B. in dealing with the secondary boycott. A labor union picketed an employer's plant to compel the employer to insert into a proposed collective labor contract a clause obligating the employer to employ, for repairs or replacements only, contractors who had collective agreements with the union. Before the N.L.R.B. had acted upon its charges, the employer obtained judgment for an injunction in a state court of Missouri (which was affirmed by its Supreme Court) holding that the Union had violated a statute against restraint of trade. The question presented to the federal Supreme Court was whether the state court's jurisdiction had been pre-empted by the authority vested in the N.L.R.B. On a review of the matter, the Supreme Court held: "A State may not enjoin under its own labor statute conduct which has been made an 'unfair labor practice' under the federal statutes." Such was the holding in *Garner v. Teamsters, etc., Local Union*, supra, 346 U.S. 485, 499, 74 S.Ct. 161, 98 L.Ed. 228, 244.

[4] It is therefore established that a state court may not prohibit the exercise of rights which the N.L.R.A. protects. Ill

v. *State of Florida*, supra, 325 U.S. 538, 65 S.Ct. 1373, 89 L.Ed. 1782, 1784. However, it must be borne in mind that the state courts are free to act upon such controversies as arise over which the Congress has not given specifically exclusive primary jurisdiction to the N.L.R.B. But a state may not inhibit conduct, the right to pursue which the N.L.R.A. has guaranteed. N.L.R.A. § 7; *Amalgamated Ass'n, etc., v. Wisconsin Employment Relations Board*, 340 U.S. 383, 71 S.Ct. 359, 95 L.Ed. 364, 375; *La Crosse Tel. Corp. v. Wisconsin Employment Relations Board*, 336 U.S. 18, 69 S.Ct. 379, 93 L.Ed. 463, 469. But a state may regulate such behavior as is not subject to regulation by the N.L.R.B. *Allen-Bradley Local No. 1111, United Electrical, etc., of America v. Wisconsin Emp. Relations Board*, supra, 315 U.S. 740, 62 S.Ct. 820, 86 L.Ed. 1154, 1160; *International Union, etc., v. Wisconsin Employment Relations Board*, supra, 336 U.S. 245, 69 S.Ct. 516, 93 L.Ed. 651, 662. From a consideration of the foregoing review, the cited decisions appear to have made it unlawful "for a state to impinge on the area of labor combat designed to be free" and, also, it is an obstruction of federal policy for a state to declare union activity "free for purposes * * * which the federal Act prohibits." *Garner v. Teamsters, etc., Local Union*, supra, 346 U.S. 485, 499, 74 S.Ct. 161, 171, 98 L.Ed. 228.

Weber v. Anheuser-Busch, Inc., supra, gives no aid to respondent. It involved a jurisdictional dispute between two unions. It declared that N.L.R.A. covers the area of jurisdictional disputes and provides procedures and remedies with which the state court is without competence to intrude. *Dyer v. International Brotherhood of Teamsters, etc.*, 124 Cal.App.2d 778, 783, 269 P.2d 199.

The recent decision of the California Supreme Court, *Garmon v. San Diego Building Trades Council*, 45 Cal.2d 657, 291 P.2d 1, suggests no relaxing of the conclusions heretofore announced by the federal Supreme Court. The Garmons, engaged in the lumber business, became involved in a dispute with labor organizations. They were awarded damages and the defendants

were enjoined from certain activities. *After the N.L.R.B. had refused jurisdiction*, the plaintiffs sued in the superior court which found that the plaintiffs' operations affected interstate commerce and that plaintiffs had refused to execute a contract proposed by the unions. Basing its decision upon the authorities hereinabove reviewed and others, the Supreme Court held first that the N.L.R.B. has exclusive primary jurisdiction to prevent unlawful demands; that where the N.L.R.B. refuses to accept jurisdiction of a complaint because the effect of the complainant's business on interstate commerce is not substantial, the state courts may act.

The court points out that the reason for prohibiting state courts from acting where the N.L.R.B. has jurisdiction is to obtain uniform application of the substantive rules prescribed by N.L.R.A. and to avoid diversities and conflicts likely to result from a variety of local procedures and attitudes toward local controversies. The decision does not in the least detract from the exclusive jurisdiction of the N.L.R.B., but it held definitely that where a business has only "a limited effect on interstate commerce" the board may exercise its discretion to accept or refuse jurisdiction and "the legislative purpose must have been to give the state courts jurisdiction when the Board specifically determines that the controversy will not affect the national economy." 45 Cal.2d 663, 291 P.2d 5.

[5] From the foregoing, it is clear that the affirmance of the Garmon judgment did not rest, in the slightest degree, upon the theory that the N.L.R.B. has not exclusive, primary jurisdiction. It is made equally clear that a state court may enforce rights, guaranteed by the Cartwright Act, after the N.L.R.B. has declined to act. A state court has no power to determine that the N.L.R.B. would refuse jurisdiction. Such power to withhold cognizance of a controversy is within the Board's exclusive jurisdiction.

[6] Further support for the doctrine that a state court cannot exercise its jurisdiction over a labor controversy such as is involved in the action at bar, unless the

N.L.R.B. has refused to take cognizance thereof, is found in the recent decision of *Charles H. Benton, Inc., v. Painters Local Union No. 333*, 45 Cal.2d 677, 291 P.2d 13. Also, the recent unanimous decision in *Local Union No. 25 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America v. New York, New Haven & Hartford Railroad Co.*, 350 U.S. 155, 76 S.Ct. 227, 100 L.Ed. 166, in an action similar to the one at bar, holds that the jurisdiction of the N.L.R.B. is exclusive. The fact that injustices might result during the period prior to the decision of the N.L.R.B. to assume or reject jurisdiction is a problem for Congressional consideration, and not for judicial action.

The order is reversed.

FOX and ASHBURN, JJ., concur.



139 Cal.App.2d 728

The PEOPLE of the State of California, acting by and through the Department of Public Works, Plaintiff and Appellant,
v.

Forrest STOWELL, Mrs. Forrest Stowell, also known as Mrs. Delma Stowell, husband and wife, Defendants and Respondents.

Civ. 5230.

District Court of Appeal, Fourth District,
California.

March 6, 1956.

Rehearing Denied March 27, 1956.

Hearing Denied May 2, 1956.

Action by the State against landowners to restrain obstruction of an alleged natural water course allegedly flowing across a state highway. The Superior Court, Riverside County, Hilton H. McCabe, J., rendered judgment for landowners and the State appealed. The District Court of Appeal, Griffin, J., held that where State dug a dip in a road bringing it below the level of landowners' surrounding

property, and creating a condition which permitted surface waters to flow into the dip through other means than its natural course, even though surface water could flow into such dip, the portion of the highway forming such dip could not be classified as a natural drainage or water course, and therefore landowners who built a dike on the edges of the dip to prevent the waters from flowing onto their land were not required to remove such dikes to let the waters drain off onto their land.

Judgment affirmed.

1. Appeal and Error ⇐391

Where evidence which was not introduced at trial would not be conclusive of a question presented on appeal even if considered by District Court of Appeal, application to produce such evidence in District Court of Appeal would be denied.

2. Easements ⇐61(2)

A party cannot be enjoined from obstructing something that does not presently exist.

3. Waters and Water Courses ⇐116

Every landowner must bear the burden of receiving upon his land the surface water naturally falling upon land above it and naturally flowing to it therefrom.

4. Waters and Water Courses ⇐116

Every landowner has a right to have surface water naturally falling upon his land or naturally coming upon it flow freely therefrom upon adjoining lower land as it would flow under natural conditions.

5. Waters and Water Courses ⇐119(2)

A landowner has a right to level his land in order that it may be devoted to agricultural projects so long as adequate provision is made for the natural flow of drainage water, if any.

6. Highways ⇐120(2)

Where state dug a dip in a road bringing it below the level of landowners' surrounding property, and creating a condition which permitted surface waters to flow into the dip through other means than its natural course, even though surface water could flow into such dip, the portion of

the highway forming such dip could not be classified as a natural drainage or water course, and therefore landowners who built a dike on the edges of the dip to prevent the waters from flowing onto their land were not required to remove such dikes to let the waters drain off onto his land. Streets and Highways Code, §§ 7, 91, 92, 725(b).

George C. Hadley, A. R. Early, Jr., Richard L. Franck, Los Angeles, Joseph A. Montoya, Northridge, for appellant.

Earl Redwine and Maurice C. Sherrill, Riverside, for respondents.

GRIFFIN, Justice.

Plaintiff and appellant brought this action under section 725(b) of the Streets and Highways Code, against defendants and respondents to restrain obstruction of a claimed natural water channel.

Defendants own three 40-acre sections of land near Mecca, on Highway 195, commonly known as Box Canyon Road, a secondary highway which crosses said property in an east-west direction. The slope of the land in this vicinity and the natural drainage is from the mountains to the north, in a general southerly direction toward the Salton Sea. This was formerly a county road taken over by the State, and from the earliest days until about 1945, the entire road was constructed at grade. The terrain is of typical desert type and typical desert rainfall from infrequent storms is encountered in this area. The average rainfall is about three inches per year. It appears from the testimony that about the year 1945 there was flood damage to that entire area due to an excess of rain, and after the water crossed the highway at the point here involved a gulch about ten feet deep resulted in the center of the road, running through the lower or southerly portion of defendants' land a short distance, and then spreading out into an alluvial fan toward the Salton Sea. It inundated the south half of the road to that depth. No such washing was indicated north of the highway. The greatest depth of any channel did not show a measurement of over 12 inches in that northern section. There-

after plaintiff dug a dip in the road approximately 10 feet deep, 300 feet long, and about 22 to 24 feet wide, and then traffic passed through this dip.

In 1946, the Flood Control Works of the Coachella Valley Canal were completed. This construction was in progress in 1945, and its purpose was to protect not only the main (All American) Canal to the Coachella Valley but also the lands, utilities, railroads, and highways, and other properties below the canal from overflow damage from storm waters or surface waters. This project lies approximately 1½ miles north of Highway 195, from the point here involved and effectually disposes of both surface and flood waters from a range of rocky and barren mountains to the north. The only waters involved in this action are these originating south of the canal and north of and on Highway 195, and covering an area of approximately 325 acres. In July, 1953, defendants acquired their property. They were assessed \$5 per acre per year for each acre available for irrigation purposes, whether the water was used or not. As soon as the water was made available defendants proceeded to level their land for agricultural purposes. There was no controversy until defendants, in preparing their land to the south for planting operations, and believing that all possible flow and drainage difficulties had been solved by the construction of the Flood Control Works, constructed a large bank of earth referred to as a dike, across the old channel or water course adjacent to the south side of the dip in the highway. It closed off the wash at that point. This resulted in a dip in the road with embankments on both sides of it of approximately the same height and on a level with the surrounding terrain.

There is a conflict of opinions as to whether surface waters which might accumulate in the area below the flood control canal will find their way through this particular course in the future. The bulk of the evidence is that there has not been sufficient rain in the area since 1945 to cause any runoff which would affect this old water course or drainage course to any extent. There is evidence that an irrigator leasing property to the north allowed irrigation wa-

ter to escape and run into the dip one night; that 18 inches of water accumulated in the bottom of the dip; and that a traffic hazard resulted because there was no means for the water to escape on account of the construction of the embankment to the south on defendants' property.

[1] Since the case was tried in the lower court plaintiff's counsel, on appeal, now contend they discovered that on February 3, 1955, a rainstorm occurred in that area and the road foreman observed water on the road in the bottom of the dip to a depth of about six inches in the center of the highway, and approximately 18 inches at the edge of the pavement. He offered a photograph so indicating. The request now is to produce this additional evidence in this court in determining the merits of this appeal. A motion for new trial was made March 11, 1955, and the only excuse for not offering this evidence at that time is that the foreman did not tell counsel of this fact until shortly before this appeal had been taken. The source of the water thus accumulated is not indicated, but from the photograph it might well appear that it was water that flowed upon and ran down the highway into the dip. This evidence, even if considered by this court, would not be conclusive of the question here presented. The application should therefore be denied.

The main argument presented by the pleadings and statements of counsel, as we see it, is who should bear the burden of paying the cost of filling the dip and bringing it to the grade level of the surrounding territory. Defendants in their answer allege that any apprehended injury or damage to the State Highway would be removed by filling the dip to the grade of the adjacent level land; that defendant offered to cooperate with the State and pay an equitable cost of filling it, and again renewed that offer. In reply to the court's inquiry as to this offer plaintiff's counsel stated that the State had considered this offer; that it was willing to pay 30 per cent of the cost, provided defendants built it according to plans and specifications provided by the State; that the State fixed a price which defendants claim was unjust, and the offer was not accepted at that amount. The

judge refused to be an arbitrator as to this phase of the case and wrote a memorandum opinion which was incorporated as part of the findings. Therein he fully discussed the factual background and found that since the flood control work was completed it would take care of flood waters which would come across the dip except those waters which would naturally fall on the land north of and immediately adjacent to the dip; that no flood or surface waters have crossed or accumulated in the dip since the installation of the flood control project. It then found that the land north of the dip had been adequately protected by dikes, retention walls and banks of land, and found that the State, whose highways were also being protected by this flood control project, knew of it prior to the installation of the dip, and this fact could not have gone unnoticed by it or its Department of Highways; that despite these obvious facts it built a dip below the natural level and contour of the land on the north side; and knew that any water, on the surface of the highway near the dip, would flow into it from either end, and found that "It is conceded by all parties to this action that if the dip were filled and the highway made to cross this fill, no danger would be present and everyone would be satisfied. Since this is true, it is clear that the dip is unnecessary under the present or anticipated conditions"; that "It may be true that at one time there was a natural water course through this area. It is true that natural water courses may be present and have been present in other parts of the State but by reason of progress they have been changed or eliminated entirely. In the instant case the cause for a natural water course has eliminated the necessity for maintaining it. When the reason for the application of the rule of law no longer exists, then the law has nothing on which to operate. The Court finds this to be true in the instant case. If this were not the law, the cities of San Francisco, Los Angeles and others would never have reached their present state of development because the people would have had to maintain natural water courses which no longer served any useful purpose." The court then found

generally in favor of defendants and entered judgment accordingly.

It is plaintiff's claim that defendants have a duty to accept the drainage of the water across and from the highway and that this duty has been breached by the erection of the dike; that the judgment creates an impossible situation whereby plaintiff must accept onto its highway waters flowing from defendants' northerly property, but cannot discharge this water from the highway onto defendants' southerly property; and that thus impounded, this water creates a hazard to the traveling public; that it is plaintiff's duty to keep the State Highway safe and in a usable condition under the mandate imposed upon it by sections 7, 91 and 92 of the Streets and Highways Code; and that the court failed to make a material finding that a water course existed south of the highway.

[2] The court specifically found, upon conflicting evidence it is true, that a water course or natural channel did not exist north of the highway, and found, at least by inference, that since the construction of the flood control project, no water followed the former water course or natural drainage channel theretofore existing, either above or below the highway. Under this finding, which has evidentiary support, one cannot be enjoined from obstructing something that does not presently exist.

Plaintiff concedes in its brief that its concern is with those "waters which, under conditions as they existed at the time of trial, would flow across its highway".

[3,4] Every landowner must bear the burden of receiving upon his land the surface water naturally falling upon land above it and naturally flowing to it therefrom, and he has the corresponding right to have the surface water naturally falling upon his land or naturally coming upon it, flow freely therefrom upon the lower land adjoining, as it would flow under natural conditions. *Heier v. Krull*, 160 Cal. 441, 117 P. 530.

[5] No case or authority is cited which prevents a landowner from leveling his land in order that it may be devoted to agricultural projects so long as adequate provi-

sion is made for the natural flow of drainage water, if any. *Turner v. Hopper*, 83 Cal.App.2d 215, 188 P.2d 257.

[6] It is true that water may flow into the dip from surface water falling on the highway leading into the dip and may cause some danger to the traveling public, but this portion of the highway could not be classified as a natural drainage or water course, particularly where the State created the condition which permitted the water to flow into the dip through other means than its natural course. *Robinson v. County of San Diego*, 115 Cal.App. 153, 300 P. 971.

Application to take additional evidence denied. Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



139 Cal.App.2d 802

In the Matter of the ESTATE of Clifford Arden BRIGGS, Deceased.

Anne E. BRIGGS, Petitioner and Appellant,
v.

James K. BRIGGS, Legatee and Respondent.
Civ. 21505.

District Court of Appeal, Second District,
Division 1, California.

March 12, 1956.

Proceeding for construction of will. The Superior Court of Los Angeles County, Roy L. Herndon, J., entered an order adverse to testator's ex-wife. Ex-wife appealed. The District Court of Appeal, Doran, Acting P. J., held that testator's interest in partnership was not income-bearing property within will giving ex-wife use and income from testator's income-bearing property.

Order affirmed.

1. Wills ⇨704

In proceeding for construction of will which gave ex-wife use and income from testator's income-bearing property, finding that ex-wife was entitled during her lifetime to interest income from deed of trust, and that other property, including inventoried partnership interest, should become a part of trust corpus, was a direct finding that deed of trust constituted the only income-bearing property.

2. Wills ⇨558(1)

Testator's interest in partnership was not "income bearing property" within will giving ex-wife use and income from testator's income-bearing property. West's Ann.Prob.Code, § 571.

See publication Words and Phrases, for other judicial constructions and definitions of "Income Bearing Property".

3. Trusts ⇨239

Where will gave ex-wife right to use principal necessary for her support during her life and appointed ex-wife and son executors with power to sell or encumber estate property and to use and invest proceeds and court construed will as creating trust for support of ex-wife for life, order appointing ex-wife and son as sole trustees did not give son control of estate or of the manner in which ex-wife should live.

4. Trusts ⇨239

Where will was construed as creating trust the principal of which was to be used for necessary support of ex-wife for life, and ex-wife and son were appointed trustees by order providing that in event of failure of trustees to agree as to amount necessary for support, ex-wife could apply to court for determination of such amount, rights of ex-wife were sufficiently protected and she was not entitled to sole control of the situation.

5. Wills ⇨705

Where will provided that ex-wife should have possession for her own residential purposes of such residence as she might elect within reasonable time after testator's death and only one residence was mentioned in inventory, order giving ex-wife right of occupancy of such residence

if she should so elect before distribution of estate adequately effectuated testator's intention.

6. Attorney and Client ⇨20

An attorney at law should not attempt to represent parties whose interests are adverse.

7. Will's ⇨660

In action for construction of will, the presentation, by appeal or otherwise, of ex-wife's proposed interpretation of will, did not warrant forfeiture of testamentary gift to ex-wife under will providing for forfeiture in event of contest of will.

8. Appeal and Error ⇨766

Although appellant's briefs could have presented the appeal in closer compliance with the rules and usages appertaining thereto, where the contentions were made reasonably clear, no dismissal of appeal was warranted.

Walter H. Young, Los Angeles, for appellant.

Arthur E. Briggs, Los Angeles, for respondent.

DORAN, Acting Presiding Justice.

The decedent's will, as originally drawn by attorney Arthur E. Briggs, decedent's brother, provided: "Third: I give and bequeath to Anne E. Briggs, my former wife, the use and income from any income bearing property of which I may die possessed to have during her lifetime only, with the request that she shall in her discretion provide for the needs of my son and grandchildren hereinafter named, as she may be able to do so, it being my intention that she shall have possession for her own residential purposes of such residence as she may elect within a reasonable time after my death".

As stated in appellant's brief, "When this will was submitted to Clifford Arden Briggs he added the additional clause: 'and she may use any part of the principal of my estate which may be necessary for her support and maintenance during her lifetime.'"

The will, as finally executed, left "All the rest, residue and remainder of my property and estate of whatsoever kind or character, and wheresoever situated * * * to my son James K. Briggs, if he shall be living at the time of the distribution of my estate, or in the event he shall die previously thereto, then to my grandsons, James K. Briggs, Jr., and John Arden Briggs, share and share alike, or such of them as shall survive my said son, and in the event of the death of my said son during the minority of said grandchildren or either of them, the said Anne E. Briggs shall hold such property in trust for such grandchild until he shall attain majority and provide in her discretion for his maintenance and support."

Anne E. Briggs and James K. Briggs, or the survivor, are nominated and appointed "as joint executors hereof to act and qualify without bond". The Fifth paragraph of the will gives "power to my executors jointly or the survivor of them to sell or encumber any property of my estate and to use and invest the moneys therefrom as in their judgment seems best". The will also provides "that in the event any person shall contest in any court any of the provisions of this instrument, or shall not defend or assist in good faith in the defense of any and all such trusts and contests, then each and all of said persons shall not be entitled to any devises, legacies, and/or benefits under this will or any codicil hereto or under the trusts created hereby", etc.

On December 8, 1954, Attorney Arthur E. Briggs, on behalf of Anne E. Briggs, filed a "Petition for decree determining interests in Estate". At the hearing on December 30, 1954, Attorney Briggs stated to the Court that "There are conflicts in the statements of the two heirs and legatees, but it is really a friendly matter between them and they wish the Court to construe the will in the matters which are in question". Both of the interested parties were present in court but were not separately represented by counsel; each party made certain oral statements relative to the matter, and later filed written statements of their respective claims.

The trial court took the matter under submission and on March 25, filed findings of fact and conclusions of law adverse to the contentions of appellant. The court found that it was the testator's intention "to create a trust and to constitute his son, James K. Briggs and his ex-wife, Anne E. Briggs, co-trustees of his estate for the purposes and intents expressed in his last will * * * and to manage and administer the same during the lifetime of Anne E. Briggs." The court found that the testator intended that the trust should be administered for the purpose of giving to appellant, testator's ex-wife, the use and income from any income bearing property during appellant's lifetime, "provided that if the said son and grandchildren * * * be in need, that she provide for their needs if able to do so". It was further found that appellant should have possession "of such residence as she may elect within a reasonable time after testator's death", and "That she be entitled to the use of any part of the principal of his estate which may be necessary for her support * * *".

The trial court found that all other property "was intended by said testator to vest in said James K. Briggs, and after the death of said Anne E. Briggs the said James K. Briggs, his heirs and assigns, should be entitled to the rest, residue and remainder of said property, rights and interest not bequeathed to the said Anne E. Briggs". The only "income bearing property" bequeathed to Anne E. Briggs, was found to be a "Second trust deed securing note on which there was an unpaid balance of principal * * * of \$3190.71 at time of decedent's death * * * payable \$35.00 on the 21st day of each month". Personal property, namely five rooms of furniture in the residence, and a 1953 Mercury automobile were distributed to James K. Briggs. All other assets in the estate were distributed to appellant and respondent "as co-trustees under provisions of trust agreement to be entered into and accepted by them as provided by order of court in conformity with the findings of fact herein construing the last will * * *".

The order here appealed from, in addition to giving appellant the income from the

trust deed hereinbefore mentioned, also provides that Anne E. Briggs is entitled, "during her lifetime * * * To the use of any part of the principal or corpus of the trust estate * * * as may be necessary for her maintenance and support upon proof of existing necessity therefor from time to time". Both Anne E. Briggs and James K. Briggs then signed the following which is appended to the court's order: "The trustees appointed as aforesaid hereby accept the trust decreed and ordered by the aforesaid order and decree of court and agree to act as said co-trustees in accordance with the terms and provisions of said trust".

[1] It is appellant's contention that "the Findings of Fact are deficient in that they do not define the meaning of the term 'income bearing property' nor is there any finding as to what property of the decedent was income bearing. This is particularly true with respect to the partnership property. The only evidence as to the nature of the partnership property is that it is a half interest in a partnership in a subdivision with an original capital of \$18,500 and \$20,000 profit. This raises the question whether Anne E. Briggs gets the \$20,000 profit as income from income bearing property and furthermore was this profit accumulated before or after the death of the decedent?"

As hereinbefore indicated, the trial court determined that appellant was entitled "during her lifetime to (1) The interest income from the deed of trust described", and that other property including the inventoried partnership interest should become a part of the trust corpus to be administered by the appellant and respondent as co-trustees. This was, in effect, a direct finding that the trust deed constituted the only "income bearing property" mentioned in the will. The findings of fact were in no manner deficient in this respect.

[2] As pointed out in respondent's brief, Section 571 of the Probate Code provides that, "When at the time of his death, a partnership existed between the decedent and any other person, the surviving partner has the right to continue in possession

of the partnership, and to settle its business, but the interest of the decedent in the partnership must be included in the inventory, and be appraised as other property." This interest in the partnership property has been so inventoried and appraised in the instant estate. No decision has been presented by appellant holding that the decedent's interest therein shall be deemed "income bearing property".

[3] Appellant's assertion that "The effect of the present order is to really put control of the estate in James Briggs and on what scale she (appellant) shall live", is obviously incorrect, since the appellant is, as the will provides, appointed co-trustee with James Briggs in the administration of the property. Respondent has no more control over the situation than does the appellant.

[4] If "any part of the principal or corpus * * * be necessary for her maintenance and support at any time", the trial court found that Anne E. Briggs is entitled thereto" upon proof of existing necessity therefore from time to time". The order provides that "in the event of inability of said co-trustees to agree as to the amount necessary * * * she may apply to any court of competent jurisdiction to determine and fix such amount". The contention that appellant should be given sole control of the situation is justified neither in law nor under the terminology of decedent's will.

[5] The trial court's findings and order likewise adequately effectuate the testator's intention by giving to appellant the right of occupancy of the residence property "if she shall so elect before distribution of said estate". The will provided that appellant "shall have possession for her own residential purposes of such residence as she may elect within a reasonable time after my death". There is only one residence mentioned in the inventory.

[6] It is true, as appellant states, that an attorney at law should not attempt to

represent parties whose interests are adverse, and that a clearer and better record would have resulted in the instant case had this precept been more closely followed. A survey of the record, consideration of the testator's intentions as evidenced in the will, and the statements of the parties, written and oral, plus all other relevant facts, however, lead to the conclusion that the findings and order are entirely adequate to protect the appellant's rights and are supported by the record. No prejudicial error has been made adequate.

[7] Respondent's point that under the forfeiture provisions contained in the will, appellant, by virtue of the appeal here presented, "has forfeited all devises and bequests to her", cannot be sustained. In this connection, it is not irrelevant to consider that the original petition was filed by Attorney Briggs on behalf of the present appellant, Anne E. Briggs, seeking an interpretation of the testamentary provisions, and that the parties, although having adverse interests, were not represented by independent counsel. Certainly the presentation, by appeal or otherwise, of appellant's proposed interpretation of the will, in such a situation, is entirely justified.

As said in *Estate of Kline*, 138 Cal.App. 514, 523, 32 P.2d 677, 681, "If the action of a legatee is merely one to determine the true construction of the will, or of any of its parts, the action cannot be held to breach the ordinary forfeiture clause, for the object of the action is not to make void the will, or any of its parts, but to ascertain its true legal meaning."

[8] Likewise, although the appellant's briefs could have presented the appeal in closer compliance with the rules and usages appertaining thereto, the contentions have been made reasonably clear, and no dismissal of the appeal is warranted.

The order is affirmed.

FOURT, J., concurs.

139 Cal.App.2d 819

Bernice N. HELVERN, Plaintiff and Respondent,**v.****Alonzo Wallace HELVERN, Defendant and Appellant.****Civ. 16516.****District Court of Appeal, First District,
Division 1, California.****March 14, 1956.**

Former husband's proceeding for post decretal order reducing support payable under separation agreement and divorce decree. The Superior Court, City and County of San Francisco, Orla St. Clair, J., entered order denying relief, and former husband appealed. The District Court of Appeal, Peters, P. J., held that under separation agreement providing for division of property between spouses, providing for support payments to be made monthly to wife in stipulated amounts, until her remarriage, providing that agreement was final adjustment of property rights and that neither party could thereafter make claims against other, there was implied waiver by wife to any other right to support and maintenance than provided therein so as to make alimony and support provisions inseverable from property division provisions and render agreement immune from modification against will of either party.

Order affirmed.

1. Divorce ⇨245(1)

If support provisions have been made an inseverable part of agreement between husband and wife to divide their property, and court in divorce action approves agreement, support provisions cannot thereafter be modified without consent of both contracting parties. West's Ann.Civ.Code, §§ 158, 159.

2. Husband and Wife ⇨278(1)

Property settlement contracts, if equitable, are enforceable even though not presented to court in divorce action. West's Ann.Civ.Code, §§ 158, 159.

3. Divorce ⇨236, 245(1)

If property settlement agreement is presented to court in divorce action, court may modify provisions for alimony before, or, if provisions are incorporated in decree, after judgment in accordance with power over alimony generally. West's Ann.Civ.Code, §§ 158, 159.

4. Husband and Wife ⇨279(1)

Property settlement contracts in which support and maintenance provisions are not in nature of alimony but are part of division of property, including contracts providing solely for payment of monthly or lump sums in lieu of community property, must be treated like other property settlement agreements dealing solely with division of property. West's Ann.Civ.Code, §§ 158, 159.

5. Divorce ⇨249(2), 254

If property settlement agreement in which support and maintenance provisions were not in nature of alimony was not fraudulent when made, and there was no violation of confidential relationship, it will be binding on court and there can be no modification of payments after decree without consent of parties. West's Ann.Civ.Code, §§ 158, 159.

6. Divorce ⇨236

Court, in divorce action, may grant alimony to wife and approve property settlement agreement in which support and maintenance provisions are not in nature of alimony but are part of division of property, since such agreements purport to deal only with division of property of parties. West's Ann.Civ.Code, §§ 158, 159.

7. Divorce ⇨245(1)

The test as to whether support provisions in separation agreement are severable from property division provisions and subject to modification is not whether support provisions become part of decree but is whether such provisions are integral part of separation agreement and fact that support provisions were separately treated in and become merged in decree is not determinative. West's Ann.Civ.Code, §§ 158, 159.

8. Divorce ☞249(3)

Where wife is granted divorce on grounds of husband's extreme cruelty, in absence of separation agreement, court may award wife all of community property. West's Ann.Civ.Code, §§ 158, 159.

9. Husband and Wife ☞278(5)

The amicable adjustment, in separation agreement, of doubtful question as to what constitutes community property may provide sufficient consideration to support entire agreement. West's Ann.Civ.Code, §§ 158, 159.

10. Divorce ☞245(1)

Express waiver by wife, in separation agreement, of any right to support and maintenance other than provided therein in consideration for wife's receiving major portion of community property is conclusive evidence that support provisions are inseverable from property division provisions. West's Ann.Civ.Code, §§ 158, 159.

11. Divorce ☞245(1)

Under separation agreement providing for division of property between spouses, providing for support payments to be made monthly to wife, in stipulated amounts, until her remarriage, providing that agreement was final adjustment of property rights and that neither party would thereafter make claims against other, there was implied waiver by wife to any other right to support and maintenance than provided therein so as to make alimony and support provisions inseverable from property division provisions and render agreement immune from modification against will of either party. West's Ann.Civ.Code, §§ 158, 159.

12. Divorce ☞245(3)

In former husband's proceeding for post decretal order to reduce support payments under separation agreement and divorce decree, husband's proffered evidence of his undisclosed intent, in entering into agreement, that alimony provisions were to be severable from support provisions was inadmissible where there was no offer that such intent was ever communicated to other contracting party.

13. Husband and Wife ☞279(1)

In determining intent of parties in entering into separation agreement, an objective and not a subjective standard is imposed.

14. Divorce ☞1

Husband and Wife ☞278(2)

Public policy does not discourage divorce where relations between husband and wife are such that legitimate objects of matrimony are utterly destroyed, and, in absence of fraud, collusion, or imposition on court, public policy does not prevent parties who have separated from entering into contract disposing of their property rights to become effective only in event one of the parties obtains divorce, even though such contract may be factor in persuading party who has good cause for divorce to establish it. West's Ann.Civ.Code, §§ 158, 159.

Dodge & Evans, Philip L. Evans, Oakland, for appellant.

George E. McDonald, James C. Calkins, Alameda, for respondent.

PETERS, Presiding Justice.

The main problem involved in this case is whether a separation agreement entered into by a husband and wife dividing their property and providing for the support of the wife was an integrated property settlement agreement which cannot be modified, or whether the support provisions are severable, and therefore subject to modification. The trial court ruled, as a matter of law, that the agreement was an integrated property settlement agreement and not subject to modification. The husband appeals. We agree with the interpretation of the trial court.

The facts are as follows:

On February 4, 1948, the wife filed an action for divorce against her husband, charging extreme cruelty. Paragraph V of that complaint alleged:

"That plaintiff and defendant have entered into an agreement settling and determining their property rights and adjusting their rights to community property and

providing for the maintenance and support of plaintiff herein. That in and by the terms and provisions of said agreement, defendant herein has promised and agreed to pay to plaintiff as alimony and for her maintenance support, the sum of \$250 per month, commencing as of November 1, 1947, so long as she shall remain single, and has further provided that in the event of the death of defendant prior to the death of plaintiff, plaintiff shall have a claim against the estate of defendant for any unpaid alimony and for all payments thereafter to become due, computed in accordance with tables of expectancy then in use in determining valuations of such future interests by the Treasury Department of the United States.

"That defendant has further agreed to transfer certain properties and assets to plaintiff herein as provided by said agreement.

"That a copy of said agreement is attached hereto, made a part hereof and marked 'Exhibit A,' and incorporated as fully and to the same extent as if at this point recopied and set forth at length and pleaded in legal effect."

The prayer of the complaint requested that: "* * * said decree approve said property settlement agreement attached hereto as aforesaid and order and direct defendant to comply with and perform each and all of the terms and provisions in said agreement on his part to be performed and to pay to plaintiff herein, the sum of \$250 per month commencing as of November 1, 1947, as and for her alimony and support, and that in the event of the death of defendant, plaintiff has a claim against his estate as in said agreement provided."

The agreement referred to was executed on December 31, 1947.

The recitals of that agreement read as follows:

"Whereas, the parties hereto are husband and wife, and because of unhappy differences between them have decided to live separate and apart; and

"Whereas, the parties hereto desire to enter into an agreement settling and determining their property rights with reference

to each other, including their rights to community property and the right of * * * [plaintiff] to alimony and support from and by * * * [defendant], pursuant to the provisions of Section 159 of the Civil Code of the State of California.

"Now, therefore, in consideration of the premises and for good and valuable consideration moving from each of said parties to the other, * * *"

So far as pertinent here, the important provisions of that agreement are as follows:

Clause (1) provides that the plaintiff receives, as her sole and separate property, a 1941 Chrysler sedan automobile, 25 shares of designated stock, the real property held in joint tenancy in San Francisco, together with all the furniture and furnishings therein, a \$1,000 insurance policy issued by the Central and Southern Pacific Railroad Employees' Mutual Benefit Association, and a \$4,000 Government Life Insurance policy.

Clause (2) contains the provision in regard to the payment to the plaintiff of the sum of \$250 per month "as alimony and for her maintenance and support" which is identical to the provisions of Paragraph V of the complaint quoted above.

Clauses (3) and (5) of the Memorandum of Agreement provide for the payment by the husband of the certain existing debts.

Clause (6) then provides for the transfer to the husband of all of his personal effects, including his stamp collection, trunk and clothing.

Clause (8) provides for a waiver of all rights of inheritance in the estate of the other.

Clause (10) then provides as follows:

"That the execution of this agreement shall be and is intended to be a full, complete and final adjustment of all the property rights, including the community property rights, of each of the parties hereto, and that neither party shall or will at any time hereafter make or attempt to make any further or other claims against the other party hereto, excepting under the terms hereof, or incur any bills or obligations in the name of the other party hereto, and that all future obligations of the parties

hereto shall be assumed and paid by the party incurring same individually."

Clause (11) then provides that the husband represents that "he has no property or assets of any kind not hereinabove mentioned, and specifically that he owns no stocks, securities, bonds or jewelry of a value in excess of \$250 or any interest in any business, firm or enterprise, excepting the accounting firm of which he is a member."

Clause (13) provides:

"That this agreement may be introduced in evidence on the trial of any litigation for divorce between the parties hereto as a binding agreement constituting a fair and equitable settlement and adjustment of their property rights and of all of the matters herein referred to and contained, and that in any decree entered in such matter the court may find and order that the provisions in such decree contained for the support and maintenance of * * * [plaintiff] are predicated hereon."

The husband filed an answer to the divorce complaint on February 5, 1948, in which he admitted all of its allegations except the charge of extreme cruelty, which he denied, and in which he waived notice of time and place of trial, and findings.

On the same day the trial court granted an interlocutory degree of divorce to the wife, and "Ordered, Adjudged and Decreed that the property settlement agreement made and entered by the plaintiff and defendant under date of December 31, 1947, be, and the same is hereby approved and made a part hereof as fully and to the same extent as if herein set forth at length. Both plaintiff and defendant are hereby directed to perform each and all of the terms and provisions therein contained on their part to be performed.

"It is further hereby Ordered, Adjudged and Decreed that defendant pay to plaintiff the sum of \$250 on the first day of each and every month, commencing as of November 1, 1947, as alimony and for her maintenance and support, so long as she shall remain single, and that in the event of the death of defendant prior to the death of plaintiff, plaintiff shall have a claim

against the estate of defendant for any unpaid alimony and for all payments thereafter to become due, computed in accordance with the tables of expectancy then in use in determining valuations of such future interests by the Treasury Department of the United States."

The Final Judgment of Divorce was entered on March 8, 1949, and provides: "It is further Ordered and Decreed that where said interlocutory decree makes any provision for alimony said provision be and the same is hereby made binding on the parties affected thereby the same as if herein set forth in full, and that where said interlocutory decree relates to the property of the parties hereto, said property be and the same is hereby assigned in accordance with the terms thereof to the parties thereon declared to be entitled thereto."

On July 2, 1954, the husband filed a motion for an order to show cause why the final decree of divorce should not be modified by reducing the alimony payments on the ground of changed conditions. The affidavit filed in support of this motion avers that since the original order was made there has been a material change in the conditions and circumstances of the parties in that when the original order was made the husband was earning as a certified public accountant and attorney about \$14,000 a year, while he is now earning but \$3,500 a year. It is also averred that at the time of the interlocutory the husband was free of debt whereas he now owes in excess of \$10,000.

Thereafter, the husband filed an "offer of proof" in support of his motion in which he offered to prove that when the agreement was entered into it was his intention and belief that the alimony provisions would remain subject to modification, with the agreement simply fixing the maximum amount of alimony, and that the property settlement agreement was, in fact, an illegal agreement to secure a divorce.

The trial court entered its order discharging the order to show cause, sustaining objections to the offer of proof and denying the motion to modify the divorce decree. The objections to the offer of proof were sustained on the ground that: "* *

the interlocutory decree of divorce heretofore entered herein and the final judgment of divorce heretofore entered herein constitute an integration of the property settlement agreement executed by plaintiff and defendant and that said property settlement agreement was a final determination between the parties of all the rights of both parties, including the rights of plaintiff to support by defendant and her right to share the community property of plaintiff and defendant and that this Court has no jurisdiction to modify or amend said final decree of divorce."

From this order the husband appeals.

[1] The law in this state is well settled that if support provisions have been made an inseverable part of the agreement between husband and wife to divide their property, and the court in the divorce action approves the agreement, the provisions of such agreement cannot thereafter be modified without the consent of both of the contracting parties. The leading case on the subject is *Adams v. Adams*, 29 Cal.2d 621, 177 P.2d 265. At page 624 of 29 Cal.2d, at page 267 of 177 P.2d the court summarized the law on the subject as follows:

[2, 3] "The most difficult problems arising from such contracts are those concerning support and maintenance provisions when the agreement is presented to the court in a divorce action. The parties, upon separation, may agree to provide for support and maintenance in a variety of ways, which generally fall into three categories. The first includes contracts in which the support and maintenance provisions are in the nature of alimony, whether in lump sum or monthly payments, and are separable from the provisions that divide the property. The contract may even provide solely for support and maintenance without reference to a division of property. These contracts, if equitable, are enforceable even though not presented to the court in a divorce action. [Citation.] If presented to a court in an action for divorce the court has the power to modify the provisions for alimony before or, if the pro-

visions are incorporated in the decree, after judgment in accord with its power over alimony generally. [Citation.]

[4-6] "The second category includes, among others, contracts in which the 'support and maintenance' provisions are not in the nature of alimony but are part of the division of property. This category also includes contracts that provide solely for the payment of monthly or lump sums 'in lieu of community property.' Such contracts must be treated like other property settlement agreements dealing solely with divisions of property. [Citation.] If the contract was not fraudulent when made, and there was no violation of the confidential relationship, it will be binding on the court and there can be no modification of the payments after the decree without the consent of the parties. [Citation.] The court in the divorce action may grant alimony to the wife and approve the agreement as well, since these agreements purport to deal only with the division of the property of the parties. [Citations.] It is often difficult to determine, in a contract containing provisions for division of property and payments of 'support and maintenance,' whether the payments are part of the division of property or are in the nature of alimony. 'It would be better practice to have that determination clearly and concisely made by the trial court when it renders the decree of divorce. Considerable confusion and uncertainty could be avoided in that fashion. The court could examine the agreement, the circumstances under which it was made, and the nature and value of the property as related to its division and the amount of the periodic payments giving consideration to the statutory rules on the subject.' [Citations.]

"The third category includes contracts in which the wife waives all support and maintenance, or all support and maintenance except as provided in the agreement, in consideration of receiving a more favorable division of the community property. The court cannot add a provision for alimony to such contracts without changing basically the agreement of the parties as to the division of their property."

These principles have frequently been reaffirmed. In *Dexter v. Dexter*, 42 Cal.2d 36, at page 40, 265 P.2d 873, at page 876, it is stated:

"A husband and wife may contract with respect to their property, Civil Code, § 158, and if they are living separate and apart they may provide for the support and maintenance of either of them and their children. Civil Code, § 159. Moreover, as between the husband and wife, if the provisions for support and maintenance have been made an integral or inseverable part of the division of their property, and the court in a divorce action has approved the agreement, its provisions cannot thereafter be modified without the consent of both of the parties. [Citations.]

"* * * When, as in this case, however, the parties have made the provision for support and maintenance an integral part of their property settlement agreement, the monthly payments will ordinarily have a dual character. To the extent that they are designed to discharge the obligation of support and maintenance they will ordinarily reflect the characteristics of that obligation and thus have the indicia of alimony. [Citations.]"

Fox v. Fox, 42 Cal.2d 49, 53, 265 P.2d 881, 883, added the following thought:

"The labels adopted by the parties are not conclusive, since the agreement must be considered as a whole. [Citations.] Moreover, as pointed out in the *Dexter* case, to the extent the monthly payments are designed to discharge the obligation of support and maintenance, they will ordinarily have some of the indicia of alimony. Similarly, the fact that the payments might be reduced under certain specified circumstances does not indicate that they were alimony." See also *Flynn v. Flynn*, 42 Cal.2d 55, 265 P.2d 865; *Finnegan v. Finnegan*, 42 Cal.2d 762, 269 P.2d 873; *Lane v. Bradley*, 124 Cal.App.2d 661, 268 P.2d 1092; *Taliaferro v. Taliaferro*, 125 Cal.App.2d 419, 270 P.2d 1036; *Van Dyke v. Van Dyke*, 126 Cal.App.2d 238, 271 P.2d 910; *Pearman v. Pearman*, 104 Cal.App.2d 250, 231 P.2d 101; see also for good discussions, 42 Cal.L.Rev. 524; 1 *Armstrong California Family Law*, p. 797, et seq.

[7] Thus, the rule of law is well settled. The problem in the instant case is to apply these principles so as to determine whether the alimony and support provisions of the agreement and decree are or are not severable from the property division provisions. As evidence of severability within the agreement itself appellant refers to the recital of the agreement designating the agreement as one settling "property rights * * * including their rights to community property and the right of First Party to alimony and support." (*Italics added.*) Appellant also points out that the provision for support is in a separate paragraph (#2) from the paragraphs relating to the distribution of the property (# 1, and # 6), and that the \$250 payment is to cease on the remarriage of the respondent. He also claims that the fact that the original divorce complaint, and the final and interlocutory decrees, make separate provisions for support and for division of the property, and because the alimony court order makes no reference to the agreement, that this is strong internal evidence of severability. These arguments are without merit, because the purpose of such separate treatment is obviously to make the support provisions enforceable by contempt process. The Supreme Court in *Dexter v. Dexter*, 42 Cal.2d 36, 265 P.2d 873, rejected the argument that merely because the alimony provisions are separately incorporated and merged in the decree they thereby become subject to modification. The test is not whether the support provisions become part of the decree, but whether such provisions are an integral part of the separation agreement. The fact that they are separately treated and became merged in the decree is of no help in solving this problem. See also *Finnegan v. Finnegan*, 42 Cal.2d 762, 269 P.2d 873.

[8,9] The appellant also argues that, with the exception of appellant's personal possessions, under the agreement the respondent received all of the community property and therefore it must follow that the provisions for support could not have formed any portion of the consideration for the division of the property. This argument is unsound for two reasons. The

first was stated as follows in *Dexter v. Dexter*, 42 Cal.2d 36, at page 43, 265 P.2d 873, at page 877: "Moreover, at the time a property settlement is made, the parties may be uncertain as to which of their property is community rather than separate, and they will ordinarily not know how the court in the divorce action will find the facts or how it would, in the absence of an acceptable agreement, exercise its discretion in dividing the property and awarding alimony. The amicable adjustment of these doubtful questions with respect to the property and support and maintenance rights of the parties may alone supply sufficient consideration to support their entire agreement. * * * Moreover, since plaintiff secured her divorce on the ground of extreme cruelty, had the parties not settled their rights by agreement, the court could in its discretion have awarded plaintiff all of the community property."

Secondly, the argument is unsound because its basic premise—that respondent received all of the community property—is incorrect. Appellant received a stamp collection as part of the division. This may be a valuable asset. In addition, Paragraph 11 of the agreement, quoted in part *supra*, states that appellant owns an interest in the accounting firm of which he is a member. The agreement is silent as to the value of this firm, or as to its nature as community or separate property. The marriage here involved lasted for over 25 years. It is more than reasonably probable that all or part of appellant's interest in this firm was community property. Thus, it is not true that the division of the property was not consideration for appellant's promise of support.

As opposed to the minor provisions mentioned above that are contained in the agreement and relied upon by appellant to show severability, there are several major provisions which demonstrate, to a reasonable certainty, the inseverable nature of the agreement. These can be summarized as follows:

1. The agreement recites that "in consideration of the premises," and then in one of the essential paragraphs, #2, provides

for alimony and support, which thus becomes one of the "premises."

2. While the support provision provides that support will terminate on the remarriage of respondent, it then provides that, if appellant should predecease respondent, respondent shall have a claim against the estate of appellant for such support based on her life expectancy. Such provision strongly suggests that the support provisions are an integral part of the property division provisions.

3. Paragraph 10 expressly states: "That the execution of this agreement shall be and is intended to be a full, complete and final adjustment of all of the property rights, including the community property rights, of each of the parties hereto." While there is no mention here of alimony and support, the paragraph goes on to state "and that neither party shall or will at any time hereafter make or attempt to make any further or other claims against the other party hereto, excepting under the terms hereof." This would appear to constitute a waiver of maintenance and support other than as provided in the agreement.

4. This same thought is carried out by paragraph 12 which provides that all property acquired after the execution of the agreement shall be the separate property of the one who acquires it, not subject to the claims of the other—which would include alimony.

5. Then comes paragraph 13 declaring that the entire document constitutes "a binding agreement constituting a fair and equitable settlement and adjustment of their property rights and of all of the matters herein referred to and contained, and that in any decree entered in such matter the court may find and order that the provisions in such decree contained for the support and maintenance of First Party are predicated hereon."

[10] Frequently, in such agreements, there appears an express waiver by the wife of any right to support and maintenance, other than as provided in the agreement, in consideration of the wife's receiving the major portion of the community property.

Such express waiver is conclusive evidence that the support provisions are inseverable from the property division provisions. See *Adams v. Adams*, 29 Cal.2d 621, 177 P.2d 265; *Dexter v. Dexter*, 42 Cal.2d 36, 265 P.2d 873; *Finnegan v. Finnegan*, 42 Cal.2d 762, 269 P.2d 873; *Taliaferro v. Taliaferro*, 125 Cal.App.2d 419, 270 P.2d 1036; *Van Dyke v. Van Dyke*, 126 Cal.App.2d 238, 271 P.2d 910.

[11] In the instant case, there is no express waiver of alimony and support except as provided in the agreement. But such a waiver is necessarily implied from the many provisions of the agreement summarized above. That being so, the agreement, on its face, shows that the alimony and support provisions are inseverable from the property division provisions. Therefore, the agreement cannot be modified against the will of either party.

[12, 13] Defendant's offer of proof was properly rejected. Even if the agreement were ambiguous on the issue of severability of the support provisions so that parol evidence would be admissible on the issue of intent, *Flynn v. Flynn*, 42 Cal.2d 55, 265 P.2d 865; *Taliaferro v. Taliaferro*, 125 Cal.App.2d 419, 270 P.2d 1036; *Van Dyke v. Van Dyke*, 126 Cal.App.2d 238, 271 P.2d 910, the proffered extrinsic evidence was not admissible. The appellant, who is an attorney, offered to prove that: "Defendant * * * believed at such time that the alimony provisions of any decree of divorce would remain subject to the power of modification * * * upon a proper showing"; that "Defendant intended that the agreement serve only to place a limit on the maximum alimony demand" of plaintiff; that "Defendant intended that, as to the alimony provisions, the agreement be only admissible in evidence * * * and be not binding on the Court." Thus, all that appellant offered to prove was that his personal, undisclosed intent was that the alimony provisions were to be severable. No offer is made to show that such intent was ever communicated to the other contracting party. As already pointed out, the agreement does not disclose such intent. It needs no citation of authority to support

the proposition that in determining intent in such a case an objective and not a subjective standard is imposed. Thus, the proffered evidence was inadmissible.

[14] The appellant also offered to prove that the entire agreement was illegal and void. Appellant states that the property settlement agreement was not a bona fide agreement under section 159 of the Civil Code because the parties had been separated for 6 months when it was executed, during which time respondent had been demanding separate maintenance with an award for support, and appellant signed the agreement to induce respondent to procure a decree of divorce. Therefore, says appellant, the agreement was in fact one made in contemplation and consideration of divorce, and hence illegal. This, appellant offered to prove. The complete answer to this contention is to be found in *Hill v. Hill*, 23 Cal.2d 82, 142 P.2d 417. That case involved facts almost identical to the offer of proof here. The trial court held the separation agreement to be illegal. This, the Supreme Court reversed, stating, 23 Cal.2d at page 93, 142 P.2d at page 422: "Public policy seeks to foster and protect marriage, to encourage parties to live together, and to prevent separation. [Citations.] But public policy does not discourage divorce where the relations between husband and wife are such that the legitimate objects of matrimony have been utterly destroyed. [Citation.] In the absence of fraud, collusion or imposition upon the court, public policy does not prevent parties who have separated from entering into a contract disposing of their property rights which shall become effective only in the event one of the parties obtains a divorce, even though such a contract may be a factor in persuading a party who has a good cause for divorce to proceed to establish it." See also *Briner v. Briner*, 63 Cal.App.2d 429, 146 P.2d 709, and *Miranda v. Miranda*, 81 Cal.App.2d 61, 183 P.2d 61.

It is true that this agreement, in view of appellant's greatly reduced income as set forth in his affidavit, works a great hardship on appellant. But it might have worked the other way. Had appellant's

income and respondent's needs increased, respondent could not have secured an increased allowance. On December 31, 1947, appellant was willing to enter into the agreement and apparently willing, tested by the objective standard, to have the support provisions an inseverable part of the property provisions of the agreement. We have no power to relieve him simply because the contract has turned out to his disadvantage.

The order appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.



139 Cal.App.2d 744

Domenico CIGNETTI, also known as D.

Cignetti, Plaintiff and Appellant,

v.

AMERICAN TRUST COMPANY, a corporation, Bank of America National Trust and Savings Association, a National Banking Association, San Jose Abstract & Title Insurance Co., a corporation, and Gladys E. McCormick, Defendants,

San Jose Abstract & Title Insurance Co., a corporation, Respondent.

Civ. 16690.

**District Court of Appeal, First District,
Division 2, California.**

March 8, 1956.

Action on a check against drawer which issued check for principal to agent, who endorsed check without authority and misused part of funds. The Superior Court, Santa Clara County, Byrl Salsman, J., entered judgment for drawer and principal appealed. The District Court of Appeal, Devine, Justice pro tem., held that title company, which drew check for principal on request of agent, who did not have power to endorse check, and who endorsed check and misused part of funds, was liable for amount of loss suffered by principal.

Judgment reversed.

1. Bills and Notes ☞26

Drawer of check is liable to holder if payment is refused, and holder may sue on check itself or on original consideration.

2. Principal and Agent ☞119(1)

In action against drawer of check upon which payee's name was endorsed by his agent, burden of proving agent's authority to endorse the check was on the drawer. West's Ann.Civ.Code, § 3100.

3. Principal and Agent ☞109(4)

Agent must have actually believed she possessed authority to sign check to establish actual but implied authority to do so. West's Ann.Civ.Code, § 2316.

4. Principal and Agent ☞109(4)

The power to endorse commercial paper by an agent is not one lightly to be inferred and the power does not follow merely from authority to collect a debt. West's Ann.Civ.Code, § 2319.

5. Principal and Agent ☞123(9)

In action on a check by principal against drawer, which drew check on principal upon request of agent, who endorsed principal's signature thereto, evidence was insufficient to show power to endorse the check was proper and usual in the ordinary course of business or that agent had ostensible authority to endorse the check. West's Ann.Civ.Code, § 3104.

6. Principal and Agent ☞137(1), 147(2)

One who seeks to charge a principal upon a charge of ostensible authority must himself believe that the agent had authority to do the act in question, and also an act or negligent omission of principal must have led the third party to a mistaken belief.

7. Principal and Agent ☞137(1)

Fact that person was an agent and was entrusted to do specific thing did not constitute want of ordinary care on part of principal in not anticipating agent doing other acts far beyond the scope of the granted power.

8. Principal and Agent ☞147(2)

One dealing with an agent must inquire as to the extent of his authority.

9. Principal and Agent ⇨94

The authority of a manager of a continuing business enterprise is to be distinguished from that of an agent whose authority is to make collection of a single loan, and who is therefore a special agent. West's Ann.Civ.Code, § 2297.

10. Principal and Agent ⇨154(1)

Title company, which drew check payable to principal on request of special agent, who subsequently endorsed check without authority and misused part of funds of that check, was liable to principal for the amount of the loss suffered by principal. West's Ann.Civ.Code, § 3146.

Bressani & Hansen, San Jose, for appellant.

Royal E. Handlos, San Francisco, for respondent.

DEVINE, Justice pro tem.

We are faced with the necessity again of deciding which of two innocent parties must bear the loss caused by the perfidy of Gladys McCormick, as we had to do in the case of Hagen v. Silva, 139 Cal.App.2d 199, 293 P.2d 143. In that case, we were engaged with the subject of authority to collect principal as related to admitted authority to collect interest. In this case, authority of the agent to collect both principal and interest is not in dispute, but the question is whether or not the agent had authority to endorse commercial paper made payable to the principal.

Plaintiff, a man of little education, having nevertheless accumulated the sum of \$8,500, arranged with Gladys McCormick, a real estate and loan broker who did business in San Jose as Wesley L. Pieper Co., to lend this sum to parties named Dalke. A note payable at the rate of \$85 or more a month and a deed of trust with McCormick as trustee were executed by the Dalkes. Payments were made regularly by the Dalkes at the McCormick office, as the note provided they should be, but in what form the payments were made does not appear. Cignetti collected at that office over a period of about four years, in the form of checks drawn by McCormick.

In 1950, Cignetti was about to visit Italy, and he instructed McCormick to send his monthly checks to his cousin until he should return. Within a month of Cignetti's departure, McCormick arranged refinancing of the Dalke loan, the Bank of America taking over the loan and sending the funds to cover, to defendant San Jose Abstract and Title Insurance Company. McCormick sent a reconveyance of the Cignetti deed of trust, executed by her as trustee, to the title company, and made demand for collection of \$7,759.49 for Cignetti. The title company sent a check for that amount, drawn on American Trust Company and payable to Domenico Cignetti, to McCormick. McCormick endorsed the check, first, by writing "Domenico Cignetti", and, below that stamping, "Pay to the order of Bank of America of California Gladys E. McCormick Trustee."

She continued to remit monthly "payments" to Cignetti for about two years after the reconveyance. When Cignetti learned of the transaction, McCormick had become bankrupt.

This is an action on the check against the title company, the drawer. The American Trust Company, which was the drawee, and the Bank of America, an endorser, had been made defendants, but they demurred successfully on the statute of limitations, and the action proceeded against the drawer only.

[1] The drawer of a check is liable to the holder if the drawee refuses to pay, and the holder may sue on the check itself or on the original consideration. Roff v. Crenshaw, 69 Cal.App.2d 536, 159 P.2d 661; Gambord Meat Co. v. Corbari, 109 Cal.App. 2d 161, 240 P.2d 342. In this case, plaintiff has proceeded on the check, the drawee bank having refused to pay him.

It is the contention of defendants that plaintiff has received payment in that McCormick was his agent to collect and to endorse the check. If the endorsement be forged or made without authority, and if there be no estoppel, it is wholly inoperative. § 3104, Civ.Code. The trial court found that McCormick was the agent of plaintiff not only for the purpose of effect-

ing collection of the note, but also, a check payable to plaintiff having been transmitted to the agent, for the purpose of endorsing the check. This finding is attacked by plaintiff as unsupported by the evidence.

[2] The authority of an agent to sign a negotiable instrument may be established as in other cases of agency, and no particular form of appointment is necessary. § 3100, Civ.Code. The burden of proving the agent's authority to endorse is on the defendant herein. *Walsh v. American Trust Co.*, 7 Cal.App.2d 654, 47 P.2d 323.

The trial court found to be true all the allegations of one paragraph of the answer which contained averments of agency in a general way, and also of estoppel, so that, in order to determine whether or not there is substantial evidence, including all legitimate inferences which might be drawn by the trial court, to support the finding, we shall consider the possible kinds of authority of agents, and the subject of estoppel.

[3] Actual authority is such as the principal intentionally confers on the agent or intentionally, or by want of ordinary care, allows the agent to believe himself to possess. § 2316, Civ.Code. The testimony of plaintiff that he did not tell the agent that she had power to endorse is uncontradicted. There is no showing of lack of ordinary care such as would lead the agent to believe she might endorse the check, nor any showing that actually she did believe she had such authority, which would be necessary to establish actual but implied authority. *Columbia Outfitting Co. v. Freeman*, 36 Cal.2d 216, 223 P.2d 21.

Section 2319 of the Civil Code, provides "An agent has authority:

"1. To do everything necessary or proper and usual, in the ordinary course of business, for effecting the purpose of his agency; * * *."

The act of refinancing without consulting the principal was, in itself, an officious one; but, assuming it to have come within the agent's power, there was no showing of necessity of endorsing the check in order to effect the purposes of the agency. The agent could have held the check for endorsement by the principal.

We turn to the question whether or not endorsement was "proper and usual, in the ordinary course of business" for the purposes of the agency, and at this point, the nature of authority of an agent to endorse a negotiable instrument is to be considered.

[4] The authorities are in accord that the power to endorse commercial paper is not one lightly to be inferred. 2 C.J.S., Agency, § 112; 2 Am.Jur. 141; 1 Mechem on Agency, 2d Ed., § 969; Cases collected in 37 A.L.R.2d 456 et seq.; Restatement of the Law of Agency, § 72d. It does not follow merely from authority to collect a debt. Vol. 1, Daniels on Negotiable Instruments, 7th ed. § 324. The Supreme Court of this State has recognized the rule in *Arcade Realty Co. v. Bank of Commerce*, 180 Cal. 318, 181 P. 66, 12 A.L.R. 102, although, as appears below, the court held that under the circumstances of that case, the agent did have authority to endorse.

In *Helgeson v. Farmers Insurance Exchange*, 116 Cal.App.2d Supp. 925, 255 P.2d 484, it was held that where an attorney endorsed his client's name on a draft given in settlement of a personal injury case, and absconded with the proceeds, the drawer who had paid the forged draft must pay again to the rightful holder. The test was whether or not the agent needed the power of endorsing in order to fulfill the purposes of the agency.

[5] There has been no showing in the present case that, in the light of the authorities cited, the power to endorse was proper and usual in the ordinary course of business, but to the contrary, it appears that an extraordinary power was assumed by the agent.

[6-8] Absent also is proof of ostensible authority, which may be considered together with the subject of estoppel. One who seeks to charge a principal upon a charge of ostensible authority must himself believe that the agent had authority to do the act in question. *Harris v. San Diego Flume Co.*, 87 Cal. 526, 25 P. 758; *Walsh v. American Trust Co.*, supra. There is no testimony in the record that anyone in the title company believed McCormick had any right to endorse the check. In fact when

it was returned to the drawer it had already been honored by the drawee, and, no doubt, the drawer relied on the drawee's action, and the drawee, in turn, on the prior endorsement by the Bank of America. A second necessary element of ostensible authority is that an act or negligent omission of the principal must have led the third party to a mistaken belief. *County, etc., Bank of Santa Cruz v. Coast Dairies & Land Co.*, 46 Cal.App.2d 355, 366, 115 P.2d 988. This, too, is missing. There is not a single prior act of the principal in permitting an endorsement which might give color to authority when known to the third party, or which would estop him from denying that the agent actually possessed the high power of endorsing. The fact that McCormick was an agent and was entrusted to do a specific thing did not constitute want of ordinary care on the part of the principal in not anticipating her doing other acts far beyond the scope of the granted power. On the other hand, one dealing with an agent must inquire as to the extent of his authority. *Ernst v. Searle*, 218 Cal. 233, 240, 22 P.2d 715.

The cases cited by respondent are quite distinguishable from the one at hand. In the *Arcade* case, *supra* [180 Cal. 318, 181 P. 67], the court sustained the finding and conclusion of the trial court that the agent was empowered to endorse, this authority resulting from the facts, 1. that the agent was a general agent for the leasing, care and repair of the building and possessing, as the court said, "far more power than a mere collector" and, 2. that the principal must have been aware that when the agent remitted his own personal check every month, he, the agent, was depositing rents as they came in, in his personal account.

[9] The case of *Safeway Stores v. King Lumber Co.*, 45 Cal.App.2d 17, 113 P.2d 483, has to do with the authority of the manager of a lumber yard in a town which had no bank, to cash checks made payable to the company. The manager had authority to collect, to sell, to pay wages and generally to carry on the business; the practice of cashing the checks had gone on for many months. The company's bookkeeping did not require the manager to differentiate

between cash receipts and check receipts. The court, affirming the trial court, held that there was abundant proof of want of ordinary care on the part of the company which had misled those extending the favor of cashing the checks. The authority of the manager of a continuing business enterprise is to be distinguished from that of an agent whose authority is to make collection of a single loan, and who is therefore a special agent. *Civ.Code*, § 2297.

The case of *Gaine v. Austin*, 58 Cal.App. 2d 250, 136 P.2d 584, has nothing to do with authority of an agent to endorse paper made payable to his principal. The checks in that case were payable to the agent who, it was held, had authority to collect, where the principal, the mortgagee, had suggested that the mortgagor should sell the property, and had given the agent an executed satisfaction of mortgage.

[10] As was pointed out in a comment on the *Helgeson* case, *supra*, in 27 So. Cal. Law Review 463, the rule which forces a second payment by a drawer may seem harsh at first sight, but usually the drawer can recoup from intermediate parties between the holder and himself who have guaranteed payment. In this case, it is entirely possible that recoupment will be had from the drawee and by the drawee from the endorser it relied upon. This is said, not by way of basing the decision on such possibilities, but because it is deemed not inappropriate in view of respondent's claim, asserted in the answer, that the equities lie with respondent. The negligence which, added to the nefarious conduct of McCormick, brought about the loss, is of those who chose to rely on her warranty, by endorsement, that she had good title to the check. *Civ.Code*, § 3146. The drawer's liability, in turn, follows from the general rule of drawer's responsibility, as given above. It was the drawer's choice to select a drawee bank and to place confidence in that drawee's decision to make payment to the proper holder.

The judgment is reversed.

DOOLING, Acting P. J., and KAUFMAN, J., concur.

139 Cal.App.2d 691

**Lambert COLE, as administrator of the
Estate of Cornelius Cole, Plaintiff and
Respondent,**

v.

Louise H. COLE, Defendant and Appellant.

Civ. 21291.

District Court of Appeal, Second District,
Division 3, California.

March 5, 1956.

Quiet title action. The Superior Court, Los Angeles County, Thurmond Clarke, J., entered judgment for plaintiff and defendant appealed from the judgment and from an order denying a motion for a new trial. The District Court of Appeal, Vallée, J., held (1) that the order was not appealable, and (2) that a property settlement agreement between plaintiff's decedent and defendant had not terminated joint tenancy agreement.

Appeal from order dismissed and judgment reversed.

1. Appeal and Error ⌋110

Order denying defendant's motion for new trial in quiet title suit was nonappealable.

2. Executors and Administrators ⌋55

Joint Tenancy ⌋6

Survivorship is one of incidents of joint tenancy, and unless estate is terminated before death of joint tenant, decedent's administrator has no interest in property.

3. Joint Tenancy ⌋5

A joint tenancy may be terminated by agreement of parties, but a contract between joint tenants concerning exclusive possession of property will not necessarily terminate joint tenancy.

4. Joint Tenancy ⌋4

A lease for a term of years by one joint tenant to a stranger will not effect a complete severance of joint tenancy.

5. Joint Tenancy ⌋8

Where property is held in joint tenancy, co-tenants have equal interests among themselves. West's Ann.Civ.Code, § 683.

6. Joint Tenancy ⌋1, 8

One of essential unities of a joint tenancy is that of possession, but a co-tenant has right to take possession of whole, subject to equal right of his companion in interest.

7. Joint Tenancy ⌋9

Possession by one joint tenant is possession by all, and ordinarily joint tenant out of possession cannot recover exclusive possession of joint property from his co-tenant but can recover only right to be let into joint possession of property.

8. Husband and Wife ⌋14(3)

Where husband and wife held property in joint tenancy and, pursuant to property settlement agreement, wife gave up her right to be let into joint possession and gave husband exclusive possession for his life in consideration of which he gave up his right to convey his interest and agreed at his sole expense to keep property in good repair and fully insured and to pay all taxes, liens, and assessments, agreement did not terminate joint tenancy, and recital therein that property was owned "an undivided one-half interest thereof by wife and an undivided one-half interest thereof by husband" was merely a statement that parties owned the property in equal shares. West's Ann.Civ.Code, § 683.

Draper, Porter & Kramer and Herbert L. Porter, Monrovia, for appellant.

Hahn & Faith and Alvin W. Hahn, Monrovia, for respondent.

VALLÉE, Justice.

[1] Appeal by defendant from a judgment for plaintiff in a suit to quiet title to an undivided half interest in a parcel of realty. Defendant also appeals from the order denying her motion for a new trial. That order is nonappealable and the appeal therefrom must be dismissed.

Defendant Louise Cole and Cornelius Cole were married in 1935. Prior to their marriage and during their engagement they bought the property in question. Defendant furnished all of the purchase price, which she paid in installments of \$15 a month. It

was purchased as a place for her parents to live. Title was taken in the name of Cornelius. On October 26, 1945, by a conveyance, title was vested in defendant and Cornelius as joint tenants.

Later defendant and Cornelius were divorced. While the divorce action was pending they entered into a property settlement agreement. The agreement was drawn by the attorney for Cornelius. It contained these provisions:

"3. That there is certain real property located at 344 West Colorado Street, Monrovia, California, and described as follows to-wit:

"[Description]

which said property is owned an undivided one-half interest thereof by the wife, and an undivided one-half interest thereof by the husband; that if either owns less than an undivided one-half interest in said real property then the one owning more than an undivided one-half interest therein hereby grants unto the other such percentage of said real property so that from and after the date hereof each party hereto will own an undivided one-half interest in and to the said real property.

"That said husband is now occupying said real property and shall be under no obligation to pay to the wife any rental for the use thereof; that said husband, at his own sole expense, keep said property in a state of good repair, fully insured, keeping all taxes, liens and assessments thereon fully paid, provided, however, the foregoing use of the real property, without expense to the husband other than the repair, upkeep, the payment of taxes, liens and assessments, shall cease if said husband rents or sublets the said premises or any portion thereof, sells, encumbers or otherwise transfers said real property."

"The husband shall have the exclusive right to live in the family home located on the real property mentioned in Paragraph 3 hereof as long as he shall live or desire, provided, however, that he shall not sell or convey his interest in said real property or rent or sublet

the said premises, or any portion thereof, or encumber or otherwise transfer said property."

Following the divorce Cornelius occupied the property until his death. The record does not show the date of death. Plaintiff is the administrator of his estate and brought this suit to quiet title to a half interest in the property. Judgment was for plaintiff, from which defendant appeals.

Defendant's contention is that there was no termination of the joint tenancy and that on the death of Cornelius she became the owner of the entire interest in the property in fee. Plaintiff's brief is of no help in solving the problem. As best we are able to gather, he contends the property settlement agreement terminated the joint tenancy and that at the death of Cornelius the parties held the property as tenants in common. It is conceded that a joint tenancy was created. The question is whether the property settlement agreement terminated the joint tenancy. We have concluded it did not.

[2-4] Survivorship is one of the incidents of joint tenancy; and unless the estate is terminated before the death of a joint tenant, the decedent's administrator has no interest in the property. *Dando v. Dando*, 37 Cal.App.2d 371, 372, 99 P.2d 561. A joint tenancy may be terminated by agreement of the parties. *Estate of Zaring*, 93 Cal.App.2d 577, 579-580, 209 P.2d 642. A contract between joint tenants concerning the exclusive possession of the property will not necessarily terminate the joint tenancy. 13 Cal.Jur.2d 305, § 18. A lease for a term of years by one joint tenant to a stranger will not effect a complete severance of the joint tenancy. *Swartzbaugh v. Sampson*, 11 Cal.App.2d 451, 454-462, 54 P.2d 73. In *Hammond v. McArthur*, 30 Cal.2d 512, 183 P.2d 1, one joint tenant conveyed to the other a life estate in the property with the right to all of its rents and profits. The court held that the granting of the life estate did not terminate the joint tenancy insofar as the right of survivorship was concerned. The court stated 30 Cal.2d at page 516, 183 P.2d at page 3:

"But joint tenants may contract with each other concerning the exclusive

possession and division of income from the property and this will not necessarily terminate the joint tenancy. [Citations.] And a lease by one joint tenant for a term of years will not effect a complete severance of the tenancy. [Citations.] As stated by text writers, when one of two joint tenants in fee simple makes a conveyance of his interest for life, upon the termination of the life interest, the joint tenancy, as it originally existed, revives. [Citations.] Applying these principles to the facts shown by the present record, and excluding from consideration the parol evidence received for the purpose of explaining the intention of the parties in executing the deed, the release of the life estate in favor of Mrs. Rowley did not terminate the joint tenancy for the purposes of survivorship." Also, see, *Fish v. Security-First Nat. Bank*, 31 Cal.2d 378, 387-388, 189 P.2d 10; annotation: 129 A.L.R. 813; "Joint Tenancy" by Albert M. Cross, 19 Los Angeles Bar Bulletin, 389.

[5-8] The property settlement agreement neither enlarged nor diminished the title then held by the parties. There was no evidence of any agreement between defendant and the decedent to terminate the joint tenancy. There is no language in the agreement indicating the parties thereto intended to destroy the existing joint tenancy. Joint tenancy is a joint interest owned by two or more persons in equal shares. Civ.Code, § 683. The cotenants have equal interests among themselves. *Wallace v. Riley*, 23 Cal.App.2d 669, 676, 74 P.2d 800. The principal and distinguishing incident of joint tenancy is the right of survivorship. 13 Cal.Jur.2d 301, § 16. The language in the agreement that the property "is owned an undivided one-half interest thereof by the wife, and an undivided one-half interest

thereof by the husband" is merely a statement that the parties owned the property in equal shares. It is not inconsistent with a joint tenancy. Each party could at that time have conveyed an undivided half interest. The only grant in the instrument is that if either owns less than a half interest the party owning more than a half interest grants unto the other enough to make it a half interest. Since the parties owned the property in equal shares, this language was surplusage. No interest was conveyed by the agreement. The agreement is clear that the parties did not intend to terminate the joint tenancy. Uncontradicted evidence introduced by plaintiff supports this conclusion.¹ See, *In re Rauer's Collection Co.*, 87 Cal.App.2d 248, 257-258, 196 P.2d 803. The provision "that he shall not sell or convey his interest in said real property or rent or sublet the said premises, or any portion thereof, or encumber or otherwise transfer said property" manifestly indicates an intent not to terminate the joint tenancy but to preserve it. It was the evident intent of the parties to provide living quarters for the decedent during his lifetime without affecting the title to the property in the event of the death of one of the joint tenants. *Gillette v. Nicolls*, 121 Cal.App.2d 185, 189, 262 P.2d 856.

One of the essential unities of a joint tenancy is that of possession. *Siberell v. Siberell*, 214 Cal. 767, 771, 7 P.2d 1003. A cotenant of real property has a right to take possession of the whole, subject to the equal right of his companion in interest. 13 Cal. Jur.2d 310, § 23. The fact that defendant gave the decedent possession of the property until his death did not destroy the joint tenancy. Cf., *Edwards v. Edwards*, 90 Cal. App.2d 33, 43, 202 P.2d 589. Possession by one joint tenant is possession by all. "Ordinarily, one joint tenant out of possession cannot recover exclusive possession of the

1. Defendant testified:

"Q. By Mr. Hahn [attorney for plaintiff]: This is your handwriting here, is it not? A. Yes, that is.

"Q. You gave him that at the time when you told him he could stay there the rest of his life? A. Yes.

"Q. By that, you meant he could stay

there and have exclusive possession of it as long as he lived, is that correct? A. I told him he could live there as long as he lived and I expected that if anything happened to either one of us—

"Mr. Hahn: I will introduce this as Plaintiff's next— A.—that it would belong to the other person."

joint property from his cotenant. *Jamison v. Graham*, 57 Ill. 94. He can only recover the right to be let into joint possession of the property with his cotenant." *Swartzbaugh v. Sampson*, 11 Cal.App.2d 451, 454, 54 P.2d 73, 75. What the parties agreed to was simply this: defendant gave up her right to be let into joint possession and gave the decedent exclusive possession for his life in consideration of which he gave up his right to convey his interest, agreed at his sole expense to keep the property in good repair, fully insured, and pay all taxes, liens, and assessments; in other words, he gave up his right to terminate the joint tenancy during his life. The parties did not terminate the right of survivorship.

The appeal from the order denying a new trial is dismissed; the judgment is reversed.

SHINN, P. J., and PARKER WOOD, J., concur.



139 Cal.App.2d 798

Anna WASSERSTROM, Plaintiff and Respondent,
v.

Julius WASSERSTROM, Defendant and Appellant.
Civ. 21373.

District Court of Appeal, Second District,
Division 1, California.

March 12, 1956.

Action by wife for a divorce, support and maintenance, community property, etc., wherein husband filed a cross-complaint. The Superior Court of Los Angeles County, Edwin L. Jefferson, J., entered judgment for plaintiff, and from the judgment and an order denying his motion for new trial, defendant appealed. The District Court of Appeal, Fourn, J., held that the evidence justified granting wife a divorce on ground

of extreme cruelty and that division of community property was fair to defendant.

Appeal from order denying a new trial dismissed and judgment affirmed.

1. Divorce ⇨147

Infliction of grievous mental suffering constituting extreme cruelty as ground for divorce is a question of fact to be determined from the circumstances of each particular case, in the light of the status of the parties. West's Ann.Civ.Code, § 94.

2. Divorce ⇨184(10)

Conclusion and decision of trial court as to infliction of grievous mental suffering constituting ground for divorce will not be disturbed on appeal, unless the evidence is so slight as to indicate abuse of discretion. West's Ann.Civ.Code, § 94.

3. Divorce ⇨130

Evidence justified granting wife a divorce on ground of extreme cruelty. West's Ann.Civ.Code, § 94.

4. Divorce ⇨27(18)

A course of conduct by which one party to marriage continually indicates dissatisfaction with the other and makes such dissatisfaction known to friends may cause humiliation, embarrassment and mental anguish to a degree constituting extreme cruelty. West's Ann.Civ.Code, § 94.

5. Husband and Wife ⇨264

In divorce action, evidence as to source of purchase price of realty justified finding that such realty was the separate property of wife.

6. Divorce ⇨252

Divorce judgment awarding to wife as her separate property from the community property an automobile and \$800 bank account, and to husband an older automobile, \$1,000 building and loan certificate, leather goods business and \$500 bank account, was extremely fair to husband.

7. Divorce ⇨177

Appeal would not lie from order denying defendant's motion for new trial in divorce action.

Julius Wasserstrom, in pro. per.

Low & Stone, by Sheldon Berlin, Beverly Hills, for respondent.

FOURT, Justice.

Plaintiff brought an action for divorce against the defendant wherein she alleged, among other things, that the defendant had been guilty of extreme cruelty, and that certain particularly described property was the community property of the parties. She requested a divorce, support and maintenance, reasonable attorney's fees and costs, restoration of her former name and all of the described community property. The defendant answered the complaint and filed a cross-complaint wherein he set forth that the parties were possessed of various items of community property consisting of both real and personal property, without describing the same, and further set forth that the plaintiff and cross-defendant had been guilty of extreme cruelty toward him, and requested that the court adjudicate and determine the community and separate property interests in the several items of property in question, and that it make a just disposition of the community property, and that he be awarded a decree of divorce.

The cause came on for hearing, each party being represented by counsel. The court made findings of fact wherein it found, among other things, that the plaintiff was a resident of the county and state for more than a year prior to the filing of the complaint; that she was married to the defendant in Los Angeles county on July 3, 1948, and separated October 8, 1952, and that there were no children; further, that the defendant had no funds with which to pay her attorney's fees or alimony; that the plaintiff had not been guilty of extreme cruelty toward the defendant; that the defendant had constantly humiliated the plaintiff by demanding a divorce; that he had belittled her; that during the major portion of the marriage he had refused to get a job and contribute to the support and maintenance of the wife, and that he had caused many arguments. The court also found that certain real property referred to as the Winona property was the separate property of the wife; that the community property

consisted of a 1950 model automobile, \$800 in a bank account at the Union Bank & Trust Co. of Los Angeles, a 1940 model automobile, a \$1,000 building and loan certificate, a leather goods business and a \$500 bank account in the husband's name. From the facts as found, the court concluded that the wife was entitled to an interlocutory judgment of divorce; that when the judgment was final she should have her maiden name restored to her; that the Winona property was her separate property; that the plaintiff should have awarded to her, as her separate property from the community property, the 1950 model automobile and the \$800 bank account. The defendant was awarded the 1940 automobile, the \$1,000 building and loan certificate, the leather goods business and the \$500 bank account. The plaintiff was denied alimony and was to pay her own attorney's fees; defendant to take nothing by the cross-complaint, except the community property above awarded to him. She was to recover her costs. Judgment was made and entered accordingly.

Defendant made a motion for a new trial and to vacate the judgment and such motion was denied. He thereafter filed his notice of appeal from the judgment and from the order denying the motion for a new trial.

Appellant contends that the trial court erred in (1) finding that he was guilty of extreme cruelty as charged, and (2) the distribution of the community property.

[1,2] Section 94 of the Civil Code defines extreme cruelty as "the wrongful infliction of grievous bodily injury, or grievous mental suffering, upon the other by one party to the marriage." In each case, the infliction of grievous mental suffering is a question of fact to be determined from the circumstances of the case, in the light of the status of the parties. The conclusion and decision reached by the trial court will not be disturbed unless the evidence is so slight as to indicate an abuse of discretion. *MacDonald v. MacDonald*, 155 Cal. 665, 670, 102 P. 927, 25 L.R.A.,N.S., 45.

[3,4] In this case there was ample evidence upon which the court could base its

finding of cruelty on the part of the husband. Among other things, there was testimony that he made little or no contribution to the support of the family for a considerable period of time; that he stayed out to 5 o'clock in the morning on occasions; that he gambled; that he repeatedly humiliated her; that he refused to assume any responsibility; that he repeatedly said, "Well, if you don't like it send me a divorce". It was aptly stated in *Keener v. Keener*, 18 Cal.2d 445, at page 448, 116 P.2d 1, at page 2, "A course of conduct by which one party to the marriage continually indicates dissatisfaction with the other and makes such dissatisfaction known to friends of the parties may well cause humiliation, embarrassment and mental anguish to a degree constituting extreme cruelty. * * * The trial judge was in a position to observe the intelligence, refinement and delicacy of sentiment of the defendant and to determine whether plaintiff's conduct caused her grievous mental suffering. In the absence of an abuse of discretion, his conclusion cannot be disturbed."

Appellant's contention that the court erred in the distribution of the community property is likewise not well taken. There was ample evidence that the plaintiff had certain real property before the marriage which she retained as her separate property after and during the marriage. The real property she had before marriage was sold and the money deposited in various banks in the name of the plaintiff. Later, following some intermediate transactions which did not affect the status of the funds, the plaintiff purchased a lot using a part of the monies from the separate bank accounts to pay for the same. She then made a construction loan and borrowed other monies from her sister, and caused an apartment house to be constructed on the premises. The matter of the purchase of the Winona property and the construction of the buildings thereon was never discussed with appellant. In *Citizens Nat. Trust & Sav-*

ings Bank v. Hawkins, 87 Cal.App.2d 535, 542, 197 P.2d 385, 389, the court said: "While the court in a divorce action should not 'assign the separate property of one of the spouses to the other', *Fox v. Fox*, 18 Cal.2d 645, 646, 117 P.2d 325, 326, yet when the issue has been made the court may determine whether the property is separate or community and quiet title in the rightful owner. [Citing cases.] * * * In *Roy v. Roy*, 29 Cal.App.2d 596, 603, 85 P.2d 223, 226, the court said: 'The jurisdiction of the court with respect to the disposal of property in a divorce action is found in section 137 et seq. of the Civil Code. As a general rule, and subject to certain exceptions not material here, the power of the court is limited to a disposition of the community property and the court is without power to pass upon a dispute as to separate property or the disposition of the same. [Citing cases.] Another exception to the general rules arises where an issue is made by the pleadings as to separate property and both parties, without objection, have submitted the question to the court, in which case it has been held that under its general jurisdiction the court has power to hear the questions raised as to the ownership of separate properties and to make proper disposition thereof. [Citing cases.]'"

[5,6] The plaintiff's testimony shows clearly the source of the entire purchase price of the Winona property, and each part thereof was her undisputed separate property. The court apparently believed the plaintiff and disbelieved appellant, and made the judgment accordingly, which was perfectly proper. As to the division of the admittedly community property, the court was obviously extremely fair to the defendant.

[7] The appeal from the order denying motion for new trial, being a non-appealable order, is hereby dismissed. The judgment is affirmed.

DORAN, Acting P. J., concurs.

139 Cal.App.2d 814

G. E. STRATTON, Plaintiff,**v.**

Eugene S. GRANT and Irma Grant, Anglo California National Bank of San Francisco, Guardian of the Estate of Anna M. Snider, Anna Leonard, Guardian of the person of Anna M. Snider, Defendants.

ANGLO CALIFORNIA NATIONAL BANK OF SAN FRANCISCO, Guardian of the estate of Anna M. Snider, Cross-Complainant and Respondent,

v.

Eugene S. GRANT and Irma Grant, Cross-Defendants and Appellants.

Civ. 16551.

District Court of Appeal, First District, Division 2, California.

March 13, 1956.

Action to quiet title in which guardian filed cross-complaint to rescind deeds executed by ward to plaintiff and to another defendant conveying same property. The Superior Court, City and County of San Francisco, Daniel R. Shoemaker, J., entered judgment for the guardian and the defendant grantees appealed. The District Court of Appeal, Dooling, J., held that where ward had given two deeds to the same property and told her physician that she was planning to sell the property to a third person, evidence was sufficient to sustain finding that ward was not mentally competent to deal with subject with full understanding of rights.

Judgment affirmed.

1. Deeds ⇨211(1)

In action to quiet title and cross-action by guardian to rescind deed given by ward before appointment of guardian, where ward had given two deeds to same property and told her physician she was planning to sell the property to a third person, evidence was sufficient to sustain finding that ward was not mentally competent to deal with subject with full understanding of rights. West's Ann.Civ.Code, § 39.

2. Cancellation of Instruments ⇨53

In an action to quiet title and action by guardian to set aside deeds on ground

ward was of unsound mind, finding that ward was deceived and imposed upon by grantees of deed was not necessary to support judgment rescinding deeds, in view of finding of incompetency. West's Ann.Civ. Code, § 39.

3. Deeds ⇨68(1½)

There need be no conscious overreaching to support rescission of deeds for grantor's incompetency. West's Ann.Civ. Code, § 39.

4. Mental Health ⇨389

Where grantees unequivocally refused to rescind deed after appointment of guardian, for grantor, the fact that notice of rescission was given by bank before its appointment as guardian was unimportant and second notice to rescind and offer to restore purchase price was not necessary. West's Ann.Civ.Code, § 39.

5. Cancellation of Instruments ⇨57

In action to quiet title and cross-action by guardian to rescind ward's deeds, where no data or amounts were furnished to support grantees' contention that they spent money for benefit of property and to reduce loan, it was proper for trial court to disregard a grantee's conclusions and opinions in that respect and to allow guardian reasonable rental value of grantees' occupancy.

William E. Barden, Paul M. Hopf, Robert J. Smith, San Francisco, for appellants.

Douglas M. Moore, San Francisco, for respondent, Anglo California Nat. Bank of San Francisco.

Samuel B. Stewart, Christopher B. Jenks, Arthur V. Toupin, San Francisco, for respondent, Bank of America.

DOOLING, Justice.

Cross-defendants Grant appeal from a judgment entered in favor of cross-complainant Anglo California National Bank of San Francisco (hereafter called Anglo) as guardian of the estate of Anna M. Snider. In a suit brought by one Stratton to quiet his title to the real property involved Anglo as guardian of Mrs. Snider filed a cross-complaint to rescind a deed to appellants Grant and another deed to the

same property to plaintiff Stratton on the ground that when the deeds were executed Mrs. Snider was of unsound mind. The court entered judgment rescinding both deeds. Stratton has not appealed.

On January 17, 1953, Anna M. Snider entered into a written agreement for the sale of her home and the furniture in it to G. E. Stratton for the sum of \$9,300, the agreement providing for a broker's commission of \$450. On January 20, 1953, she signed a deed conveying this property to Stratton. This deed was acknowledged March 13, 1953, and was recorded April 7, 1953. No part of the purchase price on this transaction was paid to Mrs. Snider.

On February 25, 1953, Mrs. Snider and Eugene Grant entered into an agreement for the sale of the same house to Grant. The purchase price was \$7,000, exclusive of furniture and not subject to any commission. Mrs. Snider received the full purchase price and the deed covering this transaction was placed of record on March 4, 1953.

Anna M. Snider was declared an incompetent on April 21, 1953, and Anglo was appointed guardian of her estate.

About April 15, 1953, prior to its appointment as guardian, Anglo, on behalf of Anna M. Snider, notified the Grants in writing that the purported sale to them was rescinded and offered to return the \$7,000 paid by them to Mrs. Snider. On April 21, 1953, subsequent to its appointment as guardian, Anglo was notified by the Grants of their refusal to reconvey the property to Mrs. Snider on payment to them of \$7,000.

In addition to ordering the rescission of both the Stratton and Grant deeds the trial court further decreed that Anglo, as guardian, was entitled to a reconveyance of the property by the Bank of America upon payment to it of \$5,603.39 plus interest (the amount due on a loan taken out by the Grants and secured by a deed of trust). The Court also ordered that upon reconveyance of the property the guardian should pay to the Grants the sum of \$571.61, less the reasonable rental value of the property at the rate of \$75 per month until the reconveyance should be accomplished.

Appellants first argue that the evidence is insufficient to support the finding "* * * that on the 25th day of February, 1953, when she executed said agreement of sale and said deed to said Eugene S. Grant and Irma Grant, said Anna M. Snider was of unsound mind and she was not mentally competent to deal with the sale and conveyance of her said real property with a full understanding of her rights, and she did not actually understand the nature, purpose and effect of said agreement and said deed, and at said times she was mentally incompetent and was unable, unassisted, to properly manage her property, or to take care of herself or her property, and by reason thereof she was deceived and imposed upon by said Eugene S. Grant and Irma Grant." Respondent Anglo's cross-complaint seeking rescission was based on Civil Code, section 39, to the effect that: "A conveyance or other contract of a person of unsound mind, but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission, as provided in the Chapter on Rescission of this code." It has been established that in order to have relief under this provision it is not necessary that one be incompetent to enter into any kind of contract or to transact any business. Rather the test is whether or not the party was mentally competent to deal with the subject before him with a full understanding of his rights. Such a question is to be determined by the court or jury and if there is found in the evidence any rational ground supporting its determination its conclusion on this point will be upheld. *Pomeroy v. Collins*, 198 Cal. 46, 69, 243 P. 657; *Carr v. Sacramento Clay Products Co.*, 35 Cal. App. 439, 170 P. 446.

[1] An examination of the evidence satisfies us of its sufficiency to support the finding that when Mrs. Snider executed the deed to the Grants she was not mentally competent to deal with the subject with a full understanding of her rights. The evidence shows that she had shortly before entered into a binding agreement to sell house and furnishings for \$9,300 less a \$450 commission and that pursuant to this agreement she had actually signed a deed to Stratton.

The witness Chambers testified that the furnishings were worth "a couple of hundred dollars" and they were later sold for \$200 by Anglo acting as guardian. Deducting these amounts from \$9,300, on her contract with Stratton she would receive for the real property net to her \$8,650. Stratton's real estate agent testified that the money was in his hands for payment to Mrs. Snider as soon as she vacated the home and that he so informed her. To her knowledge he had made considerable efforts to find for her another suitable place to live. In the face of these facts when she was negotiating the sale of her property to the Grants she told their agent, Pollach, that she had been offered \$9,300 for her property orally, but that she had not signed anything and the listing had expired. On March 16, 1953, long after she had signed and delivered not only one, but two, deeds to her property, she told her physician that she was planning to sell her property to a man who lived in the neighborhood. Her physician testified that she was suffering from senile dementia and in his opinion on the date that she deeded her property to the Grants she was not competent to understand the transaction.

Appellants cite cases distinguishing medical unsoundness of mind from legal competency. Giving these their full weight the trial court could reasonably find from the above evidence that on the date of the deed to the Grants Mrs. Snider was not competent to understand the effect of the transaction. With a firm sale from which she would receive \$8,650 net for her real property as soon as she could arrange to deliver possession, with the contract with Stratton and the deed to him signed and in the hands of his agent she accepted \$7,000, a net loss of \$1,650, and told the agent that she had signed nothing and the listing had expired, and on March 16 after signing two deeds she still said to her doctor that she was planning to sell her property. Coupled with the expert opinion of her incompetency this evidence furnishes abundant support for the court's finding.

[2, 3] Appellants urge that there is no support for the finding that Mrs. Snider

"was deceived and imposed upon" by them. This latter finding is not necessary to support the judgment. The finding of incompetency alone is sufficient to support the rescission and there need be no conscious overreaching. *Neale v. Sterling*, 117 Cal. App. 507, 509, 4 P.2d 250; Civ.Code, § 39.

[4] The fact that the notice of rescission was given by Anglo before it was appointed guardian becomes unimportant because the Grants unequivocally refused to rescind after Anglo became guardian. The law does not require idle acts and after the Grants had flatly refused to rescind it would have been idle to give them a second notice of rescission and offer to restore the purchase price. The court said in *McDonald v. Pacific Debenture Co.*, 146 Cal. 667, 672, 80 P. 1090, 1091:

"The defendant's conduct was in effect a positive refusal under any circumstances to return the money already received, and this positive refusal relieved the other parties from the necessity of offering to return or cancel the contract prior to beginning the action."

[5] The court found the reasonable rental value of the property to be \$75 per month (it was in fact rented for \$75 per month from September 1953). It allowed the appellants \$571.61 with provision that \$75 per month be deducted therefrom for every succeeding month that the Grants refuse to reconvey. This figure was arrived at by charging the Grants \$75 per month rental from the time they took possession of the property and deducting this amount and the amount of the bank loan from the \$7,000 paid by the Grants. Appellants complain that the \$75 per month should not have been deducted because of the following testimony of Mr. Grant:

"The Court. The \$75 comes in—

"The Witness. That takes care of the electricity, whatever I have, taxes, insurance, liability and the loan on the bank."

Appellants urge that from this the court was compelled to find that all of this money was spent for the benefit of the property and to reduce the loan. They already re-

ceived the benefit of the reduction of the loan, because the court used the figure to which the loan was reduced in its calculation. No supporting data or amounts of other expenditures was furnished and the court could disregard the testimony of other expenditures in the casual and cavalier way in which appellant Grant testified to them: "That takes care of etc." As so phrased this amounted to no more than the unsubstantiated conclusion and opinion of the witness.

Judgment affirmed.

NOURSE, P. J., and KAUFMAN, J.,
concur.



139 Cal.App.2d 10

CITY AND COUNTY OF SAN FRANCISCO,
a city and county, Plaintiff and
Appellant,

v.

Henry J. BUDDE and Cyril Magnin, substituted for Ward Walkup and Dwight L. Merriman, and Harold Lopez, constituting The Board of State Harbor Commissioners for San Francisco Harbor, Defendants and Respondents.

Civ. No. 16671.

District Court of Appeal, First District,
Division 2, California.

March 2, 1956.

[Action by city and county against Board of State Harbor Commissioners for declaratory relief and injunction. The Superior Court, City and County of San Francisco, Milton D. Sapiro, J., rendered judgment of nonsuit, and an appeal was taken. The District Court of Appeal, Nourse, P. J., affirmed, 292 P.2d 955. On filing of petition for rehearing, the District Court of Appeal, Nourse, P. J., held, inter alia, that the action of the Board of State Harbor Commissioners in erecting curbs on either

side of railroad tracks on the Embarcadero thus preventing direct communication for vehicular traffic between Francisco Street and the Embarcadero was authorized.

Petition for rehearing denied.

Dooling, J., dissents.

1. Navigable Waters ⇨14(2)

Under amendment of Harbors and Navigation Code section relating to Embarcadero and its width and sidewalk and providing that Board of State Harbor Commissioners might remove paving, erect barriers and perform such other acts as might prohibit movement of vehicular and pedestrian traffic over and along railroad tracks, action of Board in erecting curbs on either side of tracks and preventing direct communication of Francisco Street with Embarcadero for vehicular traffic was authorized. West's Ann. Harbors & Nav. Code, § 3131.

2. Municipal Corporations ⇨657(1)

With respect to authority of Board of State Harbor Commissioners, where action of Board did not constitute closing of street but only the prevention of its direct communication with the Embarcadero for vehicular traffic, rules relating to closing of streets had no application. West's Ann. Harbors & Nav. Code, § 3131.

3. Navigable Waters ⇨14(1)

Harbors and Navigation Code section providing for extension of city streets so as to intersect Embarcadero does not require that direct communication for vehicular traffic between Embarcadero and any extended city street, however unimportant, be provided. West's Ann. Harbors & Nav. Code, §§ 3131, 3137.

4. Navigable Waters ⇨14(2)

Harbors and Navigation Code section prohibiting obstruction of use of streets near waterfront as thoroughfares by using them for loading and landing of merchandise was not violated by Board of State Harbor Commissioners when it closed direct communication for vehicular traffic between Francisco Street and Embarcadero. West's Ann. Harbors & Nav. Code, §§ 3131, 3138.

5. Declaratory Judgment 345

Record in action for declaratory judgment and injunction failed to establish that Board of State Harbor Commissioners, in closing direct communication for vehicular traffic between Francisco Street and Embarcadero failed to establish abuse of Board's discretion to consider best interest of both vehicular and railroad traffic, nor did record show any obstruction of constitutional right of way to navigable water required for public purpose, even if such constitutional section would otherwise be applicable. West's Ann. Harbors & Nav. Code, § 3131; West's Ann.Const. art. 15, § 2.

Dion R. Holm, City Atty., George E. Baglin, Patrick R. Kelly, Deputy City Attys., San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Miriam E. Wolff, Robert L. Bergman, Deputy Attys. Gen., for respondents.

NOURSE, Presiding Justice.

Petitioner's main contention is that the amendment of Harbors and Navigation Code section 3131, like the section itself, relates to the width of the roadway and to the sidewalk of the Embarcadero only and therefore cannot grant power to the Board to close Francisco Street or to act in violation of Harbors and Navigation Code sections 3137 and 3138.

[1-5] Although it is true that the amendment relates to the power of the Board as to the Embarcadero itself only, the significant point is that the changes complained of were made solely on the Embarcadero itself and fully in accord with the power given in the amendment, which dispelled any doubt which may have existed as to whether the action of the Board violated section 3131, *supra*. Petitioner has not convinced us that there is any ground which causes the works complained of nevertheless to be illegal. Francisco Street has not been closed, but only its direct communication with the Embarcadero for vehicular traffic prevented. Rules relating to closing of streets have no application. Har-

bors and Navigation Code section 3137, which provides for extension of the city streets so as to intersect the Embarcadero, does not expressly provide that the direct vehicular traffic between the Embarcadero and any such extended street, however unimportant, is sacrosanct and we decline to give it such meaning by interpretation. Harbors and Navigation Code section 3138 prohibits the obstruction of the streets near the waterfront as thoroughfares by using them for loading and landing of merchandise. Francisco Street has not been used in such manner. Both provisions predate the construction of the State Belt Railroad and should not be construed to limit the power of the Board in relation to said railroad and its tracks when their language does not so require. The amendment of section 3131 directs the Board to consider the best interest of both vehicular and railroad traffic and there is no evidence whatever showing that the Board has abused its discretion in that respect. Neither is there any showing that any obstruction of the right of way to navigable water required for a public purpose, Cal.Const. Art. XV, § 2, is actually here involved, so that it is unnecessary to decide whether said section would apply to obstruction by the Board.

The following modifications are made in the opinion:

Page 1 line 3 from bottom: The words "The State-owned Port of San Francisco" are deleted and replaced by "The Embarcadero forms part of the tideland which".

Page 2 line 1: After the word "maintained", the words "the Embarcadero as a" are inserted.

Page 2 line 11: The word "as" is deleted and replaced by "in connection with".

Page 2 line 17: The word "merely" is deleted.

Page 2 lines 19 and 20: The sentence beginning "The real issue" is deleted and replaced by "The issue of power is simple."

Page 2 line 21: The words "the area known as" are deleted.

The petition for a rehearing is denied.

DOOLING, J., votes for a rehearing.

139 Cal.App.2d 847

Walter MULLER and Frank Muller, copartners doing business as Muller Brothers, Plaintiffs, Respondents & Appellants,

v.

Pancho BARNES, a/k/a Florence McKendry, Defendant, Appellant & Respondent.

Civ. 21432.

District Court of Appeal, Second District,
Division 2, California.

March 15, 1956.

As Amended on Denial of Rehearing

April 10, 1956.

Action to recover the purchase price of horses sold to defendant who filed a cross complaint alleging that an animal had been delivered to defendant other than the one agreed upon. From a judgment in the Superior Court of Los Angeles County, William P. Houghton, J., both parties appealed. The District Court of Appeal, Fox, J., held that the evidence sustained the judgment for the plaintiff and that plaintiff was entitled to recover interest from the date set forth in the instrument of sale.

Modified and affirmed.

1. Appeal and Error ⇨1041(3)

Refusal to allow defendant's request to amend her pleadings was not shown to be prejudicial where the issues sought to be raised were actually considered on the pleadings before the trial court.

2. Sales ⇨415

In suit to recover the price for horses sold to defendant burden was on defendant to prove the allegations of her cross-complaint that she received one animal when she should have had another.

3. Appeal and Error

⇨994(3), 1011(1), 1012(1)

Trial court has the responsibility to pass upon the credibility of the witnesses and the weight that should be given their testimony and to resolve the conflicts in the testimony of an individual witness and such a factual decision is controlling on appeal.

4. Appeal and Error ⇨991

In action to recover the price of horses sold to defendant where defendant cross-complained alleging that she had received

one animal when she should have had another, factual matters were for the determination of the trial judge.

5. Interest ⇨39(1)

Where the amount of claim under a contract is liquidated but is reduced by existence of an unliquidated setoff or counterclaim thereto, interest is properly allowed on the balance of the fund found to be due from the time it became due.

6. Interest ⇨39(1)

In suit to recover a liquidated amount on sale of horses to defendant under an agreement to pay interest at six percent, wherein defendant filed an unliquidated set-off and plaintiffs prevailed, plaintiffs were entitled to interest on the amount found due from the time the agreement was executed.

Joseph M. Wapner, Los Angeles, for Muller Brothers.

Pancho Barnes in pro. per.,

FOX, Justice.

As part of the consideration for the purchase of fourteen horses from Victor Cox, defendant signed a document dated September 16, 1950, reading in part as follows:

"Pancho Barnes promises and agrees to Pay to Vic Cox the sum of Three Thousand and Two Hundred and No cents (\$3200.00) within one year from the date of this agreement. However Pancho Barnes agrees that all monies from the sale of any of the above stock shall be paid to Vic Cox as soon as is possible (sic.) until the full amount of \$3200.00 shall have been paid. The unpaid balance shall bare (sic.) an interest of six per cent (6%) per annum."

In September, 1953, Cox assigned this instrument to plaintiffs. Defendant having failed to make other than a \$10 payment on the obligation, plaintiffs filed suit. Defendant answered by way of denials. She also filed a cross-complaint charging Cox with fraud and misrepresentation and that he substituted another animal for one he agreed to deliver. The court found in favor of plaintiffs on the issues raised by the complaint and answer. On the cross-complaint, the court found Cox had de-

livered an animal other than the one he had agreed to deliver and cross-complainant had been damaged thereby in the sum of \$250. This amount was deducted from the unpaid balance of \$3,190, and judgment accordingly entered for plaintiffs for \$2,940. The court, however, refused to allow interest at six percent as provided in the writing.

Defendant appeals from the judgment. Plaintiffs appeal from that portion of the judgment which disallows interest.

Defendant's Appeal

When the case came on for trial, defendant asked leave to file an amended and supplemental answer. While the proposed pleading is not before us, defendant's brief indicates that she sought to raise the affirmative defenses of failure of consideration and rescission on the ground of fraud. At a continued hearing on March 30, 1955 (the trial started on May 7, 1954), "defendant requested leave to amend her answer to conform to proof." While the nature of the proposed amendment is not further disclosed, apparently defendant was still desirous of raising these defenses. The request was denied.

[1] As a ground for reversal, defendant argues that the trial court abused its discretion in refusing her requests to amend her pleadings. Of course, to be a basis for a reversal of the judgment, it would be necessary to show that the rulings were prejudicial. This defendant has failed to do.

In considering the evidence under the allegations of the cross-complaint, the court found that Cox delivered defendant an animal other than one he had agreed to deliver and that she was damaged \$250 thereby. This was a finding of partial failure of consideration. It is thus clear that this issue was actually considered under the pleadings before the court. On the question of fraud which defendant raised in her cross-complaint, the court found against her charges. Thus, not being able to prove fraud, she could not, of course, establish a rescission based on

fraud. It therefore follows that defendant suffered no prejudice by the court's denial of her requests to amend her pleadings.

[2-4] Defendant contends that finding V is not sustained by the evidence. In this finding the court in effect found that all the allegations of the cross-complaint are untrue except, as above noted, that she received one animal when she should have had another, to her damage in the sum of \$250. As the aggressor in this phase of the case, the burden was on cross-complainant to establish her allegations. These were factual matters for the determination of the trial judge who had the responsibility, in making such determination, to pass upon the credibility of the witnesses, the weight that should be given to their testimony, and to resolve the conflicts¹ and inconsistencies, even in the testimony of an individual witness. *Peterson v. Peterson*, 74 Cal.App.2d 312, 319, 168 P.2d 474. Such a factual decision is controlling on appeal.

Defendant argues that the judgment is against the law in that the consideration for the agreement, of which the note was a part, failed. The difficulty with this argument is that the trial court found the consideration failed only to the extent of \$250 for which she received credit since the document was not a negotiable instrument and plaintiffs were not holders in due course.

Plaintiffs' Appeal

[5,6] Plaintiffs sued to recover a liquidated amount on which defendant had agreed in writing to pay interest at six percent. They were met with an unliquidated setoff. In such circumstances, "the general rule is * * * that: 'Where the amount of a claim under a contract is certain and liquidated, or is ascertainable but is reduced by reason of the existence of an unliquidated set-off or counterclaim thereto, interest is properly allowed on the balance found to be due from the time it became due. * * *'" *Hansen v. Covell*, 218 Cal. 622, 629, 630-631, 24 P.2d 772, 776, 89 A.L.R. 670; *McCowen v. Pew*,

1. At the trial, defendant insisted Cox had failed to complete all necessary papers and breeding certificates. However, he testified: "I took you [defendant] the

papers and gave them to you in your home * * * Made a special trip up there to take you all the papers on all the registered horses."

18 Cal.App. 482, 487, 123 P. 354; Lacy Mfg. Co. v. Gold Crown Mining Co., 52 Cal.App.2d 568, 579, 126 P.2d 644. The principle of the Hansen case, supra, was reaffirmed and applied in the recent case of California Lettuce Growers v. Union Sugar Co., 45 Cal.2d 474, 289 P.2d 785, at page 793, where the court stated, that "California Lettuce correctly contends that the mere pleading of unliquidated counterclaims does not render unliquidated an otherwise certain or determinable debt owing to the plaintiff. The unliquidated counterclaims are given treatment as discounts, not as payments made at the time the debt is due. Lineman v. Schmid, 32 Cal.2d 204, 195 P.2d 408, 4 A.L.R.2d 1380; Hansen v. Covell, 218 Cal. 622, 24 P.2d 772, 89 A.L.R. 670. They do not therefore affect the liquidated or unliquidated character of the debt." Under this rule, plaintiffs are entitled to interest on \$2,940 from September 16, 1950, at six percent per annum.

It is ordered that conclusion of law (a) be amended by deleting the period and adding thereto the following: "together with interest thereon at six percent (6%) per annum from September 16, 1950, amounting to \$970.20." It is further ordered that the following be deleted from the second paragraph of the judgment: "Two Thousand Nine Hundred Forty (\$2,940.00) Dollars" and the following be inserted in lieu thereof: "Three Thousand Nine Hundred Ten Dollars twenty cents (\$3,910.20)." As thus modified, the judgment is affirmed.

MOORE, P. J., and ASHBURN, J., concur.



139 Cal.App.2d 721

Raymond DAGDIGIAN, Plaintiff and Appellant,

v.

Kaspar J. DAGDIGIAN, Defendant and Respondent,

Gladys Caywood, Marie Arootian, and Harry Kerrigan, Defendants.

Civ. 4923.

District Court of Appeal, Fourth District, California.

March 6, 1956.

Action to establish constructive trust. The Superior Court, Fresno County, Ed-

ward L. Kellas, J., entered judgment in favor of defendant, and plaintiff appealed. The District Court of Appeal, Griffin, J., held that evidence failed to show that a constructive trust was created.

Judgment affirmed.

1. Trusts ⇐110

In action to establish constructive trust, plaintiff had burden of proving, clearly and convincingly, allegations of complaint.

2. Appeal and Error ⇐991

In action to establish constructive trust, question of whether plaintiff satisfied burden of proving allegations of complaint by clear and convincing proof was primarily one for trial court.

3. Husband and Wife ⇐264

Trusts ⇐110

In action to establish constructive trust, evidence did not show that mother's deed to father was under oral agreement that father was to have use of property during his lifetime after which he would cause the property to be conveyed to their four children, but supported finding that property was community property of father and mother. West's Ann.Civ.Code, § 164; West's Ann.Code Civ.Proc. § 382.

Allan S. Mason, Fresno, for appellant.

John D. Chinello, Gasper H. Magarian, Fresno, for respondent.

GRIFFIN, Justice.

This is an action to declare a claimed constructive trust in certain 60 acres of farm and vineyard lands in Fresno County. Plaintiff and appellant is the son of defendant and respondent Kaspar J. Dagdigian and Anna Dagdigian, deceased, who were married in 1906. Defendants Gladys Caywood, Marie Arootian and Harry Kerrigan, also children of Kaspar and Anna, were joined as parties defendant under section 382 of the Code of Civil Procedure. Respondent and his father Jacob, on December 23, 1926, acquired this property, and title was taken in respondent's name. Kaspar and Anna executed a deed to Jacob on December 31, 1926, to a 40 per cent interest in it. Apparently, on account of busi-

ness troubles, Kaspar and Jacob deeded the property to Anna on May 9, 1931, and on July 16, 1931, she filed a homestead on it in her own name. She deeded it to Kaspar on March 3, 1938, and on the same day Kasper and Anna executed a trust deed on the property to secure the payment of \$5,000 to one Freeland, from whom Kaspar and Jacob had acquired the property in 1926. Kaspar and Anna had lived and worked on the property for at least 25 years before her death in 1950.

Plaintiff's complaint alleges that Anna deeded the property to Kaspar on March 3, 1938, under an oral agreement between them whereby Kaspar was to have the use of the property during his lifetime, and "at his death, he would convey the said property and/or cause it to be transferred to the four (4) children, that is, * * * plaintiff herein, Gladys Caywood, Maria Arootian and Harry Kerrigan, the aforementioned real property in a tenancy in common". It alleged that the property was the sole and separate property of Anna at the time of the execution of this deed.

The court found that these allegations were untrue, and specifically found the property to be the community property of Kaspar and Anna. Judgment was entered in favor of respondent.

It is appellant's claim on this appeal that there was no substantial evidence to support the court's finding; that the testimony of appellant's witnesses, when considered in connection with the allowable presumptions, conclusively establish as a fact that the property was the separate property of Anna, and that the oral agreement did exist.

Appellant and his sister Gladys testified generally that the deed had been made upon the mutual agreement that upon the death of one or the other the survivor should retain a life interest in the property, and upon the death of both, the property should go to the four children. While respondent's testimony was not too clear, due to lack of education and knowledge of the English language, it does appear therefrom that he denied the existence of any such agreement, and denied such conversations.

[1,2] The trial court was entitled to disbelieve the testimony of appellant and his sister Gladys and to believe the testimony of respondent contradicting their testimony. Appellant had the burden of proving the allegations of his complaint by clear and convincing proof, and the question whether the showing was clear and convincing was primarily one for the trial court. *Hansen v. Bear Film Co., Inc.*, 28 Cal.2d 154, 173, 168 P.2d 946.

[3] Under the finding that no trust was created, the question of whether the property was separate or community becomes unimportant. However, the evidence amply supports the finding. Civ.Code, sec. 164.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J.,
concur.



139 Cal.App.2d 94

Carl SELBY and Robert S. Gregory,
Plaintiffs and Appellants,

v.

The COUNTY OF SACRAMENTO, a political subdivision of the State of California; Frank R. Elmer, Fred J. Bonetti, James H. Garlick, Ancil Hoffman and Walter C. Kelley, Supervisors of the County of Sacramento, Defendants and Respondents.

Civ. 8643.

District Court of Appeal, Third District,
California.

Feb. 7, 1956.

Rehearing Denied Feb. 28, 1956.

Hearing Denied March 28, 1956.

Action against county and members of board of supervisors for death of plaintiffs' horses, allegedly caused by county's cutting of county sewage line and resultant flowing of poisonous sewage onto land occupied by plaintiffs. Motion for nonsuit was granted by the Superior Court, Sacramento County, Ralph McGee, J., and plaintiffs appealed. The District Court of Appeal, Peek, J., held, inter alia, that where

the work was conceived by and carried out in accordance with previous plans of the county and the county board, no further notice of the condition created thereby was needed to bring to the defendants knowledge of the dangerous condition they themselves had created.

Judgment as to individually named members of board affirmed; judgment as to county reversed.

1. Counties ⇨144

County sewage line and ditch were public works and hence "public property" within meaning of Government Code section specifying conditions of liability for damage or injury from defective or dangerous condition of public property. West's Ann.Gov. Code, § 53050.

See publication Words and Phrases, for other judicial constructions and definitions of "Public Property".

2. Counties ⇨143

Where work was conceived by and carried out in accordance with previous plans of the county and county board, no further notice of condition created thereby was needed to bring to them knowledge of dangerous condition they themselves had so created, in order to impose liability upon them for injury resulting from a dangerous condition of public property. West's Ann. Gov.Code, §§ 1953, 53051(a, b).

3. Counties ⇨143

Municipal Corporations ⇨857

With respect to liability of county or municipal corporations for injury from dangerous or defective condition of public property, whether a given set of circumstances creates dangerous or defective condition is primarily a question of fact. West's Ann.Gov.Code, §§ 1953, 53051.

4. Constitutional Law ⇨87

Principles of nonliability and *damnum absque injuria* are not applicable when, in exercise of police power, private, personal and property rights are interfered with, injured or impaired in a manner or by a means or to an extent not reasonably necessary to serve public purpose for general welfare. West's Ann.Gov.Code, §§ 1953, 53051.

5. Counties ⇨144

Even if sewage problem presented county and county board with emergency, question whether damage suffered by plaintiffs as result of action taken by county to meet the emergency exceeded necessities of the case was question of fact for determination by jury in action for damages. West's Ann.Gov.Code, §§ 1953, 53051.

6. Counties ⇨143

In action against county and members of county board for death of livestock, evidence was sufficient to sustain a finding that condition dangerous to animals was knowingly created on public property by the county, that it failed to take any action to protect public against the condition and thereby proximately caused deaths of plaintiffs' horses. West's Ann.Gov.Code, §§ 1953, 53051.

7. Counties ⇨59

Where there was no showing that dangerous condition of county sewage line was directly attributable to work done by any board member individually or under his direction, that he had authority and that it was his duty to remedy such condition, or that funds were immediately available to him for that purpose as provided in statute specifying conditions of liability of officials for damage or injury from defective or dangerous condition of public property, individual board members were not liable. West's Ann.Gov.Code, §§ 1953(a-e), 53051.

James H. Phillips, Sacramento, for appellants.

J. F. O'Shea, Dist. Atty. of Sacramento County, and Russell A. Harris, Sacramento, Floyd H. Pettit, Sacramento, of counsel, for respondents.

PEEK, Justice.

By their action plaintiffs sought damages for the loss of 18 horses. At the conclusion of their case, defendants' motion for nonsuit was granted, and this appeal followed the judgment which was subsequently therein entered.

Plaintiffs' original complaint alleged that the individually named defendants were

the duly elected supervisors of the County of Sacramento; that the defendant county owned, operated and maintained a sewage maintenance district; that a sewage line of that district ran through pasture land owned by plaintiffs' lessor, upon which plaintiffs pastured horses; that defendants acting through their agents and employees, cut a hole in said sewage line thereby permitting sewage to escape and spread over the leased property; that as a result thereof the water and forage became contaminated and poisonous to horses; that as a proximate result of defendants' permitting the sewage to escape and spread over said land, the horses ate and drank the contaminated and poisoned forage and water, became ill and died; that at the time of so opening the sewer line defendants knew that horses were in the pasture and that sewage was dangerous and poisonous to them; and that plaintiffs had duly filed their claim for damages with said county as required by law and the same was rejected.

Defendants' answer admitted the cutting of the hole as alleged, but affirmatively alleged the same was an emergency measure; denied that sewage was discharged on the land; denied that the deaths of the horses were proximately caused by the eating and drinking of contaminated forage and water or that it was dangerous to them; and denied knowledge of the horses using the land for pasturage. Defendants' answer further admitted the filing of the claim as alleged. Upon the issues so joined, the cause proceeded to trial. During the course thereof the court, at its own suggestion and over defendants' objection, granted plaintiffs leave to amend their complaint by inserting in paragraph XI thereof the pertinent portions of Government Code, section 1953.

The evidence, viewed in the light most favorable to plaintiffs, *Bridges v. County of Los Angeles*, 131 Cal.App.2d 151, 280 P.2d 76, shows that for more than five years prior to the acts in question, plaintiff Selby had pastured horses on the property and that the plaintiff Gregory pastured a mare and a colt on the same land. When the horses in question were observed by plaintiffs on December 23 and 26, they appeared

to be in good condition. On the evening of the later date, plaintiffs noticed sewage on a portion of the land. It came from a hole cut in a concrete pipe by employees of the defendant district, thence spread over the banks of a ditch which had been dug across the land. Neither plaintiff had notice that the ditch was to be dug or that the hole was to be cut in the line. The following day Selby called the county executive officer and informed him of the condition. On the 28th plaintiffs noticed that some of the horses were sick. On the 29th Gregory's mare died, and thereafter 18 horses either died or were destroyed within a week or ten days of becoming sick. All of the horses exhibited the same symptoms.

On December 30 employees of the sewage maintenance district were observed with shovels placing more dirt on the sides of the ditch where the sewage was overflowing. However, this did not prevent the sewage, after it reached the end of the ditch, from spreading out over the ground and settling in low places in the pasturage. Where the sewage so spread over the grass, it left a foam four to six inches high which, when dry, formed a sheet somewhat like a thick piece of cardboard. Three or four weeks later the county built a fence around the ditch and the area where the sewage had spread over the ground. About a month later Selby put 12 horses back in the pasture and none became sick. Witnesses who pastured horses on adjacent land, some of which were thoroughbreds, testified to having so used the land for several years, and although there was star thistle on their land, as there was on the pasturage of plaintiffs, none of their horses had ever had the symptoms which caused the deaths of the Selby horses.

The county engineer testified that four days prior to the time the pipe was cut, he had explored the property and had decided that should storm conditions continue and the City of Sacramento refuse to take district sewage through the city line, then it would be necessary to relieve the district line by cutting a hole therein and carrying sewage over the land in question by means of a ditch; that he knew that sewage would create bacteria from which diseases could

be contracted; that he saw horses in the field but made no attempt to ascertain who owned them; and that he knew the owner of the land (a well-known Sacramento realtor and property owner) but was unable to contact him. The county sanitation officer also testified to bacteria in sewage.

Two veterinarians testified concerning star thistle disease and botulism poisoning, stating that the symptoms of the two diseases are somewhat similar, but their opinions that the cause of the horses' deaths was star thistle poisoning were neither uniform nor definite. One doctor stated that in his opinion star thistle disease was the cause. The other stated his opinion was given with the reservation that sewage could be a factor in rendering the star thistle toxic; however, they both testified that sewage was a suitable medium for the growth of the botulism organism which causes a toxic poisoning in animals; that the speed with which botulism affects an animal depends upon the severity of the attack and varies from a few hours to as much as two weeks; that botulism will cause death in horses in a much shorter period than will star thistle disease. One doctor testified that star thistle will affect an occasional animal but that here there were too many horses involved in the outbreak to attribute the deaths to star thistle poisoning; that a minute quantity of the botulism organism would cause death, but that it would take tons of star thistle to cause death; that when they first saw the animals they thought that the sewage might be a factor. One doctor testified that he was unable to say whether it was star thistle disease or botulism poisoning. Both of the veterinarians testified that their opinions could have been influenced by a prior autopsy performed December 11 by another veterinarian on a horse owned by Selby, wherein the disease had been diagnosed as star thistle poisoning.

At the outset of the trial, and immediately following the opening statement of counsel for plaintiffs, defendants moved for a judgment of nonsuit and dismissal upon the grounds that the court lacked jurisdiction for the reason that the county, in disposing of sewage, was acting for the

protection of the public health and welfare, a strictly governmental function, and hence enjoyed immunity from tort liability which it had not waived; and secondly, that the action was not based upon the Public Liability Act nor upon the theory that plaintiffs' damage in any way resulted from a dangerous or defective condition of public property. Defendants' motion was taken under consideration and the cause proceeded to trial. At the conclusion of the second day of trial, the court suggested that plaintiffs' complaint, to come within the Public Liability Act, should in so many words allege a dangerous and defective condition; that there should be a further allegation of notice and knowledge on the part of the county; and it should also allege that there was a failure to correct the dangerous condition after knowledge. Thereafter plaintiffs, in accordance with the suggestion of the court, were allowed to amend, over the objection of defendants' counsel. At the conclusion of plaintiffs' case, defendants again moved for a nonsuit, and the motion was granted upon the ground that " * * * the evidence offered by plaintiffs and each of them was insufficient as a matter of law to establish the liability of defendants or any of them."

Section 53051 of the Government Code provides that:

"A local agency is liable for injuries to persons and property resulting from the dangerous or defective condition of public property if the legislative body, board, or person authorized to remedy the condition:

"(a) Had knowledge or notice of the defective or dangerous condition.

"(b) For a reasonable time after acquiring knowledge or receiving notice, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition."

[1] In compliance with the statutory requirements of that section, plaintiffs alleged the creation by the county of a dangerous condition in public property, the cutting of the sewer pipe, knowledge of the dangerous condition, failure to protect them from that condition, and their resulting

damage. There can be no question but that the sewage line and ditch were public works and hence public property within the meaning of section 53050 of the Government Code. *Bauer v. County of Ventura*, 45 Cal.2d 276, 289 P.2d 1.

As previously noted, responsive to the allegations of their complaint, plaintiffs introduced testimony by the county engineer that because of heavy rains, he anticipated that the City of Sacramento might terminate the county's use of the city's sewage lines; that four days prior to the actual cutting of the pipe, he had surveyed the field, had seen horses there, made no attempt to ascertain who owned them and decided to dig the ditch and open the sewage line if the city shut off the county's use of that outlet. He further testified that he knew that sewage could create bacteria and that certain diseases could be contracted from sewage. The county sanitation officer testified that botulism-producing bacteria can be found in sewage, as did the two veterinarians.

[2-5] The work was conceived by and carried out in accordance with previous plans of the defendants, and hence, having been so created and carried out by them, no further notice of the condition created thereby was needed to bring to the defendants knowledge of the dangerous condition they themselves had so created. *McAtee v. City of Marysville*, 111 Cal.App.2d 507, 511, 244 P.2d 936. "Whether a given set of circumstances creates a dangerous or defective condition [in public property] is primarily a question of fact." *Fackrell v. City of San Diego*, 26 Cal.2d 196, 206, 157 P.2d 625, 630, 158 A.L.R. 773.

The same rule would apply even assuming as defendants contend, that the situation presented was an emergency since " * * * the principles of nonliability and *damnum absque injuria* are not applicable when in the exercise of the police power, private, personal and property rights are interfered with, injured or impaired in a manner or by a means, or to an extent that is not reasonably necessary to serve a public purpose for the general welfare." *House v. Los Angeles County Flood Control Dist.*, 25

Cal.2d 384, 392, 153 P.2d 950, 954. Necessarily then, whether the damage suffered by plaintiffs exceeded the necessities of the case, likewise was a question of fact for determination by the jury.

[6] In discussing the final question, it would appear unnecessary to again summarize the evidence produced by plaintiffs. It is sufficient to note that the evidence so summarized would sustain a finding that a condition dangerous to animals was knowingly created on public property by the county; that it failed to take any action to protect the public against the condition and thereby proximately caused the deaths of the plaintiffs' horses.

[7] Although we have concluded that plaintiffs' cause as against the County of Sacramento under section 53051, should have been submitted to the jury, that is not to say that the judgment of nonsuit as to the individually named defendant supervisors was not correct. The only theory under which plaintiffs could have proceeded against the board members personally was in accordance with the provisions of Government Code, section 1953, which provides that *all* of the following elements must appear:

"(a) The injury sustained was the direct and proximate result of such defective or dangerous condition.

"(b) The officer had notice of such defective or dangerous condition or such defective or dangerous condition was directly attributable to work done by him, or under his direction, in a negligent, careless or unworkmanlike manner.

"(c) He had authority and it was his duty to remedy such condition at the expense of the State or of a political subdivision thereof and that funds for that purpose were immediately available to him.

"(d) Within a reasonable time after receiving such notice and being able to remedy such condition, he failed so to do, or failed to take reasonable steps to give adequate warning of such condition.

"(c) The damage or injury was sustained while such public property was being carefully used, and due care was being exercised to avoid the danger due to such condition."

Even assuming that the complaint was sufficient as against the individual members of the board, there is no showing that the condition was directly attributable to work done by any defendant individually or under his direction, that he had authority and that it was his duty to remedy such condition, or that funds were immediately available to him for that purpose as provided in said section. It necessarily follows that the judgment of non-suit must be affirmed as to the board members.

The judgment as regards the individually named defendant members of the board of supervisors is affirmed. The judgment as regards the defendant County of Sacramento is reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



139 Cal.App.2d 641

M. V. WOMMACK and Arle R. Wommack,
Plaintiffs and Appellants

v.

Roy A. McCLURE, Defendant and
Respondent.

Civ. 8728.

District Court of Appeal, Third District,
California.

March 1, 1956.

Rehearing Denied March 29, 1956.

Hearing Denied April 25, 1956.

Landlords' action against tenant for declaratory relief construing lease of garage and gasoline station. The Superior Court, Sacramento County, John Quincy Brown, J., entered judgment and the landlords appealed. The District Court of Appeal, Schottky, J., held, inter alia, that where lease provided that garage was to be sub-

leased by tenant but that portion of garage was withdrawn from leased area, a subsequent oral agreement whereunder tenant was given right to use such area but whereunder tenant gave up right to sublease garage at rental in excess of that due to landlords, and permitted a landlord's son to occupy garage and supplied him with utilities and rest rooms, oral agreement was supported by sufficient consideration by tenant to be binding.

Judgment affirmed and appeal from order denying motion to vacate dismissed.

1. Landlord and Tenant §200.

Under lease providing that portion of premises were to be occupied by subtenant rather than by tenant himself and that tenant was not to be liable for rent on such portion of premises during any period when there was no subtenant in actual use and occupation of portion of premises, tenant was not required to secure subtenant but would be liable to landlords if he refused to rent to a proposed subtenant who was financially responsible.

2. Declaratory Judgment §347

In action by landlords under lease of gasoline station and garage, against tenant for declaratory relief, evidence supported trial court's findings that portion of garage withdrawn from written lease was leased to tenant by subsequent oral agreement under which tenant was not required to pay additional rent.

3. Landlord and Tenant §33

Where lease of gasoline station and garage provided that garage was to be subleased by tenant but that portion of garage was withdrawn from leased area, a subsequent oral agreement whereunder tenant was given right to use such withdrawn area but whereunder tenant gave up right to sublease garage at rental in excess of that due to landlords and tenant permitted a landlord's son to occupy garage and supplied him with utilities and rest rooms, oral agreement was supported by sufficient consideration by tenant to be binding.

4. Declaratory Judgment ⇨369

In action by landlords under lease of garage and gasoline station, against tenant, for declaratory relief, wherein trial court found that tenant had not violated terms of lease and that nothing was due from tenant to landlords under lease, finding disposed of landlords' contention that tenant had, in violation of lease, permitted a customer to park trucks in area behind garage building, even though finding did not specifically refer to such area.

5. Declaratory Judgment ⇨347

In action by landlords against tenants for declaratory relief construing lease, of garage and service station, whereunder it was provided that garage was to be subleased and that no liability for rent of garage would exist unless premises were subleased, and court found that tenant was liable to landlords if he refused to accept financially solvent subtenants, evidence on issue of whether proposed subtenants whom tenant refused were financially unsound supported findings adverse to landlords.

6. Landlord and Tenant ⇨200.2

Where lease provided that tenant would sublease garage and that rent due landlord on garage, when so occupied by subtenant, would be stipulated minimum plus percentage of gross business done by subtenant and that it was obligation of subtenant to submit certificate showing such business, where no subtenant ever had sales in amount sufficient to bring into play percentage rental provision, tenant was not liable to landlords for failure to furnish certificate of gross business done by a subtenant.

7. Appeal and Error ⇨110, 113(1)

Order denying motion to vacate judgment and for new trial was not appealable.

Stanley J. Gale, Sacramento, for appellants.

Dwyer & King, Sacramento, for respondent.

SCHOTTKY, Justice.

Plaintiffs M. V. Wommack and Arlie R. Wommack, his wife, have appealed from a judgment in favor of defendant and from the order of court denying plaintiffs' motion to vacate the judgment and for new trial. Plaintiffs sought declaratory relief; cancellation of a lease, and damages.

Appellants are lessors and respondent is the lessee of premises used by respondent for a truck terminal in Sacramento, California. It consists of a service station, truck terminal, and a large storage and repair building near the rear.

Under the lease the premises are divided into two portions. One of these is the "service station portion" under paragraph 3, which also includes approximately 50' x 40' in the northwest corner of the main building, and the other is the "garage portion" under paragraph 4, which provides for the rental "for that portion of the premises not described in Paragraph 3." Different rental formulas are provided for each of the areas. Under paragraph 3, rental was a percentage of the fuel sales with a minimum of \$350 per month. Under paragraph 4, rental was a percentage of "all business done" on that portion with a minimum of \$250 per month. Paragraph 4 also provided: "The parties do not contemplate the use by the Tenant, himself, of that portion of the premises and that portion of the personal property which is the subject matter of paragraph 4. The subletting of the same by the Tenant to a Sub-Tenant is the plan and agreement of the parties. The certificate, accordingly, giving expression to the net gross sales and charges for any month will of necessity be prepared by the Tenant's Sub-Tenant rather than by the Tenant, himself." Paragraph 4(a) of the lease provided: "It is the express agreement of the parties that there shall be no rental obligation on the tenant (minimum or additional percentage rental) during any period that the tenant is without a subtenant in the actual use and occupation of that portion of premises and that portion of the personal property which is the subject of paragraph number four (4)."

The lease became effective in March, 1948, and from that time until March, 1949, the garage premises were occupied by a subtenant and the rental was paid regularly. Since that time the garage has had intermittent periods of occupancy and vacancy, and this fact has caused the difficulties resulting in this litigation.

The trial court found that during the months of May, 1949, December, 1949, November, 1950, and February, 1951, C. E. Jacobs stored ice cream trucks on the garage premises with the knowledge and consent of the plaintiffs; that all of the rental paid by Jacobs was paid to plaintiffs, and plaintiffs waived the right to require rental payments by defendant as to the \$250 minimum; that in August and September, 1951, Frank Hayashida stored trucks on the garage premises with the knowledge and consent of the plaintiffs; that all of the rental except \$10 received by the defendant from Frank Hayashida was paid to the plaintiffs, and plaintiffs waived the \$250 rental requirement of the defendants; that in August, September, October, November and December, 1952, and January, 1953, Glenn Wommack, the son of the plaintiff M. V. Wommack, occupied the garage premises with the express agreement that no rental was to be charged the defendant; that from October, 1952, until the time of trial, a certain 30' x 60' space in the northeast corner of the garage portion was occupied by Dan Caw; that plaintiffs had agreed and consented to withdraw this portion from the lease and to allow the defendant the use of this portion for any purpose without the obligation of rental; that during April, July and September, 1953, the firm of Norman and Goodman occupied the garage premises and plaintiffs expressly accepted \$100 in full payment of rental from that firm and waived the right to further payment by defendant.

The court concluded that the plaintiffs are not entitled to recover anything from the defendant, nor are they entitled to cancel or terminate the lease. In its judgment the court also gave declaratory relief to the effect that (A) the defendant is obligated to pay rental of \$250 per month

at any time when any person occupied the garage portion without the prior knowledge, consent and agreement of the plaintiffs so long as such persons carry on any substantial activity therein without regard to whether such activity is related to the garage business and no matter what rental is paid by such persons to defendant; that (B) the lease imposes no duty on the defendant to secure subtenants or to attempt to secure subtenants; that (C) the defendant is privileged to refuse to accept a subtenant who does not enjoy a reasonably sound financial and/or business position; that (D) plaintiffs have no right to make a sublease of the garage portion; that (E) under the lease the defendant is not entitled to use a certain 30' x 60' area in the northeast corner of the garage portion, but "The right of said defendant to use said area is based upon an oral agreement with plaintiffs wherein plaintiffs gave to defendant the right to retain and use said area and wherein plaintiffs agreed that said area would not be subject to the provisions of paragraph 4 of said lease."

Appellants state that they do not contend that the findings are not supported by the evidence but that they do contend that the findings are contrary to law.

[1] Appellants first contend that the court erroneously declared in its judgment that "The said lease imposes no duty on the defendant to secure subtenants or to attempt to secure subtenants." However, this declaration must be considered along with the further declaration that respondent is obligated to pay rental of \$250 per month if any person occupies the garage portion without appellants' consent and that respondent may refuse to accept a subtenant who is not financially responsible. It is clear that there is nothing in the lease which requires respondent to secure a subtenant but it is also clear that respondent would be liable to appellants if he refused to rent to a proposed tenant who was financially responsible. The situation shown by the record is well expressed by the trial court in its memorandum opinion as follows:

"We next come to the question of the duty imposed upon the defendant

lessee here in securing a sub-lessee. Again the answer to this has to be based on sound common sense and business experience. Obviously, it is not going to be helpful to either the plaintiffs or the defendants to have a sub-tenant in the building who is not a reasonable business risk. There was a great deal of implication and argument that the defendant had arbitrarily refused to entertain any sub-tenants in this matter, but the court finds that the evidence does not support this position. Lessee has the same rights in choosing his sub-tenants as the plaintiff lessor had in choosing his tenant, the defendant. Freedom of contract means the right to determine whether the party with whom you are about to contract is financially sound and of the business caliber that you would reasonably expect under the circumstances. This, it seems to the court, is the duty of the defendant and if actually it can be shown at a future time that he has been arbitrary and has refused a tenant for other motives, that is a factual question to be then decided. The landlord would have no right to place a sub-tenant or sub-lessee in the building since that, of course, would be completely anomalous to the very words we are using. The fact we are using 'sub' lessee means that that party leases from the defendant, not from the plaintiffs.

"The court feels that the evidence clearly shows that the reason that this building has been vacant so much and that there has been no time at which there has been any need for checking anyone's accounts (since no one did anything like the amount of business necessary to arrive at a rental of \$250 per month), is apparently because there is just not the demand for that type of business at that location. The defendant is the tenant of the entire premises and it certainly would be ridiculous for him to place a sub-lessee in the building at a rent below \$250 per month which obligates him to pay the plaintiffs that sum."

Appellants contend that the court has given effect to an executory oral modification of a written lease when the court found that a certain 30' x 60' area in the northeast corner of the garage portion, referred to in the record as the "MC" area, was withdrawn from the lease in accordance with an oral agreement wherein plaintiffs gave to defendant the right to retain and use that area without being subject to the provisions of paragraph 4. Respondent argues that the oral agreement was supported by consideration in that when respondent made the agreement he gave up the right to sublease the garage portion of the premises at a rental in excess of \$250 per month, permitted appellant Wommack's son to occupy the garage and supplied utilities and restrooms. Furthermore, on many occasions when McClure paid his rent appellant Wommack signed a statement reciting that there was "no tenant in the garage" even though the "MC" premises were occupied by Dan Caw and this fact was known to appellant Wommack.

In the case of *D. L. Godbey & Sons Construction Co. v. Deane*, 39 Cal.2d 429, 246 P.2d 946, the Supreme Court held that where the oral agreement is supported by consideration it may be enforced even though executed only on the side of the party seeking enforcement. This case was followed in *Wade v. Markwell & Co.*, 118 Cal.App.2d 410, 421, 258 P.2d 497, 37 A.L.R.2d 1363. See also 40 Cal.L.Rev. 599, 600. Most of the cases cited by appellants concerning this question are distinguished in the Godbey case.

[2,3] We are satisfied that the finding of the court that the so-called "MC" area was by mutual agreement of the parties withdrawn from the provisions of paragraph 4 of the lease and that respondent was not required to pay any rental therefor is supported by substantial evidence, and further that the oral agreement was supported by sufficient consideration.

[4] Appellants contend also that a controversy exists with regard to an area behind the garage building. Frank Hayashida was engaged in the hauling and trucking business and respondent permitted

Frank to park his trucks in this area for two or three years and to store some personal property inside the garage premises. Frank bought all of his fuel and automotive equipment from respondent and was a "wonderful customer." Appellants contend that if the area is part of the premises described by paragraph 4 of the lease, McClure is obligated to pay the minimum rental during the period of occupation by Frank, and that if it is a portion of the premises described by paragraph 3 of the lease, then it falls squarely within the prohibition against subleasing, or subletting, contained in paragraph 14 of the lease. Appellant argues that this cannot be reconciled with the judgment that the lessee was not in default in any way, and that the lessor was not entitled to any relief.

Respondent in reply points out that the trial court found that appellant Wommack knew and consented to the occupancy by Frank of the garage itself and this finding was supported by the evidence. As to "Frank's Trucking Area", respondent argues that a reading of the lease substantiates his position that this area was part of the service station area and therefore came under the provisions of paragraph 3. As to appellants' argument that there has been a violation of the prohibition against assignment or subletting, respondent contends that such issue was not tendered in the pleadings. In this regard appellants argue that the record is clear that all of the matters raised on appeal were fully presented to the trial court. Appellants cite *Viglione v. City and County of San Francisco*, 109 Cal.App.2d 158, at page 160, 240 P.2d 68, at page 69, wherein the court said: "* * * 'that where a cause is tried and evidence introduced on the theory that material issues have been raised by the pleadings and the trial court renders judgment on such theory, a party will not be allowed for the first time on appeal to complain that such issues were not raised by the pleadings.'" Appellants also cite the case of *Miller v. Peters*, 37 Cal.2d 89, 93, 230 P.2d 803, to the same effect. However, it should be pointed out that in the instant case the court did not "render

judgment on such theory," so the cited cases are not applicable because the trial court chose to confine its judgment to the issues made by the pleadings. The views of the court as to the issues are thus expressed in its memorandum opinion:

"In Paragraph IV of plaintiffs' complaint, plaintiff alleges that a controversy exists between the parties and sets forth three matters wherein they request the declaratory relief. These are noted A, B, and C. However, when we come to the plaintiffs' brief, plaintiffs are now asking the court to determine sixteen questions which are therein set out.

"At the outset, therefore, the court wishes to remind plaintiffs that while this is a proceeding in equity and the court has a duty to render a declaratory judgment on controversial issues which are juridical in their nature, that does not mean that the court becomes the associate counsel for either side to advise the parties what might be a future ruling of the court on any contingency that may arise."

While the court did not refer specifically in its findings and judgment to any controversy with regard to the area behind the garage, it did find and hold that respondent had not violated the terms of the lease and further that nothing was due from respondent to appellants under the terms of said lease.

[5] Appellants' further contentions that respondent failed to sustain the burden of proving that the proposed subtenants were financially unsound, and that there is some liability on the part of respondent for unpaid rental on the garage portion of the premises by reason of the refusal of respondent to accept three specific subtenants, involve issues of fact which the court, upon sufficient evidence, determined adversely to appellants.

[6] Appellants' final contention is that respondent has breached the lease by failing to furnish the certificate of gross business done by the subtenants as provided in paragraph 4 of the lease. However, aside from the fact that the lease imposes no

obligation on McClure to submit such a certificate, it being the obligation of the subtenant, the trial court found that no subtenant ever had sales in an amount sufficient to bring into play the percentage rental provisions of paragraph 4 of the lease. On this point there was no evidence introduced by appellants.

While the evidence in the instant case was sharply conflicting and showed a somewhat confusing situation, we are satisfied from a study of the entire record that the findings and judgment of the court are supported by substantial evidence and that the court fully and fairly determined the issues that were before it.

[7] The judgment is affirmed. The order denying the motion to vacate the judgment and for a new trial being non-appellable, the appeal therefrom is dismissed.

VAN DYKE, P. J., and PEEK, J., concur.

Hearing denied; SPENCE, J., dissenting.



139 Cal.App.2d 842

Marjorie Duncan BAKER, Plaintiff and Appellant,

v.

Harry COHEN and City of Beverly Hills, a Municipal Corporation, Defendants,

City of Beverly Hills, a Municipal Corporation, Respondent.

Civ. 21425.

District Court of Appeal, Second District, Division 2, California.

March 14, 1956.

Individual brought action against city for injuries allegedly caused by a defective and dangerous condition in a public street. The Superior Court of Los Angeles County, A. Curtis Smith, J., entered judgment adverse to the individual, and he appealed. The District Court of Appeal, Ashburn, J., held that where written claim, which had

been filed by individual with city attorney, was not verified as required by statute, it was ineffective and could not form the basis of an action against the city, and that the city was not estopped to set up defense that the claim was not verified because of the fact that city attorney wrote a letter to individual acknowledging individual's letter concerning the accident and stating that a copy of the letter had been forwarded to certain insurance company.

Judgment affirmed.

1. Municipal Corporations Ⓒ312(3)

Where written claim, which was filed by individual with city attorney, and which stated that individual received injuries because of defective and dangerous condition of public street, was not verified as required by statute, it was ineffective and could not form the basis of an action against the city. West's Ann.Gov.Code, §§ 53050-53053.

2. Estoppel Ⓒ62(5)

In action by individual against city for injuries allegedly caused by defective and dangerous condition of public street, city was not estopped to set up defense that claim, which individual filed with city attorney, was not verified as required by statute, merely because city attorney wrote individual a letter stating that city attorney had received a letter regarding individual's accident and that a copy of the individual's letter had been forwarded to insurance company. West's Ann.Gov.Code, §§ 53050-53053, 53056.

William Dellamore and E. W. Miller, Los Angeles, for appellant.

Mount, Pendleton & Gillaspay, Los Angeles, for respondent.

ASHBURN, Justice.

Plaintiff appeals from a judgment in favor of defendant City of Beverly Hills, entered after sustaining of general demurrer to her amended complaint without leave to amend. The action was brought to recover damages for personal injuries alleged to have been caused by a defective and dan-

gerous condition in a public street, Govt. Code, §§ 53050-53053. The sections relating to notice of claim are set forth in the margin¹.

[1] The complaint alleged that within 90 days after the accident plaintiff filed with the city clerk "a written claim for damages;" also that "a copy of said written claim" was filed with the city attorney within said period. It is not alleged that the claim was verified. The accident was on October 13, 1953, and the filing with both city officials was on January 5, 1954, within the 90-day period. The only response of any kind that plaintiff ever received from the city or its officials was a letter from the city attorney, reading as follows: "A copy of your letter of January 4th, addressed to the City Clerk of the City of Beverly Hills regarding a fall which you had at 1000 North Crescent Drive, Beverly Hills, has been forwarded to the Foreman's Fund Indemnity Insurance Company of Los Angeles." The complaint further avers that "plaintiff at all times before the filing of this action relied upon said acts and representations of said City as an acknowledgment of said claim and its sufficiency as a claim, in proper and legal form, against said City, for its action thereon." Counsel for both sides concede that the claim bore no verification of any sort and argue the appeal upon that assumption. Appellant's reply brief says: "The sole questions as to the claim is the question of whether or not under all the circumstances as set forth in the amended complaint there was a substantial compliance with the statute; and are the facts pleaded in the complaint sufficient to establish a *prima facie* case of estoppel of the defendant to plead noncompliance with the statute."

"Compliance with the claims provisions of sections 53050 et seq. is the *sine qua non* to the maintenance of an action against a county for losses resulting by reason of

dangerous or defective condition of public property." *Albaeck v. Santa Barbara County*, 123 Cal.App.2d 336, 340, 266 P.2d 844, 846. Though the original requirement of strict compliance with the statute has given way to a rule requiring only substantial compliance, *Peters v. City and County of San Francisco*, 41 Cal.2d 419, 426, 260 P.2d 55; *Cruise v. City and County of San Francisco*, 101 Cal.App.2d 558, 563, 225 P.2d 988, it has been held repeatedly that the filing of an unverified claim is not a substantial compliance and hence cannot form the basis for an action against a municipality under the Public Liability Act. *Spencer v. City of Calipatria*, 9 Cal.App.2d 267, 269, 49 P.2d 320; *Douglass v. City of Los Angeles*, 5 Cal.2d 123, 128-129, 53 P.2d 353; *Hall v. City of Los Angeles*, 19 Cal.2d 198, 203, 120 P.2d 13; *Powers Farms v. Consolidated Irr. Dist.*, 19 Cal.2d 123, 130, 119 P.2d 717; *Redlands High School Dist. v. Superior Court*, 20 Cal.2d 348, 358, 125 P.2d 490; *Kline v. San Francisco Unified School Dist.*, 40 Cal.App.2d 174, 177, 104 P.2d 661, 105 P.2d 362; *Oda v. Elk Grove, etc., School Dist.*, 61 Cal.App.2d 551, 554-556, 143 P.2d 490; *Bradshaw v. Glenn-Colusa Irr. Dist.*, 87 Cal.App.2d 882, 883-884, 198 P.2d 106; *White-Satra v. City of Los Angeles*, 14 Cal.App.2d 688, 690, 58 P.2d 933; *Cooper v. Butte County*, 17 Cal.App.2d 43, 47, 61 P.2d 516.

In *Spencer v. City of Calipatria*, supra, it is said at page 269 of 9 Cal.App.2d, at page 321 of 49 P.2d: "Not only is the filing of an unverified claim not a substantial compliance with a statute requiring that a verified claim be filed, but, in two recent cases, it has been held that the provisions of the two statutes here in question are mandatory and must be complied with in order to lay the foundation for an action. [Citing cases.] No right to bring such an action exists independent of statutory enactment and, in giving such a right, the Legislature may prescribe the procedure

1. § 53052. "When it is claimed that a person has been injured or property damaged as a result of the dangerous or defective condition of public property, a verified written claim for damages shall be filed with the clerk or secretary of the legislative body of the local agency within

ninety days after the accident occurred."

§ 53053. "The claim shall specify the name and address of the claimant, the date and place of the accident, and the extent of the injuries or damages received."

and conditions under which it may be exercised. That such a claim must be verified is a reasonable provision which should not be held to be ineffectual and meaningless." A discussion of this case in *Douglass v. City of Los Angeles*, supra, ends with this statement, 5 Cal.2d at page 129, 53 P.2d at page 355: "The holding therein made is hereby declared to be the law in all cases coming within its purview." *Hall v. City of Los Angeles*, supra, says at page 203 of 19 Cal.2d, at page 16 of 120 P.2d: "The holding of the *Spencer* case was expressly approved by the Supreme Court in *Douglass v. City of Los Angeles*, 5 Cal.2d 123, 53 P.2d 353, and was declared to be the law in all cases coming within its purview."

No case is cited and none has been found which departs from the rule of the *Spencer* decision. Cases such as *Peters v. City and County of San Francisco*, supra, 41 Cal.2d 419, 260 P.2d 55, and *Germ v. City and County of San Francisco*, 99 Cal.App.2d 404, 413, 222 P.2d 122, are not in point for they involve the form of the verification, holding that failure of the affiant to appear before the notary does not vitiate the verification because it, when thus executed, "was sufficient to support a perjury charge were any false matters stated therein." 99 Cal. App.2d at page 414, 222 P.2d at page 130. Substantially the same language is used in *Peters*, supra, 41 Cal.2d at page 426, 260 P.2d 55. In *Osborn v. City of Whittier*, 103 Cal.App.2d 609, 619, 230 P.2d 132, 138, it is said: "The term 'verified,' as applied to claims against municipalities, has a settled meaning, and refers to an affidavit attached to the claim, as to the truth of the matters therein set forth. [Citing cases.] The chief test of the sufficiency of an affidavit is whether it is so clear and certain that an indictment for perjury may be sustained on it if false. [Citing cases.]" There is no problem of sufficiency of a verification presented at bar, because there is no verification at all, and "[s]ubstantial compliance cannot be predicated upon no compliance." *Hall v. City of Los Angeles*, supra, 19 Cal.2d 198, 202, 120 P.2d 13, 15.

[2] Appellant's claim of estoppel depends upon the letter from the city attorney to plaintiff and the silence of other officials

following the filing of the unverified claim. Certainly, silence alone can afford no basis for such a finding. The city attorney's letter gave plaintiff no assurances of any kind, offered no compromise, suggested no course of action for plaintiff to take. In fact, it did not expressly recognize plaintiff's letter as a claim; it uses these expressions: "A copy of your letter of January 4th," "regarding a fall which you had,"—not regarding "a claim which you have." Finally, it says that a copy of the letter "has been forwarded to the Foreman's Fund Indemnity Insurance Company of Los Angeles." This carries an implication of existing insurance protecting the city against such liability as that claimed by plaintiff, Govt.Code, § 53056, but it cannot be said that the reference to the insurance company would convey to the mind of layman or lawyer any promise or prediction of payment, compromise, or altruistic consideration. Casualty insurance companies are in business for profit and their handling of such matters, as is well known, must be conducted upon a strictly business basis.

Factually, the cases of *Farrell v. Placer County*, 23 Cal.2d 624, 628–630, 145 P.2d 570, 153 A.L.R. 323; *Cruise v. City and County of San Francisco*, supra, 101 Cal. App.2d 558, 562, 565, 225 P.2d 988; *Lorenson v. City of Los Angeles*, 41 Cal.2d 334, 340, 260 P.2d 49; and *Mendibles v. City of San Diego*, 100 Cal.App.2d 502, 506, 224 P.2d 42, are clearly distinguishable from the situation at bar. It is governed, rather, by *Slavin v. City of Glendale*, 97 Cal.App.2d 407, 409, 217 P.2d 984, and *Klimper v. City of Glendale*, 99 Cal.App.2d 446, 451, 452, 222 P.2d 49. In the last cited case, which turned upon the sufficiency of the complaint, it was alleged that plaintiff had contacted the mayor, chief of police, city manager and a member of the city council, advising them that she intended to file a claim and later to file a suit against the city and those officers; that they were fully advised of her grievance against the city; that she requested of the mayor, chief of police and the member of the city council, information as to what procedure she should take, and that said officials advised that her claim could be adjusted and settled, and advised her to wait to see what developed;

**In the Matter of the ESTATE AND GUARDIANSHIP of Susan Ann BLAIR, etc.,
an Incompetent.**

**Rebecca RILEY, Contestant and Appellant,
v.**

**Naomi Blair RUOFF, Petitioner and
Respondent.**

Civ. 21334.

**District Court of Appeal, Second District,
Division 1, California.**

March 14, 1956.

Rehearing Denied April 4, 1956.

Hearing Denied May 9, 1956.

Proceeding in the matter of the estate and guardianship of an incompetent. From an order of the Superior Court of Los Angeles County, Walter H. Odemar, J., approving account of closing the expenses, discharging the guardian and exonerating the bond, and denying objections to closing expenses, petition for surcharge, and for vacation of the order, the administratrix of the deceased ward's estate appeals. The District Court of Appeal, Doran, Acting P. J., held that where daughter who was executrix of the estate of her father and the guardian of the estate of her incompetent mother acted in good faith in not seeking a widow's allowance from the father's estate, she was not subject to liability for failure to apply for such amounts during the widow's lifetime.

Order affirmed.

1. Mental Health §219

Where daughter was appointed executrix of her father's estate and was also guardian of the estate of the incompetent widow of the decedent and acted in good faith with ordinary prudence in maintaining the widow from her own estate and not seeking widow's allowance, imposition of liability on the daughter in failing to apply for the family allowance was properly denied. West's Ann.Prob. Code, § 680.

2. Judgment §715(3)

Where only issue before the reviewing court on a previous appeal was whether a family allowance for the maintenance of the widow of the deceased could be made after the widow's death, and it was held that

that they did not advise her to file a written verified claim but assured her that her grievance against the city and its officials would be properly taken care of; that she believed and relied upon said representations and assurances and therefore failed to file a written verified claim within the 90-day period, which she would have done had she not received the advice aforesaid. 99 Cal.App.2d at page 450, 222 P.2d 49. Concerning the plea of estoppel, Mr. Justice Parker Wood, speaking for the court, said at page 452 of 99 Cal.App.2d at page 53 of 222 P.2d: "Appellant contends further that she alleged sufficient facts to show that respondents City of Glendale and officers were estopped to rely upon the provisions of the charter and the ordinance with reference to presenting a claim. Appellant cites certain cases in which the doctrine of estoppel was applied. It is to be noted that in each of those cases a claim had been filed but it was not filed within the time provided by law for filing such claim. In the present case no claim has been filed. Sufficient facts were not alleged to excuse appellant's failure to file a claim." Hearing in Supreme Court was denied. We see nothing to justify plaintiff's averment in this case that "at all times before the filing of this action [she] relied upon said acts and representations of said City as an acknowledgment of said claim and its sufficiency as a claim, in proper and legal form, against said City, for its action thereon."

No complaint is made by appellant of the refusal of leave to amend, nor is there any suggestion in the record that appellant desires or could make a helpful amendment. Indeed, the reply brief concludes with a paragraph containing this: "[A]nd that Plaintiff is entitled to a reversal of that judgment, permitting the appellant to go to trial on the amended complaint as filed, and submit the issue of the substantial compliance of the statute under the most recent authorities cited in the opening brief, and the facts on which the Court may determine at the trial the merits of the estoppel of defendant as set forth in the amended complaint."

Judgment affirmed.

MOORE, P. J., and FOX, J., concur.

the statute made no provision for such allowance, previous decision was not res judicata of the issue whether the daughter of the parties as guardian of the widow and the father's executrix should be held liable for failure to apply for such allowance during the widow's lifetime. West's Ann. Prob. Code, § 680.

3. Mental Health ☞310

Where the trial court ordered maintenance of widow of deceased from her own estate and such decision was not appealed from and payments were made by daughter of widow, and when a stipulation was made between parties, objectant made no claim against daughter for paying maintenance of widow from her estate and not collecting widow's allowance, and account of the daughter as guardian was duly filed and approved, matter was concluded, and guardian was not surchargeable for failure to apply for family allowance for the widow from the decedent's estate. West's Ann. Prob. Code, § 680.

Pines & Walsh, and Roy B. Woolsey, Los Angeles, for appellant.

Leon U. Everhart, Pasadena, for respondent.

DORAN, Acting Presiding Justice.

This is an appeal by Rebecca Riley, as administratrix of the deceased ward's estate, from an order in the guardianship proceeding, approving account of closing expenses, discharging the guardian, Naomi Blair Ruoff, and exonerating bond; and denying objections to closing expenses, petition for surcharge and for vacation of order.

Alfred G. Blair died July 8, 1950, leaving the entire estate to wife Susan for life, with remainder for life, share and share alike to the respondent daughter, Naomi Blair Ruoff and to Phoebe L. Bonnen, and their survivor. On August 2, 1950, Naomi was appointed executrix of Mr. Blair's estate. On August 8, 1950, the widow, Susan, was declared incompetent and Naomi became guardian of both person and estate.

Although Mr. Blair's estate was sufficient to provide a widow's allowance, no application therefor was made by anyone.

Naomi, as guardian, secured in Susan's guardianship proceeding, an order for the widow's maintenance, of not to exceed \$500 per month for 14 months. No appeal from this order was taken. The maintenance of Susan, under this order, was accordingly paid from the guardianship estate until Susan's death on May 2, 1951, the sum of \$5,216.58 being so paid.

Subsequent to the death of Susan, Phoebe L. Bonnen was appointed administratrix of Susan's estate, and on August 31, 1951, Naomi filed a final account as Susan's guardian, showing the above mentioned expenditure for Susan's maintenance. No objections were filed to this account and the same was duly approved and settled; no appeal was taken from the order made. Thereafter, Naomi, the retiring guardian, sought the vacation of this final settlement with leave to file a supplemental and amended report to include additional matters not relating to the widow's allowance. To certain items of this final account, Phoebe L. Bonnen, Susan's administratrix, filed written objections, but made no objection that the guardian's report did not show application in Mr. Blair's estate for a widow's allowance nor that the report wrongfully showed maintenance from the ward's estate. Subsequently thereto, Phoebe resigned as administratrix and Rebecca Riley, appellant herein, was appointed as Susan's administratrix.

At the hearing on the objections, at which all interested parties were present in person or by counsel, the trial court determined that payment made by Naomi as the guardian, of certain notes of Alfred G. Blair, amounting to \$18,453.94, should have been made by Naomi as executrix of Alfred's estate. Certain other minor items were found not proper credits, and an order of June 11, 1953, surcharged the guardian in the total sum of \$19,794.47. Naomi was ordered to pay such sum to Rebecca Riley, appellant herein, as the administratrix of Susan's estate. It was further ordered "that except as herein otherwise adjudged, said guardian's account as supplemented, is approved and settled". It will be noted, as respondent points out, that in this proceeding no objection was made to the guardian's

payment for Susan's maintenance, and the trial court did not direct Susan's estate to sue Alfred's estate for the amount so expended.

On June 24, 1954, in open court, in proceedings relating to the estate of Alfred, a settlement stipulation was entered into between Phoebe L. Bonnen, Rebecca Riley, who was Susan's administratrix, and Naomi, the then executrix of Alfred's estate and Susan's guardian, whereby Alfred's estate repaid to Susan's estate the \$18,453.94 erroneously paid out of Susan's estate to cover Alfred's notes. Naomi had paid to Susan's estate the minor items surcharged, retained only \$500 for closing expenses in the guardianship, and resigned as Alfred's executrix. The trial court made an order pursuant thereto.

In arriving at this settlement stipulation, the court said, "Let's not quibble about the interest", and inquired whether there were "any other matters that we have not covered?" Susan's administratrix, Rebecca Riley, the present appellant, raised no further question as to any claims against Naomi or the guardianship estate.

Naomi thereafter filed a report of the closing expenses as ordered, and petitioned for discharge. The appellant Rebecca, as Susan's administratrix, then filed objections thereto, seeking to open up the entire record, to vacate the order of June 11, 1953, and to hold Naomi liable for failure to collect interest from Alfred's estate on the \$18,453.94 paid on Alfred's notes. On March 25, 1955, the trial court overruled appellant's objections, approved the closing account, discharged Naomi as guardian, refused to vacate the previous order of June 11, 1953, and refused to further surcharge the guardian. The present appeal is from this order.

In the written objections just mentioned, appellant sets forth, "That following the death of said Susan Ann Blair and the appointment of an administratrix for her estate, an application for such family allowance was then filed. An order was thereafter made for the payment of such family allowance from the estate of Alfred G. Blair, deceased, from which order the said Naomi Blair Ruoff and one Alfred

Granville Blair, appealed. Said appeal was ultimately determined by the Supreme Court * * * in which the order for family allowance was reversed on the ground that the death of Susan Ann Blair divested the probate court from making an order in her predeceased husband's estate for her allowance. In its opinion in such case, 42 Cal.2d 728, 269 P.2d 612, 615, the Supreme Court held that 'The guardian may be held to account in the guardianship proceedings for any alleged failure to preserve his ward's estate by failing to make a timely application for family allowance'. The failure of the guardian to apply for a family allowance from her predeceased husband constituted a fraud upon the ward and upon the ward's estate."

It is appellant's contention that "A. A guardian is liable for failure to take advantage of a right or source of funds as family allowance"; that "B. Approval of the guardian's account does not deprive the court of jurisdiction to hold her liable for failure to apply for family allowance, although such failure occurred during a period covered by the account"; and that "C. The guardian should not be discharged and her bond should not be exonerated until she has paid the interest" on the \$18,453.94 hereinbefore mentioned.

The record herein discloses a long series of objections, and court proceedings of various kinds in relation to the three estates involved, namely that of Alfred G. Blair, deceased, Susan Ann Blair, incompetent, and Susan Ann Blair, deceased, dating from the death of Alfred in 1950. After divers legal maneuvers, a stipulation was entered into in open court, as hereinbefore mentioned, which apparently, as respondent states, "closed all connection and responsibility of Naomi in both estates except for the item of Closing Expenses left in her hands under court order".

The position of the appellant is untenable. A survey of the record indicates that appellant's rights have in no manner been prejudiced at any point in the proceeding, and that the determination as it now stands, and as it stood when the settlement stipulation was entered into, affords adequate protection to all parties having an interest

therein. It is fundamental that there must be an end to all litigation.

[1] As stated in respondent's brief, "A person who is simultaneously executrix of one estate and guardian of the estate of the incompetent widow of the decedent and who acts in good faith with ordinary diligence and prudence in maintaining the ward from her own estate and not seeking widow's allowance has no liability for mistake in judgment". In the instant case there is no showing of bad faith, carelessness or imprudence on the part of Naomi. In this situation, there is no occasion for the imposition of liability.

[2] The previous appeal, *In re Estate of Blair*, 42 Cal.2d 728, 269 P.2d 612, furnishes no authority for the appellant's position. The only issue before the reviewing court in that case was whether a family allowance for maintenance of the widow could be made after the widow's death, and it was held that such allowance is entirely statutory, and Probate Code, Section 680 makes no provision for such allowance after a widow's death. Whether Naomi, as Susan's guardian and Alfred's then executrix, should be held liable for failure to apply for such allowance during the widow's lifetime, was not an issue. Nor is the appellant's argument supported by the other authorities cited.

[3] As hereinbefore noted, the trial court's order authorizing Susan's maintenance from the incompetent's estate, was not appealed from, and became final. Payments, authorized by such order, were made by Naomi as hereinbefore set forth. And, as mentioned in respondent's brief, when the court stipulation was made, the present appellant made "no claim against Naomi for paying maintenance from the ward's estate and not collecting widow's allowance". The only matter then remaining undisposed of was the guardian's duty to render further account in respect to closing expenses, which account was duly filed, and approved. This closing account was obviously intended to and should have set the entire matter at rest for all time. Such, indeed, is its legal effect.

Examination of the entire record, the orders made, the stipulation entered into, and the various activities of the interested parties, indicate that there has been no miscarriage of justice, and that there is no merit in the present appeal.

The order is affirmed.

FOURT, J., concurs.



130 Cal.App.2d 668

John S. BEVAN, Plaintiff and Respondent,

v.

CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION, and Department of Employment, et al., and Richard Roe, Director of Employment of the California Department of Employment, Defendants,

William A. Burkett, Director of Employment of the State of California, and Department of Employment of the State of California, Appellants.

Civ. 21205.

District Court of Appeal, Second District,
Division 1, California.

March 5, 1953.

Action by distributor of vacuum cleaners against former Director of Employment and Department of Employment to recover unemployment insurance contributions, interest and penalties paid under protest. The Superior Court, Los Angeles County, Clarence M. Hanson, J., found that the distributor's salesmen were independent contractors and were not subject to the provisions of the Act. Defendants appealed. The District Court of Appeal, Fourt, J., held that evidence compelled the finding that the salesmen were employees rather than independent contractors.

Reversed with directions to enter judgment for defendants.

1. Social Security and Public Welfare Ⓒ340

In unemployment insurance statute defining term "employer", word "employment" means in effect an employer-employee relationship and does not include an independent contractor. Unemployment Insurance Code, §§ 1 et seq., 675.

See publication Words and Phrases, for other judicial constructions and definitions of "Employment".

2. Taxation Ⓒ111.20

In determining whether salesmen were employees of vacuum cleaner distributor or were merely independent contractors, for purpose of determining contributions under unemployment insurance statute, relevant factor was the distributor's right to control the activities of the salesmen and not whether he actually exercised such control. Unemployment Insurance Code, §§ 601-603, 675.

3. Taxation Ⓒ543(7)

In action by distributor of vacuum cleaners against former Director of Employment and Department of Employment to recover unemployment insurance contributions, interest and penalties paid under protest, evidence compelled finding that distributor's salesmen were employees within meaning of unemployment insurance statute rather than independent contractors, and therefore contributions were payable by distributor on earnings of the salesmen. Unemployment Insurance Code, §§ 601-603, 675.

Edmund G. Brown, Atty. Gen., Irving H. Perluss, Asst. Atty. Gen., N. B. Peek, Deputy Atty. Gen., for appellants.

William Crum, Los Angeles, for respondent.

4. Subsequent to the filing of this appeal, defendant Burkett was succeeded in the Office of Director of Employment by Harry W. Stewart, who is now the duly appointed and acting Director of Employment of the State of California.

2. The California Unemployment Insurance Act, Stats.1935, Chap. 352, Deering's Gen.

FOURT, Justice.

This is an appeal from a judgment of the Superior Court in favor of plaintiff and respondent, John S. Bevan, sometimes hereinafter referred to as Bevan, against William A. Burkett, Former Director of Employment of the State of California,¹ and the Department of Employment of the State of California, (for convenience both defendants are sometimes hereinafter referred to as defendant), rendered in an action brought to recover unemployment insurance contributions, interests and penalties totaling \$3,049.72, paid under protest pursuant to the provisions of the former California Unemployment Insurance Act,² hereinafter referred to as the Act for the period August 15, 1948, through June 30, 1950.

On December 11, 1950, the defendant levied an assessment against Bevan based upon the premise that certain persons who sold Kirby vacuum cleaners were his employees.

Following a protest payment of said assessment, Bevan filed with defendant a claim for refund asserting, among other things, that said persons were independent contractors in that he did not have the right to control the manner or means of their sales activities and that said persons were accountable only as to the results obtained.

The claim for refund was denied, and Bevan having properly exhausted all administrative remedies, filed the action now under consideration.

The court below found that the persons associated with plaintiff were independent contractors rather than employees and hence were not subject to the provisions of the Act.

It is conceded by appellant that the Act did not require the payment of contribu-

Laws Act 8780d, was repealed and superseded by the enactment of the California Unemployment Insurance Code, sometimes hereinafter referred to as the Code, effective January 1, 1954, Stats. 1953, Chap. 308. The provisions of the Code are substantially the same as those of the former Act.

tions in those cases involving independent contractors, but applied only to an employer-employee relationship.

A fair résumé of the facts of the case is as follows. During the period from August 1, 1948, to June 30, 1950, Bevan was the owner of Kirby of Pasadena and held the rights of distributorship from Scott-Fetzer, the manufacturers of the Kirby vacuum cleaner, for its sale in Pasadena and surrounding communities. To sell the vacuum cleaners Bevan had a sales organization consisting generally of a sales manager, several crew managers, and salesmen. From November, 1949, to the end of the period involved, Bevan employed a woman office manager. In addition, from January, 1950, to June, 1950, Bevan employed four women canvassers. There were usually one sales

manager, two crew managers during the first part of the period involved and four or five during the later portion, and four or five salesmen working with each crew manager. On an average, Bevan engaged from 20 to 30 salesmen a month, and during the entire period he engaged between 150 and 200 men.

It was conceded before the start of the trial that the sales manager should be considered an employee, and there was no issue as to the women canvassers who worked during a portion of the time under discussion.

From August, 1948, to February, 1949, and from September, 1949, to June, 1950, Bevan had an oral arrangement with his salesmen. During the interval from February, 1949, to September, 1949, Bevan operated under a written contract³ with

3. "Kirby Sales Dealer Agreement"

"Upon our acceptance of you as a Kirby Sales Dealer you will be assigned to a Field Manager. The Field Manager to whom you are assigned will furnish you with all essential demonstrating equipment at all times.

"Equipment Furnished and Its Value

1 Dirt Meter	\$5.00
1 Black Kirby Demo Book	2.50
1 Blue Sales Instruction Book	1.25
Demo Crystals, Dirt Papers, Sales Books, Forms, Etc.	1.25
	\$10.00

1 Kirby Home Renovation System C/W Power Polisher	119.95
Total	\$129.95

"The above equipment is furnished to you by Kirby of Pasadena or one of its branch distributors.

"The sum of ten dollars (\$10.00) is required for bonding purposes at the time equipment is issued. The \$10.00 is the only money requirement needed by you to become a Kirby Sales Dealer.

"We train you in the basic arts of direct selling, such as:

You will have two and one half days inside training plus the same in the field. Your training will be under the direct supervision of one of our experienced men. The training will consist of the various uses of the Kirby and instruction in handling.

How to intelligently show and converse with the client. Field training will also be under direct supervision of one of our experienced men. He will show you how

to approach homes and after gaining admittance how to properly conduct yourself in order to gain a sale.

How to qualify the client in various ways, how to look for and expect a sale.

"The remuneration for the sale of a Kirby is Twenty Five Dollars (\$25.00) per sale. The commission is paid to you every Wednesday morning.

"From our experience it has been found that a Sales Dealer should endeavour to demonstrate in at least three homes every day and at least three or more night demonstrations per week.

"We are so convinced of the great importance of demonstrating that we offer this additional bonus for weekly demonstrations:

"12 to 17 Demonstrations per Sale per week	\$ 5.00
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"18 Plus Demonstrations per Sale per week	\$ 7.50
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"The above Bonus payments are made monthly and are additional to the payment for each sale. For example: If you have put on Twelve Demonstrations and One Sale you will receive \$25.00 plus \$5.00. Bonuses Are Paid Only If Sales Are Made.

"After completion of your training you will be assigned to a Field Manager. Your Field Manager will assign you to the territory you are to work in and keep you furnished with the proper equipment at all times. Any problems which arise may be corrected by consulting your Field Manager who will be in your working area, or if he is absent his assistant will be in the area.

them, although only about 50 percent of the salesmen actually signed the agreement and there was no strict compliance with its terms by those who did.

The method of operation of the salesmen under the written agreement was substantially the same as that under the oral arrangement, except for the last six months of the period involved when Bevan employed the women canvassers. In addition, the terms of the relationship between Bevan and the salesmen were substantially the same throughout the entire period involved. There was an oral arrangement between Bevan and his crew managers for the entire period involved.

Salesmen were usually obtained by Bevan through advertising in the "help wanted" columns of newspapers and by means of personal contacts. In addition, Bevan use the placement facilities of the defendant, Department of Employment of the State of California, to secure salesmen, although the record does not show for what portion of the period involved he availed himself of this employment service of the State of California. The newspaper ads usually stated that those who were interested in securing work should report to the Green Hotel, Pasadena, for an interview. During this meeting at the

hotel, Bevan or his sales manager would explain the nature of the job, give a demonstration of the Kirby machine, administer an aptitude test, and inform the men of the terms of the arrangement. Apparently Bevan had difficulty in securing men, and he gave the test to make "our job look important to them". Those whom he engaged were told to report to his office, which was at 749 North Marengo, Pasadena, from August, 1948, to about June, 1949, and at 25 North Santa Anita, Pasadena, from June, 1949, through June, 1950. Most of the men had no previous experience in selling vacuum cleaners. Each man usually underwent a training program of from two to five days, during which he was instructed as to the operation of the machine and the completion of conditional sales contracts which were furnished by Bevan. At the completion of this training period, each salesman was issued a Kirby vacuum cleaner, dirt meter, Kirby demonstration book, demonstration crystals, dirt papers, forms, and, for a portion of the period involved, a sales instruction book.

It appears that generally speaking after the salesman had joined a crew, he was accompanied by his field or crew manager or another experienced salesman for the

"When a sale is completed the various forms are to be turned in to your Field Manager along with all monies. On any payments that are made by check the check is to be made out to Kirby of Pasadena, not to you personally.

"A Sales Meeting is held Monday through Saturday from 8:30 to 9:00 A.M. to help you in your daily work. All men are expected to attend and if for any legitimate reason you cannot, please inform your Field Manager by phone. If for any reason you are going out of town or you cannot be at work for one or more days we ask to be informed. If you are to be gone for a week or longer either on vacation or various other reasons All Equipment Is To Be Turned In and upon your return you will receive a re-issue.

"Equipment is issued from 9:00 to 9:15 A.M. daily by your Field Manager.

"Contacts and Demonstrations should be made between 9:15 A.M. and 4 P.M. and evening demonstrations should be made from 7 P.M. on. Call-backs should be made after 4 P.M.

"Kirby Of Pasadena Or Any Of Its Branch Distributors Reserve The Right To Ask You For Your Equipment At Any Time That It Is Felt You Are Not In Accord With The Policy Of Our Organization And That Any Money Payable To You Will Be Withheld Until Proper Clearance Is Made Of All Of Your Accounts.

"At the termination of duties with this organization the equipment is to be returned to us. You will then be issued a 'clearance letter' properly endorsed relieving you of any and all responsibilities. This letter will permit you to seek sales work with any Kirby distributor.

"Kirby Of Pasadena

"By _____
John S. Bevan

"_____
Sales Dealer

"_____
Field Manager

"The Preceding Rules Are Subject To Change"

first few days in order to obtain practical experience in house-to-house selling. Ordinarily, the salesmen worked in the same general area that their crew managers were working. And the crew managers would "suggest" the territory in which their crews would work. However, a salesman could work alone and some did. Also, a salesman could go anywhere in the territory of Bevan's distributorship, except in an area being worked by a sub-dealer whose methods of operation were entirely different from those of the crew managers or salesmen. While a salesman was prohibited by Bevan from engaging in general selling outside his distributorship territory, a salesman could, by virtue of a reciprocal agreement between Bevan and other Kirby distributors, follow a lead in another distributor's territory.

The salesmen were instructed to take any problems they had to their crew managers. In Bevan's words, the crew or field manager was "the man that was the overseer in the field". In this connection, plaintiff's witness, Robinson, a crew manager, testified on cross-examination that he would possibly see each member of his crew two or three times a day to determine how they were getting along. The crew managers told members of their crew that if they ever had any trouble in making a sale, they could always call on them for help, and Robinson testified that he helped some of his crew "close deals". No specific territory was assigned to a crew manager, but the crew managers had a general knowledge of where each crew was working, and, except for the latter portion of the period involved when Bevan employed canvassers, the crews generally worked in different areas.

As previously indicated, Bevan's sales organization during the major portion of the period involved, consisted generally of a sales manager, crew managers and salesmen. A Mr. Fred Pape was sales manager from about November, 1948, to November 1949, and from January, 1950, to June, 1950, C. Warren Sawyer held the position. During the time from August, 1948, to November, 1948, and November, 1949, to January, 1950, Bevan acted as his own

sales manager. In the course of the trial it was stipulated that Pape and Sawyer were employees of Bevan, and their earnings were subject to tax under the Act.

The sales manager helped Bevan procure and train salesmen. In addition, he would "suggest" to salesmen that they should work with certain crews. Bevan paid the sales manager by giving him an overriding commission on every sale made by a crew manager or salesman.

The crew managers, who also sold machines in the same manner as the salesman, were selected from salesmen who had demonstrated superior sales ability, and this possibility of promotion was held out to them as a reward for those who had an above-average record of sales. In fact, Mr. Sawyer, Bevan's sales manager, worked his way up in Bevan's organization from salesman to crew manager to sales manager. As previously indicated, the crew managers trained the men in house-to-house selling, suggested places for their crew to work, acted as overseers, and gave assistance when asked for it.

In addition, the crew managers filed with Bevan or the sales manager a weekly report on the sales made by their salesmen. In order to understand their method of preparation and purpose, it is helpful to describe briefly the mechanics of selling a Kirby. Kirbys were sold either for cash or on credit through conditional sales contracts. When a cash sale was made, the customer was given a cash receipt slip and the salesman kept two copies. A credit buyer executed in triplicate a conditional sales contract and the salesman retained the original and a copy. Once or twice a week, the salesman would turn over to his crew manager the cash proceeds from his sales together with the copies of cash receipt slips and the original conditional sales contracts, keeping a copy of each document for his records. From these documents the crew manager compiled a weekly report sheet for each salesman in his crew, which he submitted, together with the cash, cash receipt slips, and conditional sales contracts, to Bevan, keeping a carbon copy of the weekly report sheet for his records, to show the sales that a

salesman had made during the week. These weekly reports enabled Bevan to determine the amount of commissions that each salesman was entitled to and the overriding commissions due the sales manager and the crew managers.

A machine was not sold but was issued to a crew manager or salesman, who would sign a receipt for it and a stock record was maintained by the office manager showing the number of machines that had been issued. Generally, salesmen were allowed to take out only one machine at a time, but the crew managers were permitted to take out several machines. A salesman was entitled to a commission of \$25 for every machine (retail price—\$119.95) he sold. Upon making a sale the salesman could either deduct his commission or turn it over to his crew manager. Every week Bevan would pay the salesman the total amount of his unpaid commissions, as shown by the weekly report. The salesman could take a trade-in as a down payment on a Kirby. He was not limited in the allowance he could give for the trade-in, it being necessary only that he turn over to his crew manager cash in the sum of \$94.95, or a conditional sales contract that together with the down payment totaled \$94.95, which was the difference between the sales price of \$119.95 and his commission of \$25. The trade-ins belonged to the salesman, and the salesmen could sell these second-hand machines in Bevan's territory at the same time that they were selling Kirby vacuum cleaners.

The cash receipt slip did not bear the designation "salesman" or "sales dealer". All conditional sales contracts were executed in the name of Bevan as seller and he discounted them at his bank; there were no dealings between the bank and the crew managers or salesmen. Bevan, pursuant to his arrangement with the bank, advised the crew managers and salesmen as to the required down payment and other credit terms. In case a buyer defaulted on his contract, Bevan would bear the full loss, and the salesman or crew manager would not lose any of his commission. The bank had full recourse against Bevan on every conditional sales contract. Bevan

requested the crew managers and salesmen to have all checks given in payment for the machines drawn to the order of Kirby of Pasadena.

From January, 1950, to June, 1950, which was the last six months of the period involved, Bevan conducted, in conjunction with other Kirby distributors, a radio advertising program. As part of this program, women canvassers, hired as employees by Bevan, would canvass an area to secure appointments for demonstrations of the Kirby by the salesmen. The women canvassers would give the "appointments" to certain crew managers who would pass them on to members of their crew. The canvassers were assigned by Bevan, the sales manager, or the crew managers, to the general area to be canvassed, and the canvassers were taken to the area by the crew managers in their cars. During this canvassing operation, the crew managers cooperated as to the areas to be worked, and three or four crews sometimes would work together with the canvassers.

Appellants' counsel asked Bevan whether he or the crew managers designated the particular streets that the canvassers were going to work. The judge made and sustained an objection to the question on the ground that it was immaterial. Appellants made the offer of proof that the crew managers would designate the particular streets to be worked by the canvassers. Subsequently, defendant's witness, Krosky, a crew manager, testified without objection that he assigned the streets to the canvassers. The canvassers worked closely with the crews, and during this six-month period, most of the sales were made as a result of leads obtained by the canvassers. To help defray the cost of this advertising and canvassing program, \$5 was deducted from every commission received from a sale obtained through a "canvass lead".

In addition, Bevan, during this same time, had a bonus coupon plan whereby a salesman or crew manager would give a coupon to a prospective purchaser which would entitle him to participate in a drawing for a machine.

With the sole exception of Robinson, a crew manager, who inserted ads in his name at Christmas time, no crew manager or salesman did any advertising.

No capital investment was required from any salesman. For a very few months, salesmen were required to post a bond, and Bevan purchased some of these bonds for the salesmen who had been with him for a long time. Crew managers and salesmen were furnished business cards bearing Bevan's name, address and the telephone number of Kirby of Pasadena. Bevan had the names of the crew managers printed on the cards, but the names of the salesmen were not, although the card was "designed" for the salesman to place his name and home telephone number on it. Some placed this information, together with their home address, on Bevan's card, or provided their own cards. The designation "salesman" or "sales dealer" did not appear on Bevan's cards. Bevan did not furnish any stationery to the crew managers or salesmen. The crew managers and salesmen could use Bevan's office phone, but deductions were made from their commission for toll calls. Bevan gave some sales leads to the salesmen, but usually he would hand them to the crew managers, who in turn could give them to members of their crew. Salesmen were not required to follow leads. They would also obtain their own leads by paying \$5 to any person that gave them a lead resulting in a sale, but they did not employ anyone to look for leads.

Salesmen received no expense account, drawing account or guarantee. They were compensated by commissions based on sales. However, a salesman did receive a Kirby machine as a bonus for every seven machines that he sold in a single calendar month.

Neither the crew managers nor the salesmen were required to report to Bevan's office nor to attend the sales meetings which were held at his office every morning between 8:30 and 9:00 a. m. Although the salesmen were encouraged to attend, very few did.

Salesmen were not required to submit any reports as to their activities, nor were

they or the crew managers required to make credit investigations. The crew managers and salesmen furnished their own transportation. Those who had automobiles were not required to take out public liability insurance in favor of Bevan. The salesmen were not obligated to put in any certain number of hours, and were free to engage in other work. While some of the men did have other part-time jobs, most of them were engaged by Bevan on a full-time basis. The salesmen or crew managers were not allowed to sell other new vacuum cleaners, but they could sell other second-hand machines received as trade-ins on new Kirbys.

Except for Reitz and Robinson, two crew managers, no crew manager or salesman had a separate place of business other than his home. In this regard it should be noted that salesman Lawrence Stanley, a blind man, had a separate place of business, but by stipulation Bevan and defendant excluded the commissions of \$325 paid Stanley from May to June, 1950. Defendant apparently so stipulated because it believed that his method of operation was substantially different from that of the other crew managers or salesmen. Reitz and Robinson jointly had a separate headquarters in Highland Park for a short period of two or three months in the latter part of 1949 or the early part of 1950. They were, according to Bevan, the only crew managers who worked with the crew canvassers during the six-month period from January to June of 1950. Bevan filed a contribution return under the Act for the second quarter of 1950, reporting Robinson and Reitz, and certain salesmen as employees for the reason that these crew managers were "working very closely with the canvassers", and the salesmen were "assisting" the crew managers. No return was filed by Bevan reporting Reitz and Robinson or the other salesmen as employees under the Act for the first quarter of 1950.

All sales taxes on vacuum cleaners sold by the crew managers or salesmen were reported in Bevan's name. Bevan was obligated by his distributorship agreement to furnish a one-year service guarantee

to purchasers of Kirbys. Bevan took care of the complaints and serviced most of the machines, but he did give some service calls to salesmen to handle. Bevan purchased all necessary city and county soliciting licenses for the crew managers and salesmen. He carried workmen's compensation insurance on the crew managers and salesmen. During the interview at the Green Hotel, Bevan told the men that they were independent operators, that they could come and go as they pleased, and that no deductions were to be made. Plaintiff's witness, Kirsan, a salesman, testified that Bevan told him he was going in business for himself.

Bevan had the right to terminate the services of the crew managers or salesmen at will. The crew managers and salesmen had the reciprocal right to terminate their services at will. In fact, during the trial it was stipulated, in substance, by counsel for Bevan that there was no question that Bevan had the right to terminate at will.

On January 21, 1955, the District Court of Appeal, First Appellate District, Division Two, in the case of *Sudduth v. California Employment Stabilization Commission*, 130 Cal.App.2d 304, 278 P.2d 946, held on facts substantially the same as presented here, that salesmen engaged by Kirby distributor Sudduth were employees under the Act, Sudduth having conceded that his crew managers were employees.

It would unduly extend this opinion to point out every instance wherein the facts of this case are substantially similar to the facts of the Sudduth case. However, it will be noted that in each instance their salesmen were secured and trained in an identical manner and a similar crew system was used by each of them. The cleaners were issued, sold, financed, and reported for State sales tax purposes in substantially the same way. The elements of freedom of operation inherent in this type of door-to-door selling were present in both cases, such as, not being required to attend sales meetings or follow leads, no minimum hours, no specific assignment of territory, and being free to engage in other work. In addition, neither Bevan nor Sudduth provided transportation, desk space, drawing account,

guarantee or advances, but both furnished business cards. Both Bevan and Sudduth were responsible for taking care of customers' complaints and servicing their machines; however, Bevan gave some of his service calls to salesmen to handle while Sudduth's salesmen processed them only on a "volunteer basis".

Moreover, not only are the compared relationships substantially identical but also there is an additional important element strongly indicative of an employment relationship which is present here, but not found in the Sudduth case—Bevan had the right to terminate the services of a salesman at will, whereas Sudduth had a minimum one-year agreement with each salesman which could be terminated only for cause. And Bevan, unlike Sudduth, had the power, through the "clearance letter" to prevent a salesman from working for another Kirby distributor. Also, there are other essential factors present here which were absent in the Sudduth case—Bevan carried workmen's compensation on all his salesmen; he paid for all their city and county soliciting licenses; the conditional sales contracts were executed in the name of Bevan as seller, rather than that of the individual salesman; and in case of a buyer's default on the conditional sales contract, Bevan bore the entire loss rather than only a portion thereof.

With respect to the crew managers, there is a difference between the two cases, for Sudduth conceded that they were employees, but Bevan did not, except for the second quarter of 1950, when he filed the return under the Act reporting crew managers Robinson and Reitz as employees. In view of Sudduth's concession as to the subject status of his crew managers, it was, of course, not necessary for the appellate court to set forth in detail their activities, but sufficient facts are stated in the District Court's opinion to show that their primary function was the same as that of their counterparts in this case. Sudduth's crew managers were mainly responsible for training the salesmen "as to sales methods and presentation" in actual house-to-house canvassing. *Sudduth v. California Employment Stabilization Commission*, *supra*, 130

Cal.App.2d 304, 309, 278 P.2d 946, 949. Likewise, one of the principal duties of Bevan's crew managers was to see to it that the new salesmen received the same practical training in house-to-house selling, either from the crew manager himself or from one of the experienced salesmen in his crew. In addition, Bevan's crew managers were the persons to whom the salesmen looked for assistance with their problems, including the most important one of any salesman selling on a commission basis—the consummation of a sale. Also, every week the crew managers filed their "weekly report sheets" with Bevan, together with the cash proceeds and documents of sale turned over to them by their salesmen; and these reports enabled Bevan to determine the commissions due the salesmen and the overrides owed the sales manager and crew managers. It is evident that Bevan's crew managers received the overrides as compensation for acting, in Bevan's words, as "the overseer in the field", and it is equally clear that through these crew managers Bevan maintained control of the activities of the salesmen "insofar as it is feasible to control a type of service involving salesmanship in house to house canvassing". *Sudduth v. California Employment Stabilization Commission*, supra, 130 Cal.App.2d 304, 312, 278 P.2d 946.

A thorough reading of the *Sudduth* case will demonstrate further essential similarities.

Appellants contend that the undisputed evidence establishes as a matter of law that Bevan's crew managers and salesmen were employees under the Act and that the trial court's holding that they were independent contractors is erroneous.

[1] Neither the present code, nor the former Act specifically defines the term employee. Thus section 9 of the Act (now section 675 of the Code) provided in general that an employer was a person who had in "employment" one or more individuals and paid wages in employment in excess of \$100 during any calendar quarter. This term "employment" was defined by section 6.5 of the Act (now sections 601, 602 and 603 of the Code) as "service, * * *

performed for wages or under any contract of hire, written or oral, express or implied." However, it is now well established that "employment" in effect means employer-employee relationship and does not include an independent contractor. *Bemis v. People*, 109 Cal.App.2d 253, 262-263, 240 P.2d 638; *Briggs v. California Employment Commission*, 28 Cal.2d 50, 54, 168 P.2d 696. Thus, as previously indicated, the basic issue in this case is whether or not the relationship of employer-employee existed between Bevan and his crew managers and salesmen during the period involved.

In the case of *Isenberg v. California Employment Stabilization Commission*, 30 Cal. 2d 34, 180 P.2d 11, the plaintiff brought suit to recover contributions paid under protest on the remuneration received by free-lance jockeys performing services for plaintiff. The defendant appealed from a judgment in favor of the plaintiff. There was no conflict in the evidence concerning the terms under which the jockeys were hired. Likewise, there was no conflict as to the customs or practices of the owners with regard to the jockeys. On appeal, the Supreme Court reversed the decision on two grounds, setting forth in substance that the facts being undisputed, it was then a question of law whether liability arose therefrom and that as such, it was appropriate for the Supreme Court to review the facts, saying in this connection, 30 Cal.2d at page 40, 180 P.2d at page 16: "The contention that the question whether a person is an employee under section 6.5 of the Unemployment Insurance Act is wholly one of fact, even when the evidence is not in conflict and not reasonably susceptible of conflicting inferences, is untenable. Under such a rule there would be nothing to prevent conflicting interpretations of identical facts by the various trial courts so that free-lance jockeys would sometimes be classified as employees and sometimes not. Such a rule would make effective enforcement of the Unemployment Insurance Act impossible."

The court further said, in the *Isenberg* case, that in *Drillon v. Industrial Accident Commission*, 1941, 17 Cal.2d 346, 110 P.2d

64, it had held on similar facts that jockeys were employees within the meaning of the Workmen's Compensation Act, and held in effect that if a jockey were an employee under that Act, he would likewise be one under the Unemployment Insurance Act. The court stated, 30 Cal.2d at pages 38-39, 180 P.2d at page 15, "The Empire Star Mines Co. v. California Employment Commission, 28 Cal.2d 33, 43, 168 P.2d 686, this court set forth the rules for the determination of the question whether or not a person is an independent contractor or is engaged in employment under section 6.5. The principal test of the employment relationship was held to be the 'right to control over the manner and means of accomplishing the result desired.' Strong evidence of this right is shown by the right of the principal to discharge the worker. The secondary tests are listed in that opinion as including, '(a) whether or not the one performing service is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee. Rest., Agency, § 220; Cal. Ann. § 220.'"

The court concluded the opinion as follows 30 Cal.2d at page 41, 180 P.2d at page 16:

"The result of the application of the rules of law set forth in Empire Star Mines Co. v. California Employment Commission, supra, will depend in any particular case on the essential facts of that case. Thus, in California Employment Commission v. Bates, 24 Cal.2d 432, 436, 150 P.2d 192, the judgment of the trial court was reversed because the conclusion of the trial court

from the facts was inconsistent with the decision in California Employment Commission v. Los Angeles Down Town Shopping News Corp., 24 Cal.2d 421, 425, 150 P.2d 186, where the facts were substantially the same. This holding is in accord with the rule, particularly applicable to public law cases where uniformity of decision is important, that if the essential facts are not in conflict the question of the legal relations arising therefrom is a question of law. [Citing cases.]"

The court in the case of Malloy v. Fong, 37 Cal.2d 356, 370, 232 P.2d 241, 249, said:

"Whether a person performing work for another is an agent or an independent contractor depends primarily upon whether the one for whom the work is done has the legal right to control the activities of the alleged agent. Edwards v. Freeman, 34 Cal.2d 589, 592, 593, 212 P.2d 883; Empire Star Mines Co. v. California Employment Commission, 28 Cal.2d 33, 43, 168 P.2d 686. The power of the principal to terminate the services of the agent gives him the means of controlling the agent's activities. 'The right to immediately discharge involves the right of control.' [Citing cases.] It is not essential that the right of control be exercised or that there be actual supervision of the work of the agent. The existence of the right of control and supervision establishes the existence of an agency relationship. Empire Star Mines Co. v. California Employment Commission, 28 Cal.2d 33, 43, 168 P.2d 686. The evidence clearly supports the conclusion of the jury that such control existed in the present case. The right of the Presbytery to install and remove its ministers, to approve or disapprove their transfer to other jurisdictions, and to supervise and control the activities of the local churches, particularly those in the mission stage, is inconsistent with a contrary conclusion."

[2,3] In this case Bevan had the right to terminate the services of his crew managers and salesmen at will. Having the power to discharge, he necessarily had the power to control practically all of the activities of those concerned. The fact that Bevan did not exercise the power makes

no difference. The facts of this case and the facts of the Sudduth case are substantially the same, and therefore, under the rule of the Isenberg case, to avoid inconsistency in the decisions, we must hold that Bevan's salesmen were employees.

We further are of the opinion that as a matter of law, from the undisputed facts in this case, following the criteria set out in the Empire Mines case, *supra*, that Bevan's salesmen in question were employees and not independent contractors.

The judgment is reversed with directions that judgment be entered in favor of the defendant.

WHITE, P. J., and DORAN, J., concur.



139 Cal.App.2d 684

Harold R. BEHLING, Plaintiff and
Appellant,

v.

COUNTY OF LOS ANGELES, Defendant
and Respondent.

Civ. 21396.

District Court of Appeal, Second District,
Division 1, California.

March 5, 1956.

Action for personal injuries against county allegedly resulting from negligent operation of bulldozer by county employee. The Superior Court of Los Angeles County, Bayard Rhone, J., sustained a demurrer to the first amended complaint without leave to amend, and entered judgment of dismissal. The plaintiff appealed. The District Court of Appeal, Fournier, J., held that a bulldozer is a "motor vehicle", within statute prescribing liability of state and its governmental agencies for the negligent operation of a motor vehicle resulting in death or injury to person or property.

Judgment reversed and cause remanded with directions.

1. Statutes ⇨188

Words and phrases are construed according to the context and the approved usage of the language. West's Ann.Civ. Code, § 13; West's Ann.Code Civ.Proc. § 16.

2. Statutes ⇨188

The words of a statute are to be interpreted according to their common acceptance, that is, they will be read and understood in their usual, natural, ordinary and popular sense. West's Ann.Civ.Code, § 13; West's Ann.Code Civ.Proc. § 16.

3. Automobiles ⇨187

Bulldozer is a "motor vehicle" within statute prescribing liability of state and its governmental agencies for the negligent operation of any motor vehicle resulting in death or injury to person or property. Vehicle Code, §§ 31, 32, 32.5, 39.5, 81, 142(f), 168, 400, 453(a-c); West's Ann.Civ.Code, § 13; West's Ann.Code Civ.Proc. § 16.

See publication Words and Phrases, for other judicial constructions and definitions of "Motor Vehicle".

4. Appeal and Error ⇨919

Upon appeal from judgment dismissing action consequent upon sustention of demurrer to amended complaint without leave to amend, District Court of Appeal would be required to assume that allegations in amended complaint were true.

5. Automobiles ⇨187

Where county employee operated bulldozer on road blocked off and not open to public travel, such "road" was not "highway" within statute excluding governmental liability arising from operation of motor vehicles engaged in work upon surface of a highway, and if employee negligently allowed blade brake to slip while lifting blade of similar, inoperative machine, county would be liable to person injured by falling blade. Vehicle Code, §§ 31, 32, 32.5, 39.5, 81, 142(f), 168, 400, 453(a-c); West's Ann.Civ.Code, § 13; West's Ann.Code Civ.Proc. § 16.

See publication Words and Phrases, for other judicial constructions and definitions of "Highway".

Caidin, Bloomgarden & Kalman, Beverly Hills, for appellant.

Harold W. Kennedy, County Counsel, Lloyd S. Davis, Deputy County Counsel, Los Angeles, for respondent.

FOURT, Justice.

This is an appeal by the plaintiff from a judgment of dismissal in an action for damages for personal injuries arising out of negligence, after a demurrer of the defendant to the first amended complaint as amended was sustained without leave to amend.

The plaintiff alleged in his complaint that in an area under construction in the Angeles Forest Reserve, about three miles off the Angeles Crest Highway, defendant Marlett negligently operated an Allis-Chalmers tractor, crawler type with bulldozer, which will hereafter be referred to as the first piece of equipment. He further sets forth that there was a similar piece of equipment which was inoperative with its blade on the ground, which will hereafter be referred to as the second piece of equipment; that Marlett moved the first piece of equipment to a position where the two dozer blades were butted together and the blade on the second, or inoperative, piece of equipment could be elevated by the blade of the first piece of equipment, so that the second piece

of equipment could be towed away; that Marlett so negligently operated the first piece of equipment that the "blade brake" slipped and thereby caused the blade on the second, or inoperative, piece of equipment to fall on the hand of the plaintiff, who was attempting to secure a chain around the blade of the second piece of equipment; that the equipment was on a dirt, ungraded roadway under construction; that the roadway was blocked off from traffic by means of a chain and lock across the entrance thereto, some three miles from where the accident occurred; that at the time and place of the accident Marlett was the agent and servant of the county of Los Angeles, acting in the course of his employment, but not actually engaged in work upon the surface of a highway.

The questions presented on the appeal are: (1) Whether the first amended complaint, as amended, states a cause of action, that is, whether the negligent operation of the blade brake of a bulldozer being used as a lifting device constitutes "the negligent operation of any said motor vehicle", as the phrase is used in section 400¹ of the Vehicle Code, and (2) whether the lifting of the blade of an inoperative bulldozer on a highway under construction, closed to public use, constitutes "work upon the surface of a highway", as that phrase is used in subdivision (b) of section 453² of the Vehicle Code.

1. "§ 400. Liability of Governmental Agencies.

"[Responsibility for negligent operation of motor vehicle by officer, agent or employee: Right to sue State, etc.: Subrogation to rights of injured person and recovery from officer, agent or employee.] The State, and every county, city and county, municipal corporation, the State Compensation Insurance Fund, irrigation district, school district, district established by law and political subdivision of the State *owning any motor vehicle is responsible to every person who sustains any damage by reason of death, or injury to person or property as the result of the negligent operation of any said motor vehicle by an officer, agent, or employee or as the result of the negligent operation of any other motor vehicle by any officer, agent or employee when acting within the scope of his office, agency or employment; and such person may sue the State, county,*

*city and county, municipal corporation, the State Compensation Insurance Fund, irrigation district, school district, district established by law and political subdivision of the State, as the case may be, in any court of competent jurisdiction in this State in the manner directed by law. * * **

2. "§ 453. Public Officers and Employees to Obey Code. (a) The provisions of this code applicable to the drivers of vehicles upon the highways shall apply to the drivers of all vehicles while engaged in the course of employment by this State or any political subdivision thereof or any municipal corporation or district therein including authorized emergency vehicles subject to those exemptions granted such authorized emergency vehicles in this code.

"(b) The provisions of this code shall not apply to public employees and publicly owned teams, motor vehicles and oth-

Sections 31, 32, 32.5, 39.5, 142 and 168 of the Vehicle Code read, so far as pertinent here, as follows:

"§ 31. Vehicle. A 'vehicle' is a device in, upon or by which any person or property is or may be propelled, moved or drawn upon a highway, excepting a device moved by human power or used exclusively upon stationary rails or tracts."

"§ 32. Motor Vehicle. A 'motor vehicle' is a vehicle which is self-propelled."

"§ 32.5. Truck tractor, Farm tractor, and Road tractor.

"(a) A 'truck tractor' is a motor vehicle designed and used primarily for drawing other vehicles and not so constructed as to carry a load other than a part of the weight of the vehicle and load so drawn.

"(b) A 'farm tractor' is a motor vehicle designed and used primarily as a farm implement for drawing plows, mowing machines and other implements of husbandry.

"(c) A 'road tractor' is a motor vehicle designed and used for drawing other vehicles and not so constructed as to carry any load thereon either independently or any part of the weight of a vehicle or load so drawn."

"§ 39.5. Special Highway Construction Equipment. 'Special highway construction equipment' means a vehicle which is designed and used primarily for grading of highways, paving of highways, earth moving and other construction work on highways and which is not designed or used primarily for the transportation of persons or property and which is only incidentally operated or moved over the highway. It includes road construction and maintenance machinery such as

er equipment while actually engaged in work upon the surface of a highway, or work of installation, removal, repairing or maintaining traffic signs, signals or other traffic control devices, but shall apply to such persons and vehicles when traveling to or from such work.

portable air compressors, air drills, asphalt spreaders, bituminous mixers, bucket loaders, *caterpillar tractors*, ditchers, leveling graders, finishing machines, motor graders, paving mixers, road rollers, scarifiers, earth moving scrapers and carryalls, lighting plants, welders, pumps, power shovels and drag lines, self-propelled earth moving equipment and machinery and other similar types of construction equipment. This enumeration shall not operate to exclude other vehicles which are within the purview of the term 'special highway construction equipment' as above defined. 'Special highway construction equipment' does not include any of the following:

"(a) A vehicle originally designed for the transportation of persons or property to which machinery has been attached;

"(b) Dump trucks and truck mounted transit mixers, cranes and shovels." (Emphasis added.)

"§ 142. Exemption From Registration. The registration provisions of this chapter shall not apply to any of the following vehicles:

* * * * *

"(f) Special highway construction equipment."

"§ 168. Special highway construction equipment shall not be subject to registration but prior to any movement on the highway, each piece of such equipment shall display an equipment identification plate attached thereto."

Webster's New International Dictionary, 2d ed., defines "vehicle" as:

"vehicle * * * fr. *vehere* to carry * * *. 1. That in or on which a person or thing is or may be carried from one place to another, esp. along

"(c) The provisions of this division of the code shall not apply to the duly authorized representatives of any public agency while actually engaged in performing any of the work described in subdivision (b) hereof but shall apply to such persons when traveling to and from such work."

the ground, also through the air; any moving support or container fitted or used for the conveyance of bulky objects; a means of conveyance."

[1,2] Words and phrases are construed according to the context and the approved usage of the language (Civ.Code, Sec. 13; Code Civ.Proc., Sec. 16). The words of a statute are to be interpreted according to their common acceptance, that is, they will be read and understood in their usual, natural, ordinary and popular sense (23 Cal.Jur. 749).

By adding a blade to the crawler or caterpillar type tractor it is made into what is generally known as a bulldozer and when so arranged it can be used for excavating or grading purposes, and not particularly to carry persons or property, however it can, and frequently is used to draw or push other vehicles. It is designed to draw or pull or push other vehicles, and at the same time is not so constructed as to carry any part of the weight of the vehicle or load so drawn. It obviously is self-propelled.

[3] Tested by the definitions heretofore set forth, it is apparent that a bulldozer is a motor vehicle within the commonly understood meaning thereof.

The Legislature, at times subsequent to the adoption of sections 31 and 32 of the Vehicle Code, adopted sections 142(f) and 168 of that code, wherein they set forth respectively, that the registration provisions of Chapter 1, Division III should not apply to special highway construction equipment and that such equipment should, although not subject to registration, have displayed thereon an equipment identification plate prior to any movement on the highway. Had the Legislature been so minded to exempt such equipment from the provisions of the code, wherein the operation of such equipment might bring about liability to a political subdivision, such as a county, it could have done so easily. It did not do so.

[4] Going to the next point, the plaintiff in this action, in paragraph V of his amended first amended complaint, alleged

that the accident occurred on the Angeles Crest Highway; however, pursuant to a stipulation, he filed an amendment to that paragraph wherein he sets forth that the accident occurred in an area under construction in the Angeles Forest Reserve about three miles off the Angeles Crest Highway. He further sets forth, in substance in the amendment, that the place where the tractors were located at the time of the accident consisted of a dirt roadway, ungraded and unpaved; that the area was not open to the public for vehicular travel, but to the contrary, the public vehicular travel was blocked off by means of a chain and lock stretched across the entrance to the area, and he further alleges that at the time he received the injuries he was not actually engaged in work upon the surface of a highway. For the purposes of the present proceedings, we must assume that the allegations in the amended first amended complaint are true and correct.

Section 81 of the Vehicle Code defines a street or highway as a way or place of whatever nature, publicly maintained *and open to the use of the public for purposes of vehicular travel*. The phrase "open to the use of the public for purposes of vehicular travel" was added to the statutory definition of streets or highways in 1935. The legislative history of the section in question seems to be that in 1905, by Stats. 1905, ch. 612, p. 816, the Legislature defined a public highway as follows:

"'public highways' shall include any highway, county road, state road, public street, avenue, alley, park, parkway, driveway or public place in any county, or incorporated city and county, city or town".

In 1913, the definition was amended by adding "state highway" thereto. Stats. 1913, ch. 326, p. 639. In 1915, the section dealing with the definition of public highway was amended by adding thereto "within the State of California". Stats. 1915, ch. 188, p. 398. In 1917, the definition was further amended by adding such territory or structures as "square or place, bridge, viaduct, trestle, or any other territory or structure, whether public or private, de-

signed, intended or used by or for the general public for the passage of vehicles". Stats.1917, ch. 218, p. 383. In 1919, the statute was further amended to include "driveways, upon the grounds of universities, colleges, schools, and other institutions, whether public or private". Stats. 1919, ch. 147, p. 193. In 1923, a practically new section was cast, Stats.1923, ch. 266, p. 519, and read as follows:

"Sec. 21. 'Public highway.' Every highway, road, street, alley, lane, court, place, trail, drive, bridge, viaduct or trestle laid out or erected as such by the public or dedicated or abandoned to the public, or intended or used by or for the general public, except such portions thereof as are used or prepared for use by pedestrians as sidewalks. The term 'public highway' shall apply to and include driveways upon the grounds of universities, colleges, schools and institutions. The term 'public highway' shall not be deemed to include private driveways, roads or places used by the owner, his guests and those having business with the owner and not intended to be otherwise used, or otherwise used by the general public."

In 1931, an amendment was adopted setting forth in substance that the term highway or public highway should apply to and include driveways and paths upon the grounds of universities, colleges and institutions "when and during such time or times as such driveways and paths are open to public traffic by permission of the governing board or officer charged with the control and direction of any such university, college, or institution." Stats. 1931, ch. 1026, p. 2102.

In 1935, the Legislature adopted a Vehicle Code, Stats.1935, ch. 27, pp. 93-98, and at that time set forth the definition of a street or highway as follows, p. 98:

"'Street' or 'Highway.' 'Street' or 'highway' is a way or place of whatever nature open to the use of the public as a matter of right for purposes of vehicular travel."

In 1937, the definition was amended to its present form by adding the words "publicly maintained and" and striking from the 1935 definition the words "as a matter of right". Stats.1937, ch. 282, p. 617. There have apparently been no amendments or changes in the section since 1937.

[5] It is apparent that the Legislature had in mind a limitation or restriction in the definition of what constitutes a highway, otherwise the phrase as added in 1935 and altered in 1937, would not have been used. If the language means what it says, then, surely, an area blocked off by means of a chain and lock and not open to the public for vehicular travel is not a highway within the definition in the Vehicle Code. In considering the definitions of the word "highway" as used, we must bear in mind that when used in the Vehicle Code, it is used for the special purpose of that act, and that sections of other codes and the decisions under them relating to the use of the same or similar words can have little bearing on the solution to this problem. *Sills v. Forbes*, 33 Cal.App.2d 219, 223, 91 P.2d 246.

It follows, therefore, from what has been stated, that the judgment of dismissal should be reversed and defendant permitted to answer, or otherwise appear as may be proper.

The judgment is reversed and the cause remanded with directions to the court below to overrule defendant's demurrer and allow said defendant a reasonable time within which to answer, if so advised.

WHITE, P. J., and DORAN, J., concur.

139 Cal.App.2d Supp. 945

Oscar HAGELE, Plaintiff and Appellant,
v.

C. D. RAYMOND, Defendant and
Respondent.

C. A. 29.

Appellate Department, Superior Court,
San Bernardino County, California.

March 7, 1956.

Suit was brought on note, and defendant filed a cross complaint for recovery of damages for detention by plaintiff of defendant's tools. The Justice Court of the Colton Judicial District, Lawrence E. Madsen, J., entered judgment for plaintiff in an allegedly inadequate amount, and the plaintiff appealed. The Appellate Department of the Superior Court, Mitchell, J., held that where plaintiff took possession of defendant's tools on September 8, and on September 17 defendant signed agreement to pay plaintiff \$400 for money due plaintiff, and agreement provided that on payment of the \$400 the tools were to be returned to defendant, and agreement was modified by execution of note by defendant for \$297.42 on October 19, and note provided that tools were to remain property of plaintiff until note was paid in full, but that tools were loaned to defendant, defendant was not entitled to allowance of \$200 for detention of tools by plaintiff from September 8 to October 19.

Judgment modified.

1. Trover and Conversion ⇐61

Where plaintiff took possession of defendant's tools on September 8, and on September 17 defendant signed agreement to pay plaintiff \$400 for money due plaintiff, and agreement provided that on payment of the \$400 the tools were to be returned to defendant, and agreement was modified by execution of note by defendant for \$297.42 on October 19, and note provided that tools were to remain property of plaintiff until note was paid in full, but that tools were loaned to defendant, defendant was not entitled, in action on note, to allowance

of \$200 for detention of tools by plaintiff from September 8 to October 19.

2. Trover and Conversion ⇐41

Measure of damages for loss of use of personalty is the reasonable value of the use thereof during period of detention.

Robert R. Scrim, Colton, for plaintiff-appellant.

Simpson & Mathews, by Ward O. Mathews, San Bernardino, for defendant-respondent.

MITCHELL, Judge.

Appellant instituted a suit in the Colton Justice Court upon a promissory note for the sum of \$297.42 dated October 19, 1954, in which appellant was named as payee and respondent as maker.

Respondent, in his answer, first denied the execution and delivery of the promissory note, then in his second defense he admitted signing the note but alleged that there was no consideration for the note—and that he signed it for the purpose of obtaining possession of certain personal property, belonging to him, of which appellant had possession.

Respondent also filed a cross-complaint for the recovery of \$500 allegedly due to him from appellant.

The trial court gave judgment to appellant for the sum of \$87.42.

The trial court arrived at this amount by crediting respondent with the sum of \$10 for money loaned by respondent to appellant and by crediting respondent with an allowance in the sum of \$200 for "damages" for "loss of income".

We must conclude then that the trial court found in favor of appellant on the defenses raised as against the promissory note.

No appeal was taken by the maker of the note, hence no question relative to the note is presented to us.

Appellant complains of the ruling of the trial court which credited respondent with the allowance of \$200 for damages.

[1] His complaint is good.

First: On September 17, 1954, respondent signed an agreement whereby he agreed to make restitution to appellant in the sum of \$400 for money due to appellant from respondent. In this agreement respondent declared:

"All my tools and equipment on the property of Oscar Hagele until this amount, (above), is paid in full. Upon full payment tools and equipment will be returned to me".

Five and one-half weeks later the agreement was modified and the then remaining indebtedness (\$297.42) was represented by a promissory note for that amount.

This promissory note contained the following language:

"All my mechanical tools and equipment remain the property of O. Hagele until note is paid in full, and are loaned to me * * *".

This note was signed by the respondent.

The alleged detention of which respondent complained was from September 8, 1954, to October 19, 1954. During that period of time the title to the property was in the appellant.

[2] Second: The measure of damages for the loss of the use of personal property is the reasonable value of the use thereof during the period of detention. This is not the measure used by the trial court or by respondent in his pleading. *Dunlop v. Farmer*, 64 Cal.App. 691, 222 P. 640.

Third: The parties agreed upon the amount of any credit or offset to which the respondent might be entitled when they settled the \$400 obligation dated September 11, 1954, by crediting respondent with the sum of \$102.58 and giving and accepting a note for \$297.42 on October 19, 1954, which was over one month after the \$400 amount was agreed upon.

The parties must be presumed to have arrived at the later sum after a full weighing of their respective demands.

The judgment is modified as follows: the appellant shall and does have judgment against the respondent for the sum of \$287.42, principal; for the sum of \$27.57, interest; for the sum of \$50 as and for attorney's fees; and for his costs.

COUGHLIN, P. J., and HILLIARD, J., concur.

46 Cal.2d 349

Joanne REINERT, by her Guardian ad
litem, William Rehnert, Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION
of the State of California, Central Orange
County Girl Scout Council, a corporation,
Globe Indemnity Company, a corporation,
Respondents.

L. A. 23954.

Supreme Court of California.

March 20, 1956.

Rehearing Denied April 18, 1956.

Proceedings to review an order of the Industrial Commission which denied an application for compensation for personal injuries. The Supreme Court, Carter, J., held that injuries sustained by a recreational director while riding horseback were compensable as arising out of and in course of employment, notwithstanding that accident occurred while she was riding for her own recreation and that it occurred at a location off the premises of the employer.

Award annulled.

Spence, Schauer and McComb, JJ., dissented.

1. Workmen's Compensation ⇨652

Mere fact that an employee is performing a personal act when injured does not per se bring him without the purview of the Compensation Law.

2. Workmen's Compensation ⇨605

Any reasonable doubt as to whether an act is contemplated by the employment in view of liberal policy of construction of the Compensation Act in favor of an employee should be resolved in favor of the employee.

3. Workmen's Compensation ⇨664

Where horseback riding as an assistant counselor accompanying Girl Scouts was part of the petitioner's duties and as part of the compensation, injuries sustained by petitioner while horseback riding were compensable as suffered in course of employment, notwithstanding the accident occurred while petitioner was riding for her

own recreation and occurred at a location off the premises of the employer and not under its control.

4. Workmen's Compensation ⇨713

An injury is compensable if it results from an activity contemplated by the employment, even though it occurs in a location not directly owned or controlled by the employer.

5. Workmen's Compensation ⇨1937

In compensation proceeding, refusal to admit a letter written by an officer of the employer to the petitioner's counsel containing an admission that the petitioner's activities when injured were within the scope of her employment was error, but not prejudicial in view of later testimony. West's Ann.Labor Code, § 5708.

6. Workmen's Compensation ⇨1939

Where there is no real dispute as to facts, the question of whether an injury was suffered in course of employment is one of law and a purported finding of fact on that question is not binding on the appellate court.

7. Workmen's Compensation ⇨1939

In proceeding to recover compensation by a recreational director engaged in Girl Scout work for injuries sustained while riding horseback, where it was the employment which created the conditions which brought the petitioner to engage in the recreational activity of horseback riding, the question whether injuries were compensable was one of law for the Supreme Court to decide, and the finding of the Industrial Commission was not conclusive.

Hennigan & Ryneal, Riverside, for petitioner.

Everett A. Corten, San Francisco, Edward A. Sarkisian and Herlihy & Herlihy, Los Angeles, for respondents.

CARTER, Justice.

This is a proceeding to review an order of the Industrial Accident Commission which denied an application for compensation for personal injuries on the ground that said injuries were not suffered in the course of employment.

Petitioner, Joanne Reinert, a minor, was employed by the Central Orange County Girl Scout Council at a camp which it conducted for Girl Scouts in the San Bernardino Mountains. Mrs. Mary K. Scholler was Executive Director of the Council, Camp Director of the summer camp and was in charge of employment for the Council. Although the Council had conducted summer camps in previous years, this was the first time at this particular location which had been leased for the season from a church. The leased camp grounds comprised about five acres on which were located the main lodge, kitchen facilities, and barracks type sleeping quarters. Almost all of the recreational facilities were located off the camp grounds.

In May, 1954, when petitioner and Mrs. Scholler discussed her employment, Mrs. Scholler explained that horseback riding as an assistant counselor accompanying younger Girl Scouts would be part of her duties; that while on such duty she would pay no charge for the horse; that when she had any free time she would be privileged, upon obtaining permission from Mrs. Scholler, to go riding. Petitioner was told by Mrs. Scholler at the time of the interview that part of the compensation for the work was the availability of recreational activities as a counselor which would not otherwise be available to her. Petitioner was engaged as assistant waterfront director by the Council by a written contract covering the period from June 30, 1954, to July 30, 1954, at a wage of \$40 for the period. She was informed that this wage would not come "close" to paying for all the services she rendered but it was hoped that while at camp she would be able to take advantage of all the recreational facilities available; that it was hoped that "you will also have been compensated to some extent" by those recreational facilities. The fact that petitioner enjoyed horseback riding and intended to engage in that sport was discussed at the interview.

Each employee was on duty 24 hours a day except for one 24-hour period each week. During the on-duty hours if the employee was not needed for the actual

work of the camp she could, upon obtaining permission, engage in recreational activities of her own choosing. When her duties so permitted, she was required to obtain permission for the precise recreational activity away from the camp in which she wished to engage.

Prior to her injury, petitioner had gone horseback riding some six times, three of them without charge to her because she rode as a counselor accompanying Girl Scouts and three times for her own recreation for which she was charged a reduced rate of \$1 per hour by the stable. Horses were procured at Wilson's Stables located a half mile from the camp through an arrangement whereby the campers and counselors could ride at a lower rate than that charged the general public.

On July 30th, the day petitioner received her injuries, the last group of Girl Scouts had left the camp at around noon. Some of the counselors also left at that time, but petitioner and other counselors stayed to close up camp, pack the equipment and prepare it for loading into trucks which were to depart the next day. Petitioner and some of the other counselors, including Mrs. Scholler, had made plans a day or two earlier to go for a final horseback ride and swim during the afternoon of the 30th after which they were to return to camp for the final packing and clearing up prior to loading. Mrs. Scholler received a call elsewhere and was unable to go on the ride but granted permission to petitioner and the other younger counselors to go on the horseback ride.

At Wilson's Stable, petitioner mounted a horse chosen for her by the attendant at the stable and started off to ride along a bridle path nearest to the camp. After a few minutes the horse bolted and petitioner was thrown to the ground and rendered unconscious. She was discovered later and taken to a hospital.

Petitioner's injuries are not in dispute. She is paralyzed and will remain so for the rest of her life. In addition to the transection of the spinal cord, she suffered broken ribs, broken maxilla, traumatic heart damage and lung damage.

The only question involved here is whether petitioner's injuries were suffered in the course of her employment. Respondents argue that they were not because of two factors: (1) That the accident occurred while petitioner was riding for her own recreation; and (2) that it occurred at a location off the premises of the employer and not under its control. Petitioner, on the other hand, contends that an injury is compensable even though it arose from an activity not primarily for the benefit of the employer, provided that such activity is related to the employment or contemplated as part of the employment, and that the fact that the injury occurred on premises not directly owned or controlled by the employer is immaterial so long as the injury arose out of the employment.

The day the accident occurred, July 30th, was covered by the terms of the written contract entered into between petitioner and her employer and is sufficient to show that her employment had not terminated despite the argument of respondents that petitioner "volunteered" to remain and assist in the closing of the camp and the packing and loading of the equipment. We have then to determine whether the recreational horseback ride for which petitioner was granted permission was contemplated as part of her employment.

It is apparent from the evidence heretofore set forth that recreational horseback riding during her free time was considered as part of the compensation to be paid by the employer for petitioner's work; that she was both encouraged and permitted to go horseback riding in her free time during working hours at lower rates arranged by the employer with the stable. In addition, it appears inferentially, that the Wilson Stables was the only one in the area available to the Girl Scouts and their counselors.

[1,2] In *Pacific Indemnity Co. v. Industrial Accident Comm.*, 26 Cal.2d 509, 513, 159 P.2d 625, 627, where an employee was drowned while washing in a reservoir while on his way to his employer's office to collect his pay, we held: "The mere fact that an employee is performing a personal act when injured does not *per se* bring him without

the purview of the Compensation Law. The test is stated in *Employers', etc., Corp. v. Industrial Accident Comm.*, 37 Cal.App.2d 567, 573, 99 P.2d 1089, 1092: 'The true rule to be derived from the cases is that the injury is compensable if received while the employee is doing those reasonable things which his contract of employment expressly or impliedly authorizes him to do.'" In *Phoenix Indemnity Co. v. Industrial Accident Comm.*, 31 Cal.2d 856, 861, 193 P.2d 745, 747, where a pilot was killed while taking his young daughter for an airplane ride, we held that: "* * * although it may be conceded that Hamilton was deriving a personal benefit from the flight by determining his daughter's aptitude for flying, this 'does not *per se* bring him without the purview of the Compensation Law. * * * "The true rule * * * is that the injury is compensable if received while the employee is doing those reasonable things which his contract of employment expressly or impliedly authorizes him to do.'" *Pacific Indemnity Co. v. Industrial Accident Comm.*, 26 Cal.2d 509, 513, 159 P.2d 625, 627. Benefits to the employer, or to the employee, are not mutually exclusive, and 'where the employee is combining his own business with that of his employer, or attending to both at substantially the same time, no nice inquiry will be made as to which business he was actually engaged in at the time of injury, unless it clearly appears that neither directly nor indirectly could he have been serving his employer.' *Lockheed Aircraft Corp. v. Industrial Accident Comm.*, 28 Cal.2d 756, 758, 759, 172 P.2d 1, 3." In *California Casualty Indemnity Exchange v. Industrial Accident Comm.*, 21 Cal.2d 751, 758, 760, 135 P.2d 158, the injured employee had the implied consent of her employer to go on personal errands during working hours. The court there said that it was not indispensable to recovery that the employee be rendering service to his employer at the time of the injury if the act was contemplated by the employment. It was there held that any reasonable doubt as to whether an act was contemplated by the employment, in view of this state's liberal policy of construction in favor of the employee, should be resolved in favor of the employee. See, also, *Heaton*

v. Kerlan, 27 Cal.2d 716, 720, 166 P.2d 857; Employers', etc., Corp. v. Industrial Accident Comm., 37 Cal.App.2d 567, 99 P.2d 1089; Western Pipe, etc., Co. v. Industrial Accident Comm., 49 Cal.App.2d 108, 121 P.2d 35. The record here clearly shows that petitioner's wage was low; that it had been difficult to procure counselors for the camp; that it was specifically contemplated by the employer that the use of the available recreational facilities was considered "compensation" for the long hours and exacting work.

[3] The present case, although a much stronger one factually, is very like that of Winter v. Industrial Accident Comm., 129 Cal.App.2d 174, 176, 177, 276 P.2d 689, 691, where the court annulled an order of the commission which denied compensation to a caddy who lost an eye as a result of being struck by a golf ball. The caddy was permitted to play, without charge on his day off, on the golf course where he was employed. At the time of his employment, the caddy did not know that such permission could be obtained. It was during such free play on his day off when he received his injury. The court held that the injury was sustained in the course of petitioner's employment; that it was not indispensable to recovery that the employee be rendering a service to the employer at the time of injury; and as an additional argument in favor of recovery, the court said: "The essential prerequisite to compensation is that the danger from which the injury results be one to which he is exposed as an employee in his particular employment. Industrial Indemnity Co. v. Industrial Accident Comm., 95 Cal.App.2d 804, 809, 214 P.2d 41." The court said, further, that "He [petitioner] was engaged at the time in a recreational activity, both permitted and, in the light of the facts, sufficiently encouraged by the employer, which permission and encouragement were conditioned solely upon the facts that he was a caddy employed by the club. For that reason, and for no other, he was permitted to play on the course. * * * Concerning recreational activities, and as to when injuries sustained therein are compensable, this rule is laid down in 1 Larson's Workmen's Compensation Law,

sec. 22, page 328: 'Recreational * * * activities are within the course of employment when (a) They occur on the premises during a lunch or recreation period as a regular incident of the employment.' The test, says the author, is whether or not the recreational activity 'is an accepted and normal one, since it thereby becomes a regular incident and condition of the employment. * * * The activity must be shown to have achieved some standing as a custom or practice either in the industry generally or in this particular place. * * *'" In Satchell v. Industrial Accident Comm., 94 Cal.App.2d 473, 478, 210 P.2d 867, 870, where an employee died after having drunk cleaning fluid thinking it was whiskey, the court said that the drinking of whiskey under the circumstances related was to be anticipated under the conditions of his employment, and held that "It is too well settled to admit of question that an injury is compensable if the employee is at the time engaged in doing something he might reasonably have been expected to do while in the performance of his duty. Leffert v. Industrial Accident Comm., 219 Cal. 710, 28 P.2d 911; Pacific Indemnity Co. v. Industrial Accident Comm., 26 Cal.2d 509, 513, 159 P.2d 625; Lockheed Aircraft Corp. v. Industrial Accident Comm., 28 Cal.2d 756, 172 P.2d 1; Elliott v. Industrial Accident Comm., 21 Cal.2d 281, 131 P.2d 521, 144 A.L.R. 358." See, also, Industrial Indemnity Co. v. Industrial Accident Comm., 95 Cal.App.2d 804, 809, 214 P.2d 41; City, etc., of San Francisco v. Industrial Accident Comm., 61 Cal.App.2d 248, 251, 142 P.2d 760; Whiting-Mead Commercial Co. v. Industrial Accident Comm., 178 Cal. 505, 508, 173 P. 1105, 5 A.L.R. 1518. We conclude, therefore, that recreational horseback riding was considered by both employer and employee as part of the compensation; that such consideration was the practice of the employer; and that the danger from which the injury resulted was "one to which he [the employee] is exposed as an employee in his particular employment." Winter v. Industrial Accident Comm., 129 Cal.App.2d 174, 176, 276 P.2d 689, 691; Associated Indemnity Corp. v. Industrial Accident Comm., 18 Cal.2d 40, 44, 112 P.2d 615;

California Casualty Indemnity Exch. v. Industrial Accident Comm., 190 Cal. 433, 436, 213 P. 257. Here, as in the Winter case, petitioner's injuries arose from the very risk to which she was exposed as part of her duties—riding as a counselor with the Girl Scouts.

As we held in *Truck Insurance Exchange v. Industrial Accident Comm.*, 27 Cal.2d 813, 819, 167 P.2d 705, 708, "An employee cannot be required to forego a part of his compensation in order to relieve the employer from risk. 'The duty to pay and the right to receive the compensation were integral parts of the contract of employment,' and 'The medium of exchange in which wages happen to be paid is a mere accidental circumstance and should not be permitted to cloud the issue.' (State Compensation Insurance Fund v. Industrial Accident Comm. (1924), *supra*, 194 Cal. 28, 34, 35, 227 P. 168, 170; *Pacific Indemnity Co. v. Industrial Accident Comm.* (1945), *supra*, 26 Cal. 2d [509] at page 432, 159 P.2d 625.)"

The second argument made by respondents is that the injury occurred off the employer's premises in a location not directly owned or controlled by it, and that the cases of *Fireman's Fund, etc., Co. v. Industrial Accident Comm.*, 39 Cal.2d 529, 247 P.2d 707, and *Liberty Mutual Ins. Co. v. Industrial Accident Comm.*, 39 Cal.2d 512, 247 P.2d 697, are directly in point. In both cases employees engaging in recreational activities during time off from work were injured off the employer's premises. Both cases are readily distinguishable from the one under consideration. In the *Fireman's Fund* case, the employee was injured off the employer's premises where her activities would not normally take her; neither were such activities contemplated at the time of employment as part of her compensation. In the case at bar, it was contemplated at the time of employment that the very activity causing petitioner's injuries would be engaged in as part of the compensation for her employment; it was further contemplated that the very premises on which she was injured would be used by her in engaging in that activity. In the *Liberty Mutual* case, swimming was purely a personal diversion on the part of

the injured claimant; it had not been discussed at the time of his employment; it played no part in the compensation for the employment as petitioner's horseback riding did in the case at bar. No permission to swim was given the claimant in the *Liberty Mutual* case; specific permission to ride was given petitioner here.

[4] There is ample authority to support petitioner's contention that an injury is compensable if it results from an activity contemplated by the employment, even though it occurs in a location not directly owned or controlled by the employer, *State Compensation Insurance Fund v. Industrial Accident Comm.*, 194 Cal. 28, 31, 227 P. 168; *Associated Indemnity Corp. v. Industrial Accident Comm.*, 18 Cal.2d 40, 45, 112 P.2d 615; *Freire v. Matson Navigation Co.*, 19 Cal.2d 8, 11, 118 P.2d 809; *California Casualty Indemnity Exchange v. Industrial Accident Comm.*, 21 Cal.2d 751, 758, 135 P.2d 158; *Truck Insurance Exchange v. Industrial Accident Comm.*, 27 Cal.2d 813, 816, 167 P.2d 705; *Lockheed Aircraft Corp. v. Industrial Accident Comm.*, 28 Cal. 2d 756, 760, 172 P.2d 1; *Phoenix Indemnity Co. v. Industrial Accident Comm.*, 31 Cal.2d 856, 861, 193 P.2d 745; *Papineau v. Industrial Accident Comm.*, 45 Cal.App. 181, 183, 187 P. 108; *Matthews v. Naylor*, 42 Cal.App.2d 729, 732, 109 P.2d 978; *Western Pipe, etc., Co. v. Industrial Accident Comm.*, 49 Cal.App.2d 108, 121 P.2d 35. As we held in *Associated Indemnity Corp. v. Industrial Accident Comm.*, 18 Cal.2d 40, 45, 112 P.2d 615, 618, "In order that an employee may be considered as upon his employer's premises at the time of the injury it is not necessarily essential that the premises be circumscribed by walls or barriers (*Makins v. Industrial Accident Comm.*, 198 Cal. 698, 247 P. 202, 49 A.L.R. 411); nor that the same be wholly under the control of the employer. *Globe Indemnity Co. v. Industrial Accident Comm.*, 208 Cal. 715, 284 P. 661; *Judson Mfg. Co. v. Industrial Accident Comm.*, 181 Cal. 300, 184 P. 1; *Starr Piano Co. v. Industrial Accident Comm.*, 181 Cal. 433, 184 P. 860." The employee in the *Associated* case was on some railroad tracks when he was injured, and the court concluded that he was on the

premises "with the consent and approval of his employer, and was performing his duties thereon in going from the depot to the dock."

[5] Petitioner contends that she was denied due process of law because of the referee's refusal to admit in evidence a letter written by Mrs. Scholler to petitioner's counsel. The letter contained a statement that the couple's recreation was considered part of their compensation and that it "was so intended" at the time of their employment. It is apparent that the letter constituted an admission and should have been admitted in evidence when it was offered at the first hearing when Mrs. Scholler was not available as a witness. She testified, however, at a later hearing to the same effect when she stated: "I mentioned at the time of the interview [with petitioner] we do say that the compensation by no means shows that we are trying to pay you for your services but that we recognize it is just a very little bit but we hope that while you are there *you will also have been compensated to some extent to take advantage of the recreational opportunity that you can do as a counselor that you can't do ordinarily.*" (Emphasis added.) In view of the above testimony and the liberal rules of evidence prevailing in the Industrial Accident Commission hearings, Labor Code, § 5708, it does not appear that petitioner was prejudiced in any way by the exclusion of the letter.

[6] Respondents' final contention is that whether or not an injury was suffered in the course of employment is one of fact and that the finding of the commission is conclusive. Where, as here, there is no real dispute as to the facts, the question of whether an injury was suffered in the course of employment is one of law and a purported finding of fact on that question is not binding on an appellate court, *Southern Pacific Co. v. Pillsbury*, 170 Cal. 782, 783, 151 P. 277, L.R.A.1916E, 916; *Hines v. Industrial Accident Comm.*, 184 Cal. 1, 4, 192 P. 859, 14 A.L.R. 720; *Crown City Lodge, etc., v. Industrial Accident Comm.*, 10 Cal.App.2d 83, 87, 51 P.2d 143; *San Diego Trust & Savings Bank v. San*

Diego County, 16 Cal.2d 142, 153, 105 P.2d 94, 133 A.L.R. 416.

[7] Particularly applicable in this connection is the holding in *Winter v. Industrial Accident Comm.*, 129 Cal.App.2d 174, 178-179, 276 P.2d 689, 692, where the court, in annulling an order of the commission denying compensation, had this to say: "The respondent Commission argues that even if it be conceded an award could be made upon the facts presented here, yet the issue was one of fact to be resolved by the Commission, and that the Commission's resolution cannot be set aside on review. We do not agree. The facts themselves are without dispute and hence the issue is one of law unless opposing inferences can be drawn, one set supporting an award, the other supporting the denial thereof. We think no such opposing inferences are permissible here and that the undisputed facts compel the conclusion that petitioner's injury arose out of and in the course of his employment. It was the employment which created the facts and conditions that brought petitioner to the premises of his employer to engage in the permitted and encouraged recreational activity. The course of the flying golf ball could only be intercepted at one place and the presence there of petitioner was due to the employment." The same holding applies with equal force here. It was the employment which created the conditions which brought petitioner to engage in the permitted and encouraged recreational activity. The question is, therefore, one of law for this court to decide. It appears to us that petitioner's injuries occurred in and arose out of the course of her employment.

The award is annulled.

GIBSON, C. J., and SHENK and TRAYNOR, JJ., concur.

SPENCE, Justice.

I dissent.

The respondent commission found that Miss Reinert "did not sustain any injury arising out of or occurring in the course of said employment." The majority opinion annuls the award based upon this finding

and concludes as a matter of law that the injury here "occurred in and arose out of the course of her employment." I am of the view that the majority opinion has usurped the fact-finding function of the commission by drawing inferences which are contrary to those drawn by the commission, and in some instances, contrary to the evidence itself; and that the majority opinion has thereby reached conclusions which cannot be justified.

Miss Reinert was employed as a life-guard and swimming counsellor at the Girl Scout Camp following her interview with Mrs. Scholler. The recreational features of the work were discussed at the interview as well as the arrangements for free time during which the members of the staff could leave the camp and do anything that they might choose to do. No emphasis was placed upon the particular nature of any free time activity such as horseback riding, nor was Miss Reinert thereafter "required to obtain permission for the precise recreational activity away from camp in which she wished to engage," as indicated in the majority opinion. With respect to horseback riding, Miss Reinert testified as follows: "Q. Did she (Mrs. Scholler) say something about having any opportunities to go horseback riding by yourself or when you were not with the little girls? A. Well, I don't remember whether she did or not." Miss Reinert learned after arriving at camp that she could go horseback riding in her free time on payment of \$1 per hour to Wilson's Stables, which was the fixed charge for "all organized camps—whether campers or staff personnel."

Under the evidence, the referee of the commission reported that "It is my opinion that the claimant in exercising her privilege on the afternoon of July 30, 1954, to join with other employees in horseback riding did not engage in any activity which can be designated as arising out of and occurring in the course of her employment." And the commission, in denying reconsideration, said that "* * * there is no theory upon which applicant could be awarded compensation benefits nor her injury be held to arise out of and occur in the course of the employment." It further

said: "It is true that many employments are attractive because of recreational facilities which are available in the vicinity of the place of employment. This in the opinion of the Panel, does not result in the extension of the mantle of the 'employer-employee' relationship over such recreational facilities so as to make an injury sustained while the employee enjoys such recreation compensable."

The facts in the present case are neither unusual nor complicated. The record presents the ordinary situation where an employee accepts a particular employment because of the desirable nature of the work and because of the opportunities afforded during her free time for recreational activities which she enjoys. It is a matter of common knowledge that many persons accept such desirable employment each year in the recreational camps of our character building agencies, receiving their sustenance and little or no additional compensation. Similarly, many persons accept employment each year with commercial enterprises in our resort areas. No doubt, most of these persons are induced, at least to some extent, to accept such employment by the lure of the numerous recreational activities which may be enjoyed by the employees in their free time. Thus, in a very loose sense of the word, it may be said that they find some "compensation" in the enjoyment of their free time activities, but it cannot be said that these free time activities, away from the premises of the employer and beyond the sphere of any right of control by the employer, constitute "part of the employment" or "part of the compensation to be paid by the employer for petitioner's work", as stated in the majority opinion. The employer here paid nothing, directly or indirectly, in connection with the employees' free time horseback riding but, on the contrary, the employees paid directly to the stable all charges which they incurred for such riding.

It is significant that neither the place where the accident occurred, the equipment being used, or the nature of the activity was such as to give the employer any right of control of the employee's free time recreational activity at the time and place

where the injury occurred. The stable was conducted by an independent third party at a location approximately one and one-half miles from the camp of the employer and the accident occurred at a point approximately one mile from the camp. Neither the horse trail on which Miss Reinert was riding nor any other such trail ran through the employer's camp, or any closer than one-half to three-quarters of a mile therefrom. Hence the injury here was as much apart from the employment as were the injuries in the cases hereinafter cited, which injuries were held not to be compensable; and while the employment here, as in those cases, may be said to have brought the employee to the place from which she departed for her free-time recreational activity and may be said to have afforded her the opportunity for such activity, it cannot be said that the injury sustained in that activity arose "out of and in the course of the employment." It therefore appears to me that the majority opinion here is contrary in principle to our recent decisions in *Liberty Mutual Ins. Co. v. Industrial Accident Comm.*, 39 Cal. 2d 512, 247 P.2d 697, and *Fireman's Fund, etc., Co. v. Industrial Accident Comm.*, 39 Cal. 2d 529, 247 P.2d 707; and that it is likewise contrary in principle to the cases of *Graf v. Montecito County Water Dist.*, 1 Cal. 2d 222, 34 P.2d 138, and *Arabian, etc., Oil Co. v. Industrial Accident Comm.*, 94 Cal. App. 2d 388, 210 P.2d 732, in which compensation was denied to employees who were injured while engaged in the permitted use of their employers' equipment for free time recreational activity away from the premises of their employers.

There is no conflict in the testimony regarding the nature of the trip on which Miss Reinert was injured. It shows that "That trip had nothing to do with anyone's duties in connection with the camp"; that her superior had "no interest in their activities in their free time" but "just hoped they had a good time"; that on the afternoon in question "the horseback ride and swimming was considered free time for everybody"; that from 2:30 p. m. on "all of the unit leaders and counselors and as-

sistant leaders were free"; that all that her superior required in connection with their free time was that they "checked out and checked in"; that the purpose of so checking was "just so I knew where they were going—so if their parents came to look for them in an emergency * * *." Miss Reinert testified that it was a "voluntary matter" on her part "to decide to go riding"; that "I wasn't busy, and I just thought I would like to go horseback riding, and so I went to Mrs. Scholler and asked her if there is anything to do, and she said there wasn't, so I went riding." It thus appears that the "permission" to which reference is made in the majority opinion amounted to nothing more than permission for the allowance of free time in addition to the regular day off, and that the employees were "encouraged" to go horseback riding only in the sense that they were encouraged to use their free time to engage in any recreational activity of their own choosing. The employees were not required to go horseback riding at any time during their free time, and Miss Reinert could have decided on the afternoon in question to engage in mountain climbing, boating, swimming, diving, sun-bathing, fishing, touring in her own car, patronizing places of public accommodation or amusement, or any other activity which might be enjoyed in the general area. It was she who suggested that some of her co-workers go with her on their free time on that day, first for a ride and then for a swim at a lake located five miles from the camp of her employer. Some followed her suggestion, and others did not, but the fact remains that she and the others were at liberty to go wherever they chose and to do anything they desired to do. Such activity was typical of the free time activity enjoyed by employees generally when relieved from the duties of their employment and cannot be said to be "part of the employment."

The cases upon which the majority opinion relies do not sustain the conclusion reached therein. Typical of the cited cases are those in which injuries have been held compensable under certain circumstances

when they occurred on premises of the employer, *Pacific Indemnity Co. v. Industrial Accident Comm.*, 26 Cal.2d 509, 159 P.2d 625; *California Casualty Indemnity Exchange v. Industrial Accident Comm.*, 21 Cal.2d 751, 135 P.2d 158; *Winter v. Industrial Accident Comm.*, 129 Cal.App.2d 174, 276 P.2d 689; *Employers', etc., Corp. v. Industrial Accident Comm.*, 37 Cal.App.2d 567, 99 P.2d 1089, or at places customarily used as the immediate approaches to the premises of the employer, *Freire v. Matson Navigation Co.*, 19 Cal.2d 8, 118 P.2d 809; *State Compensation Insurance Fund v. Industrial Accident Comm.*, 194 Cal. 28, 227 P. 168, or during brief deviations for personal reasons from the actual work of the employer, or at a time when the employee could be said to be acting both on behalf of himself and his employer, *Phoenix Indemnity Co. v. Industrial Accident Comm.*, 31 Cal.2d 856, 193 P.2d 745; *Lockheed Aircraft Corp. v. Industrial Accident Comm.*, 28 Cal.2d 756, 172 P.2d 1; *Western Pac. R. Co. v. Industrial Accident Comm.*, 193 Cal. 413, 224 P. 754; *Western Pipe, etc., Co. v. Industrial Accident Comm.*, 49 Cal.App.2d 108, 121 P.2d 35. These cases demonstrate that the courts have consistently and conscientiously endeavored to apply the rule of liberal construction, Labor Code, § 3202, in determining whether any given injury "arose out of and in the course of" the employment as required by our statute. Labor Code, § 3600. However, courts may not in good conscience nullify the requirements of the statute under the guise of liberal construction, and I am of the view that the majority opinion here results in such nullification.

With respect to the letter which was denied admission in evidence, I agree that it was covered in substance by the other testimony of Mrs. Scholler; but I do not believe that the use of the word "compensate" or "compensation," considered in context in either the letter or the testimony, would support a finding or conclusion that the employee's free time activities of her own choosing, far removed from the employer's premises and outside of the sphere of any right of control by the employer, were "part of her employment" or that the

injury incurred in such activities "arose out of or in the course of" her employment. On the other hand, I am of the view that the commission's finding to the contrary was abundantly supported by the evidence.

I would affirm the award.

SCHAUER and McCOMB, JJ., concur.

Rehearing denied; SCHAUER, SPENCE and McCOMB, JJ., dissenting.



Guy N. STAFFORD, Plaintiff and Appellant,

v.

Rachel F. YERGE et al., Defendants and Respondents.

Civ. 21473.

District Court of Appeal, Second District, Division 2, California.

March 16, 1956.

Rehearing Denied April 6, 1956.

Hearing Denied May 9, 1956.

Action to collect royalties on production of certain oil well. From adverse judgment and order of the Superior Court of Los Angeles County, Bayard Rhone, J., the plaintiff appealed. The District Court of Appeal, Fox, J., held that the motion for dismissal on theory that the issues were *res judicata* was properly granted.

Affirmed.

1. Appeal and Error ⇨79(1)

It is proper in an action against several defendants in which a joint or several judgment could be rendered, to appeal from judgment in favor of one of the defendants while the action remains pending and undetermined on merits as to other defendant. West's Ann.Code Civ.Proc. § 579.

2. Judgment ⇨241

The rule as to a single final judgment has no application to actions in which separate and independent relief is sought against several defendants. West's Ann. Code Civ.Proc. § 579.

3. Appeal and Error ⚡79(2)**Judgment** ⚡570(1)

A prior order in action to collect royalty from production of oil well dismissing action as to certain defendants was final as to such defendants and was therefore appealable, and hence issues determined in decision of Court of Appeals affirming the order were *res judicata* in subsequent suit. West's Ann.Code Civ.Proc. § 579.

4. Mines and Minerals ⚡74

The effect of assignment of oil lease was to make assignor a surety to lessors for assignee.

5. Principal and Surety ⚡66(2)

Where there can be no recovery against the principal, there can be none against the surety.

6. Judgment ⚡883

Where assignor of oil lease was exonerated from liability for royalties from production of oil well in prior suit, assignee was entitled to plead prior judgment as *res judicata* in suit to recover royalties from it.

Guy N. Stafford in pro. per.

Louis A. Audet, Los Angeles, for respondent Wayne H. Fisher.

Martin J. Weil, Sims Hamilton, Los Angeles, for respondent General Petroleum Corp.

Burke, Williams & Sorensen, Martin J. Weil, Sims Hamilton, Los Angeles, for respondent Joseph P. Cooney.

John W. Brooks, Long Beach, for respondent Security-First National et al.

FOX, Justice.

This is another chapter in the legal maneuvers by which the plaintiff and his assignors, the Howards, have sought to recover certain oil royalties from December 1, 1932, under a community lease to one Walter H. Fisher in 1925. See *Howard v. General Petroleum Corp.*, 114 Cal.App.2d 91, 249 P.2d 585; *Id.*, 136 Cal.App.2d 168, 288 P.2d 308; and *Stafford v. Yerge*, 129 Cal.App.2d 165, 276 P.2d 649. Fisher assigned the lease to the Walter H. Fisher Corporation, which in turn assigned it to

defendant General Petroleum Corporation in July, 1926. Prior to the commencement of the Howard suit, General Petroleum had purchased from the Howards and others the real property covered by the lease and also for a valuable consideration had received a release from the plaintiffs of all of its (General Petroleum's) obligations under the lease. In due course, General Petroleum conveyed the lots and well in question to R. P. Cooney, who later entered into an oil and gas lease with Jack Herley and Paul L. Kelley, who reconditioned the well and proceeded to operate it. See *Howard v. General Petroleum*, 114 Cal.App.2d 91, 92, 249 P.2d 585. Upon a trial of the Howard case, General Petroleum was exonerated of the charges of fraud and judgment was rendered to the effect that plaintiffs were not entitled to any royalties. This was affirmed on appeal, 114 Cal.App.2d 91, at page 94, 249 P.2d 585, at page 587, the court holding that "The grant deed and release terminated plaintiffs' right to royalties" and further observing that "The right of a lessor under a community lease lasts only during continuance of the lease." 114 Cal.App.2d at page 94, 249 P.2d at page 587. Finally, the court pointed out, 114 Cal.App.2d at page 95, 249 P.2d at page 588, that "Plaintiffs' interest in the lease having been terminated by the execution of the deed and the release, there is no basis on any theory for a judgment against the other defendants", i. e., defendants other than General Petroleum.

Thereafter, plaintiff as assignee of the Howards, filed the instant action to recover the same royalties, alleging the same ultimate facts that the Howards had alleged, but in somewhat greater detail. Defendants General Petroleum, Cooney, and Herley and Kelley filed a notice of motion to dismiss, supported by an affidavit to which was attached the judgment roll in the Howard case. The motion was granted on the theory that the issues were *res judicata*. The judgment of dismissal was affirmed by this court in *Stafford v. Yerge*, 129 Cal.App.2d 165, 276 P.2d 649.

Plaintiff then made a motion to vacate the judgment in the Howard case on the theory that Cooney and Fisher were indispensable parties-defendant and since they

had not been joined as such, the judgment was void. This motion was denied and Stafford appealed. The order was affirmed. *Howard v. General Petroleum Corp.*, 136 Cal.App.2d 168, 288 P.2d 308, 309, the court holding that "neither Cooney¹ nor Fisher was an indispensable party."

In July, 1955, Fisher appeared in the instant case and made a motion to dismiss on the ground that the issues were *res judicata* by reason of the Howard judgment. The motion was granted. Plaintiff appeals from the judgment of dismissal. At the same time, plaintiff made a motion to vacate the prior judgment herein in favor of General Petroleum et al. which this court affirmed in 129 Cal.App.2d 165, 276 P.2d 649. His motion was denied. He appeals from this order, also.

Plaintiff's theory is that because defendant Fisher had not appeared in this action at the time the court rendered its judgment in favor of General Petroleum, Cooney and the Herley-Kelley group, that judgment was not final and was, therefore, not appealable, and this court had no jurisdiction to affirm it. His contention is based on the general rule that there can be but one final judgment in an action. He argues that the prior judgment dismissing the action as to certain defendants was only a partial judgment and neither final nor appealable on the theory that Fisher was an indispensable party-defendant to a complete determination of the controversy.

[1-3] In making this argument, plaintiff starts with an unsound premise, viz., that Fisher was an indispensable party-defendant. He was no more an indispensable party in this case than he and Cooney were indispensable parties in the Howard case. 136 Cal.App.2d 168, 288 P.2d 308. Plaintiff also overlooks section 579, Code of Civil Procedure, which provides that "In an action against several defendants, the Court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper." In *Rocca v. Steinmetz*, 189 Cal. 426, 208 P. 964, the court held that under section 579, Code of

Civil Procedure, it is proper in an action against several defendants in which a joint or several judgment could be rendered, to appeal from a judgment in favor of one of the defendants while the action remains pending and undetermined on the merits as to the other defendant. Other cases to the same effect are *Weisz v. McKee*, 31 Cal. App.2d 144, 87 P.2d 379, 88 P.2d 200; *Howe v. Key System Transit Co.*, 198 Cal. 525, 246 P. 39; and *Taylor v. Western States Land, etc., Co.*, 77 Cal.App.2d 869, 176 P.2d 975. In *Huntoon v. Southern T. & C. Bank*, 107 Cal.App. 121, 290 P. 86, 90, the court stated that "The rule as to a single final judgment has no application to actions in which separate and independent relief is sought against several defendants." Plaintiff sought separate and independent relief against the several defendants in this action. A several judgment as to each defendant was therefore proper, under section 579, Code of Civil Procedure, and the cases cited supra. Hence the earlier judgment rendered in this case in favor of General Petroleum, Cooney, and the Herley-Kelley group was final as to such defendants and was therefore appealable. As a consequence, the decision of this court on the prior appeal, 129 Cal.App.2d 165, 276 P.2d 649, is final and effectively disposed of plaintiff's argument that the issues raised in this case had not been litigated in the Howard case and that the doctrine of *res judicata* was inapplicable.

[4-6] Additional consideration must be given to the judgment in favor of Wayne H. Fisher as trustee of the Walter H. Fisher Corporation, dissolved. By reason of the assignment of the lease to General Petroleum by the Fisher Corporation, a privity of interest between them was established. The effect of the assignment was to make the Fisher Corporation a surety to the lessors for General Petroleum. *Samuels v. Ottinger*, 169 Cal. 209, 146 P. 638; *Landlord & Tenant*, 15 Cal.Jur. pp. 755-756, sec. 170. It was established in the Howard case that the plaintiffs therein were not entitled to any recovery against General Petroleum. (Plaintiff herein stands in their shoes, since he is their assignee.) It follows that the

1. This court also held on the prior appeal herein that Cooney was not an indis-

pendable party in the Howard case. 129 Cal.App.2d 165, 170, 276 P.2d 649.

Fisher Corporation is under no liability to those parties for where there can be no recovery against the principal, there can be none against the surety. *Sharon v. Sharon*, 84 Cal. 433, 23 P. 1102; *Parnell v. Hancock*, 48 Cal. 452; *Suretyship*, 23 Cal.Jur. p. 1061, sec. 51. The Fisher Corporation was therefore entitled to rely on the exoneration of General Petroleum in the Howard judgment and to successfully plead it as *res judicata* in this case. *Bernhard v. Bank of America*, 19 Cal.2d 807, 813, 122 P.2d 892; *McManus v. Bendlage*, 82 Cal.App.2d 916, 922, 187 P.2d 854.

In view of the foregoing, it becomes unnecessary to discuss other points attempted to be made by plaintiff.

The judgment and order are affirmed.

MOORE, P. J., concurs.

ASHBURN, J., deeming himself disqualified, did not participate herein.



140 Cal.App.2d 115

Jessie Lavinia ROBINSON, Petitioner and Appellant,

v.

BOARD OF RETIREMENT, H. L. Byram, William T. Cobb, Walter G. Gastil, Harry S. Hargrave, Alfred L. Thomas, Clarence H. Thurber, Gladys Johnson, Marguerite Ashton and LaVerne Barclay, Respondents.

Board of Retirement, H. L. Byram, William T. Cobb, Walter G. Gastil, Harry E. Hargrave, Alfred L. Thomas, Clarence H. Thurber and Gladys Johnson, Members of said Board of Retirement, Respondents.

Civ. 21463.

District Court of Appeal, Second District, Division 2, California.

March 21, 1956.

Widow of deceased safety member of the sheriff's department brought mandamus proceeding to compel County Board of Re-

tirement to grant to widow a special death benefit, on ground that death of deceased safety member was the result of injury or disease arising out of and in course of employment. The Superior Court of Los Angeles County, Philbrick McCoy, J., entered judgment denying mandamus, and the widow appealed. The District Court of Appeal, Ashburn, J., held that fact that safety member of sheriff's department was on military leave of absence from sheriff's department for period from November 7, 1940 to June 30, 1946, and for another period from March 21, 1950 to June 27, 1953, the date of his death from heart attack, was not evidence which would rebut statutory presumption that if a safety member completes fifteen years or more of service under pension system and develops heart trouble, it shall be presumed in absence of evidence to the contrary that such heart trouble is an injury or disease occurring in and arising out of his employment, so as to justify a special death benefit. Judgment reversed with direction to Superior Court to enter judgment remanding the proceeding to the board for new hearing.

1. Mandamus ⇨172, 187(9)

In mandamus proceeding by widow of deceased safety member of sheriff's department to compel County Board of Retirement to grant her a special death benefit, trial court was confined to determining whether board had before it substantial evidence to sustain its finding, since the board is a local agency exercising a quasi judicial function, and problem of District Court of Appeal on appeal from judgment denying mandamus was merely to see whether trial court properly performed such duties. West's Ann.Gov.Code, §§ 31720.5, 31780, 31781, 31787.

2. Evidence ⇨5(2)

Court should probably take judicial notice of fact of medical examination on entrance of one into military service, but court cannot go further and guess at nature and extent of that examination or action taken if a slight heart condition or suggestion thereof is found, or surmise as to whether such a man is accepted and placed on limited service.

3. Sheriffs and Constables ⇨28

Fact that safety member of sheriff's department was on military leave of absence from sheriff's department for period from November 7, 1940 to June 30, 1946, and for another period from March 21, 1950 to June 27, 1953, the date of his death from heart attack, was not evidence which would rebut statutory presumption that if a safety member completes fifteen years or more of service under pension system and develops heart trouble, it shall be presumed in absence of evidence to the contrary that such heart trouble is an injury or disease occurring in and arising out of his employment, so as to justify a special death benefit. West's Ann.Gov.Code, §§ 31720.5, 31780, 31781, 31787.

4. Evidence ⇨597

A bare possibility is not evidence.

5. Evidence ⇨597

A bare possibility can not be accepted as evidence to the contrary of a presumption.

6. Evidence ⇨54

An inference cannot be based on mere possibilities, but must be based on probabilities.

7. Constitutional Law ⇨318

Lack of notice to widow of deceased safety member of the sheriff's department of hearing before County Board of Retirement and absence of opportunity to widow to appear before the board in support of her claim for special death benefit, amounted to want of procedural due process. West's Ann.Gov.Code, §§ 31720.5, 31780, 31781, 31787.

8. Mandamus ⇨168(2)

In mandamus proceeding by widow of deceased safety member of the sheriff's department to compel County Board of Retirement to grant her a special death benefit, widow's attorney was not obligated to show or attempt to show that widow was prejudiced by want of procedural due process before board because of lack of notice to widow of hearing before board and absence of opportunity to widow to appear before board in support of her claim, and

widow's attorney was entitled to stand on proposition that proceeding before board was void. West's Ann.Gov.Code, §§ 31720.5, 31780, 31781, 31787.

John Gratton and Marvin A. Burnett, Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, Edward H. Gaylord, Deputy County Counsel, Los Angeles, for respondents.

ASHBURN, Justice.

Appeal from denial of mandamus to compel County Board of Retirement to grant to petitioner, the widow of Stanley W. Robinson, safety member of the sheriff's department, a special death benefit provided by § 31781, Government Code. Section 31780 prescribes the normal death benefit for the survivors of one who dies while in the service (and under certain other conditions). Section 31787 provided at the time of death of Robinson: "In addition to the death benefit provided for in Section 31781, if such member was a safety member survived by a spouse or unmarried child under the age of 18 years, and such death was the result of injury or disease *arising out of and in the course of his employment* there shall be added an amount sufficient when added to the amount of the death benefit under Section 31781 to provide when applied according to the tables adopted by the board, a monthly death allowance, equal to one-half of his final compensation, payable to the surviving spouse to whom she or he was married prior to sustaining the injury or disease resulting in death until she or he dies or remarries * * *." (Emphasis added.) And § 31720.5 then said: "If a safety member who has completed 15 years or more of service under a pension system established pursuant to chapter 4 or under a pension system established pursuant to Chapter 5 or both or under this retirement system and develops heart trouble, *it shall be presumed* in any proceeding under this chapter, by the board and the court *in the absence of evidence to the contrary*, that such heart trouble is an injury or disease *occurring in and arising*

out of his employment."¹ (Emphasis added.)

It is conceded that the conditions for application of § 31720.5 have been fulfilled, i. e., decedent had had more than 15 years of service and developed heart trouble, which caused his death. There are but two questions presented on appeal, (1) was there evidence tending to offset the presumption, and (2) does the conceded fact that petitioner, the widow, had no notice or opportunity to appear upon the hearing of her application by the retirement board render its action invalid for want of administrative due process?

[1] As to the first point, both sides concede that the trial court was confined to determining whether the board had before it substantial evidence contrary to the presumption; this because the retirement board is a local agency exercising a quasi judicial function. Cf. *La Prade v. Department of Water & Power*, 27 Cal.2d 47, 53, 162 P.2d 13; *Rogers v. Retirement Board*, 109 Cal.App.2d 751, 757, 241 P.2d 611. It follows that our problem is merely to see whether the trial judge properly performed this duty. The pleadings establish that prior to his death Robinson was employed for more than 15 years in continuous service by the County of Los Angeles. The only evidence received at the hearing before the board consisted of the death certificate, showing coronary sclerosis as cause of death, and retirement records showing that Robinson was on military leave of absence from the sheriff's department for the period from November 7, 1940 to June 30, 1946, and another period from March 21, 1950 to June 27, 1953, the date of death.

[2-6] The trial judge held, and respondents' counsel argue, that it is a matter for judicial notice that a physical examination is necessary to entrance or re-entrance into military service and hence it is to be inferred that Robinson had a physical examination and was free of heart trouble when he re-entered service on March 21, 1950;

also that the fact that no heart trouble manifested itself in the last three years of his life creates an inference that it did not occur "in and arising out of his employment" but developed while in military service. It is probably true that the court should take judicial notice of the fact of medical examination upon entrance into military service, *Cook v. Mason*, 103 Cal. App. 6, 11, 283 P. 891; but it cannot go further and guess at the nature and extent of that examination or the action taken if a slight heart condition or suggestion thereof is found, or surmise as to whether such a man is accepted and placed upon limited service. Again, coronary sclerosis implies hardening of the walls of coronary arteries, a slow process; it is characteristic of heart troubles that they may be latent for a long time and suddenly and unexpectedly manifest themselves. It seems clear that the facts of a military examination and lapse of three years before coronary sclerosis manifested itself constitute no evidence at all because they do no more than prove a possibility, leaving the trier of the facts to weigh that possibility against the statutory presumption. A bare possibility is not evidence (see *McKellar v. Pendergast*, 68 Cal.App.2d 485, 489, 156 P.2d 950; *Trainor v. Maus*, 126 Cal.App.2d 295, 299, 271 P.2d 957; *Jump v. City Ice & Fuel Co.*, 92 Ohio App. 329, 110 N.E.2d 29, 33; 32 C.J.S., Evidence, § 1042, p. 1122); it cannot be accepted as "evidence to the contrary" of the presumption. "An inference cannot be based on mere possibilities; it has been held that it must be based on probabilities." *Sanders v. MacFarlane's Candies*, 119 Cal. App.2d 497, 500, 259 P.2d 1010, 1012. Respondents' cited cases² do not indicate the contrary. They were concerned with the question of whether an industrial accident was the cause of a heart trouble and the interval between the injury and the heart attack was said to be a factor to be considered in solving the problem.

[7] Lack of notice to petitioner of hearing and absence of opportunity to ap-

1. The 1955 amendment of this section does not affect the case at bar.

2. *Fitzgerald v. Department of Labor and Industries*, 45 Wash.2d 642, 276 P.2d

957; *Berndt v. Department of Labor and Industries of State*, 44 Wash.2d 138, 265 P.2d 1037; *Vendemia v. Cristaldi*, 95 U.S.App.D.C. 230, 221 F.2d 103.

pear before the retirement board in support of her petition amounted to want of procedural due process. (See *Fascination, Inc. v. Hoover*, 39 Cal.2d 260, 268, 271, 246 P.2d 656; 2 Cal.Jur.2d, § 105, p. 196.)

[8] The argument that no harm was done because petitioner had nothing further to offer is not impressive. In the first place, the record does not show this to be the fact. The trial judge drew this conclusion from the failure of petitioner's attorney to make any such claim of prejudice in the memoranda which he filed in the superior court. Counsel had made the basic point when he incorporated in the fact stipulation of February 28, 1955, the statement that "no notice was given petitioner of said hearing and petitioner had no opportunity to appear at said hearing." We are of the opinion that he was not obligated to show or attempt to show prejudice, that he was entitled then and now to stand upon the proposition that the proceeding before the board was and is void. The case of *Corcoran v. San Francisco, etc., Retirement System*, 114 Cal.App.2d 738, 745, 251 P.2d 59, cited by respondents, is not to the contrary. Be that as it may, who can say that, if present at the hearing and cognizant of what was going on, petitioner could not or would not have produced expert evidence as to the slow progress of coronary sclerosis which would have convinced the board? Who can say she could not do so if a hearing were now directed? Respondents cite cases, *Ocean Accident & Guarantee Corp. v. Industrial Accident Comm.*, 180 Cal. 389, 182 P. 35; *Walsh v. Industrial Accident Comm.*, 1 Cal.2d 747, 36 P.2d 1072, wherein it was held that improper receipt of evidence in the absence of and without notice to a party was not fatal to the proceeding because it affirmatively appeared that the complaining party could not improve his record if the matter were reopened and therefore it affirmatively appeared he had not been prejudiced by the departure from normal procedure. Those cases are not controlling here because it does not affirmatively appear that the evidence would necessarily be the same upon a new hearing,

or that petitioner would inevitably fail in her proof if given a new hearing of the kind required by law,—by due process.

The judgment is reversed with direction to the trial court to enter judgment remanding the proceeding to respondent Board of Retirement³ for a new hearing upon proper notice and consistent with the views herein expressed.

MOORE, P. J., and FOX, J., concur.



139 Cal.App.2d 918

Frances ATKINS, Plaintiff and Appellant,

v.

**Robert G. ANDERSON et al., Defendants
and Respondents.**

Civ. 21444.

**District Court of Appeal, Second District,
Division 1, California.**

March 19, 1956.

Action to compel forfeiture because of alleged violation of recorded restriction in respect to real property purchased by defendants from plaintiff. The Superior Court, Los Angeles County, Lloyd S. Nix, J., entered judgment for defendants and plaintiff appealed. The District Court of Appeal, Doran, Acting P. J., held that where plaintiff had shown no detriment and had requested no compensation damages or injunctive relief, and there was no further violation of restrictive covenant and defendants were not guilty of gross negligence or willful or fraudulent breach of duty, defendants were relieved from forfeiture.

Affirmed.

1. Deeds ☞ 175

Where grantor had built and occupied home with area of 580 feet in violation of

3. *Fascination, Inc. v. Hoover*, 39 Cal.2d 260, 265, 268, 246 P.2d 656.

recorded restriction providing that no residence shall have area of less than 1,000 square feet and conveyance from grantor did not contain any restriction, grantor waived right to declare a forfeiture and was estopped from seeking or recovering forfeiture from grantee.

2. Contracts ⇨318

A party should not be divested of valuable rights by way of forfeiture for default, unless it is clearly made to appear that other party to contract has suffered or will suffer serious detriment or damage by reason of such default, or unless it is made to appear that default was intentional or willful.

3. Deeds ⇨171(1)

In action for forfeiture for failure to comply with recorded restriction requiring home to have at least 1,000 square feet, where plaintiff had shown no detriment and had requested no compensation, damages or injunctive relief, and home had been increased to 1,700 square feet, and there was no evidence of gross negligence or willful or fraudulent breach of duty on part of defendants, defendants were relieved from forfeiture. West's Ann.Civ.Code, § 3275.

Daniel G. Marshall, Los Angeles, for appellant.

Alfred Lubin, Beverly Hills, for respondents.

DORAN, Acting Presiding Justice.

The complaint herein seeks to compel a forfeiture because of the alleged violation of a recorded restriction in respect to real property purchased by respondents Anderson from the appellant.

From the record it appears that the property was acquired by appellant and husband on January 3, 1945. On June 1, 1945, appellant constructed a dwelling house on the property, having a roof covered area of only 580 feet, and continued in occupancy thereof until March 15, 1950. The respondents acquired title to this property on July 17, 1951, and remained in possession thereof until November, 1953, no change being made in the size of the dwelling.

Thereafter respondents sold to one E. M. Gianone, who increased the footage to 1,700 square feet.

The entire parcel acquired by appellant consisted of $3\frac{1}{4}$ acres, and the dwelling hereinbefore mentioned was built on a plot of an acre and one-half. The restriction here in question, recorded in 1945, provided that "No residence shall have less than 1,000 square feet of enclosed or roofed area. Temporary buildings are permitted to be used on this property until one year after the termination of the present war with Germany and Japan. These restrictions shall continue in full force and effect until October, 1994 and are for the benefit of the grantors, their heirs, successors and assigns and of anyone deriving title from them to any part of this or adjacent parcels of land". The war with Germany terminated in August, 1945, and the war with Japan terminated in September, 1945.

The complaint alleged the respondents' breach of this clause by reason of the maintenance of the small dwelling house since July 17, 1951, and after the termination of the wars in 1945. As pointed out in respondents' brief, the complaint does not allege that the appellant has suffered any damage or detriment, and none were proven. No written memorandum of sale was entered into in respect to the sale to respondents, and nothing contained in the deed refers to any building restriction. No notice of any kind was given by appellant to respondents showing any intention to declare a forfeiture until the present action was filed.

The trial court found "That all of the allegations contained in the defendants' answer are true", and that "the allegations of the complaint inconsistent or contrary to the defendant's answer are untrue." It is further found that "the deed of conveyance from the plaintiff to the defendant did not contain any restrictions", and that since the filing of the action, the enclosed area had been increased as hereinbefore stated.

As conclusions of law, the court found "That the plaintiff has waived her right to declare a forfeiture, by her knowledge of the restriction before delivering a deed to the premises to the defendant and accepting

payment for same". The trial court also concluded that "plaintiff is estopped to seek or recover a forfeiture where she had knowledge of the condition and participated in the violation of the restriction". Judgment was rendered accordingly.

[1] Appellant's contention that the findings do not support the judgment are untenable. As said in respondents' brief, "Aside from the findings of fact which disaffirm the truth of the allegations in the complaint and affirm the truth of the allegations in the answer, * * * there are specific findings of fact which support the judgment". The trial court found that the dwelling with the inadequate area of less than 1,000 square feet was built, not by respondents but by the appellant in 1945 and occupied by Mr. and Mrs. Atkins until 1950; that the premises were sold to respondents "with no covenant or agreement as to any restriction", and that "at the time of trial the enclosed area * * * was in excess of 1000 square feet".

From these facts the judge concluded that appellant's right to declare a forfeiture had been waived, and that "plaintiff is estopped to seek or recover a forfeiture where she had knowledge of the condition and participated in the violation of the restriction". These findings and conclusions, and the ensuing judgment are adequately supported by the record, and no reversible error appears to have been committed.

[2] As stated in the respondents' brief, "The law does not favor forfeiture of property". Under the circumstances of this case, to declare a forfeiture would be oppressive and inequitable. The rule is stated in *Gattian v. Coleman*, 86 Cal.App.2d 266, 269, 194 P.2d 728, 730, that "'a party should not be divested of valuable rights by way of forfeiture for default * * * unless it is clearly made to appear that the other party to the contract has suffered or will suffer serious detriment or damage by reason of such default, or unless it is made to appear that the default was intentional or willful'".

[3] Section 3275 of the Civil Code, provides that "Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, * * * by reason of his failure

to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty". As stated by respondents, "Inasmuch as no detriment has been shown by appellant, and no compensation, damages or injunctive relief has been requested, it follows that the respondent may be relieved from such a forfeiture, where there is no further violation of such a restrictive covenant. There is not one scintilla of evidence in this case of gross negligence, or willful or fraudulent breach of duty".

"This is a case", again quoting from the respondents' brief, "in which the appellant's own evidence is clear cut, consistent and cohesive to the effect that the appellant is seeking to declare a forfeiture in which she participated in the violation of the restriction and had waived her right to have the respondents' estate forfeited to the appellant".

The judgment is affirmed.

FOURT, J., concurs.



Irene RICHTER, Plaintiff and Respondent,
v.

ADOBE CREEK LODGE et al., Defendants,

Henry Waxman, Defendant and Appellant.*
No. 16561.

District Court of Appeal, First District,
Division 1, California.

March 16, 1956.

Rehearing Granted April 13, 1956.

Action by business invitee against resort and resort owner for personal injuries sustained when piano fell on her. The Superior Court, City & County of San Francisco, Edward Molkenbuhr, J., entered judgment upon a verdict for plaintiff, and defendant-owner appealed. The District Court of Appeal, Fred B. Wood, J., held

that where business invitee at defendant's recreational resort was injured when 600 pound, upright piano was inadvertently pushed off sloping, cement stage by two 13 year old boys, who had moved it from rear of stage to find lost dart, piano and circumstances under which it was kept on stage did not furnish basis for charging defendant with foreseeability of and legal responsibility for such causative factors, and defendant was not liable to invitee for injury.

Judgment reversed with directions.

1. Negligence ☞32(1)

The duty owed by an owner to an invitee is to exercise reasonable care in maintaining premises in safe condition not to injure such invitee.

2. Negligence ☞59

Where business invitee at defendant's recreational resort was injured when 600 pound, upright piano was inadvertently pushed off sloping, cement stage by two 13 year old boys, who had moved it from rear of stage to find lost dart, piano and circumstances under which it was kept on stage did not furnish basis for charging defendant with foreseeability of and legal responsibility for such causative factors, and defendant was not liable to invitee for injury.

Cooley, Crowley, Gaither, Godward, Castro & Huddleson, San Francisco, for appellant.

Herron & Winn, John Wynne Herron, San Francisco, for respondent.

FRED B. WOOD, Justice.

Plaintiff, a business invitee at defendant Waxman's recreational resort, sat down on the steps in front of a stage which was enclosed in front by a heavy canvas curtain. A piano, pushed and pulled toward the front of the stage by two 13-year old boys, went over the edge and onto plaintiff, to her serious injury.

Plaintiff obtained a verdict for \$54,980 which was reduced to \$42,500 as the condition for an order denying a new trial.

Defendant's principal point in support of his appeal from the judgment and from an order denying his motion for judgment notwithstanding the verdict is that plaintiff failed as a matter of law to prove that her injuries were proximately caused by defendant's negligence.

The stage was enclosed at the rear and either side by a wall and covered with a roof. The boys entered out of curiosity and engaged in throwing a dart from wall to wall. It disappeared in the vicinity of the piano so they moved the piano away from the wall toward the center of the stage. Failing to find the dart, they undertook to move the piano back into place, one pulling and the other pushing. One of the boys said it at first moved a little hard, so they both tried a little harder and "finally it started moving." The other boy, asked if it moved rather freely as they went toward the front, said "No, sir, I don't believe so." As one of the boys expressed it, as one was pushing and the other pulling, "it sort of swerved around * * * and then one of the casters went off, and it started falling." The other boy said "for some reason we got it too close to this first step here, and we misjudged the place and it started to topple over on one caster."

The stage, 30 feet wide by 15 feet deep, had a smooth cement surface and, for drainage purposes, sloped $3\frac{5}{8}$ inches in $15\frac{1}{2}$ feet.

The piano was normally kept with its back against the left side wall, about three or four feet from the front of the stage. According to one of the boys that was where it was when they began moving it. The other boy placed it near the middle of the rear wall with one end against the wall.

The piano had been placed there for the use of patrons. It was an upright, weighed about 600 pounds and was about 5 feet high. It had double wheel casters for ease of movement. An expert witness testified that with this type of piano, when a caster drops off on to a lower surface, there is a tendency to throw the piano over. It has a narrow board across the bottom which makes it hard to handle, "it always wants to roll." Defendant testified that he had owned the piano in question for about five

or six years prior to the date of the accident. He knew that the surface of the stage was slightly slanted for drainage purposes. He did not know that a cement surface is conducive to the rolling of a piano. There was a standard place where the piano was kept when not in use. He had no rule that the piano could not be moved without securing permission of the management. He had instructed his foreman to put the piano in its regular place when it was not there. He knew that people moved the piano from its regular place. He thought that he could move the piano by himself.

Defendant had no blocks or chains or other means of fastening the piano at its normal location. There was a horizontal 8" x 8" timber at the front edge of the stage floor extending five feet toward the center from either end.

The piano had been on the stage ever since it was installed, with the possible exception that during the winter it would be removed and be put away. It was old fashioned but a good instrument and in good working condition when he acquired it. One of the boys testified that he tried the keys but no sound came out. Defendant did not know what condition the piano was in at the time of the accident. He did not determine what condition it was in.

There was no evidence that any one had previously been injured as a result of his own or another's use of this piano on this stage.

[1] The legal principles here involved find expression in two cases quite recently decided. "The duty owed by an owner to an invitee is to exercise reasonable care in maintaining his premises in a safe condition so as not to injure such invitee. *Butcher v. Queen City Iron & Metal Co.*, 99 Cal.App.2d 25, 221 P.2d 265." *Ashley v. Jones*, 126 Cal.App.2d 328, 332, 271 P.2d 918, 920. We see nothing about this piano or the circumstances under which it was kept that would furnish a basis for liability in the instant case. A piano is not a dangerous instrumentality nor does there appear to be anything about it to excite the curiosity of children in the sense of inviting or tempting them to move it about. No such ele-

ment was operative here. Plaintiff's counsel directs attention to the movability of this piano, the smoothness of the floor surface and the slope of the floor toward the front but we do not see in those factors, under the evidence in this case, foreseeable causes of injury to person or property. It is simply a case of forces set in motion by independent third parties, the two boys who moved the piano away from the wall and then, endeavoring to move it back, pushed and pulled it to the front and over the edge, thus causing it to fall upon the plaintiff. This presents the question whether the defendant proprietor was legally chargeable with foreknowledge of such conduct. The applicable principles we find clearly and succinctly stated in *Porter v. California Jockey Club, Inc.*, 134 Cal.App.2d 158, 285 P.2d 60. A nonsuit was affirmed in an action brought by a patron of a race track who was injured when another patron running upstairs collided with her. Mr. Justice Dooling, speaking for the Court, said: "In passing upon the motion for nonsuit the trial judge asked: 'should the track assume not only that a man is going to run but that he is going to run right into a person standing in the space that he must occupy, and guard against that?' This question pointed up the weakness of plaintiff's case. It was established that spectators were in the habit of congregating on the stairways at the start of each race and that bettors were in the habit of running to place bets at the last moment; but there was no evidence of any prior negligent conduct on the part of even one spectator. The liability of the landowner to provide against injury to an invitee from the act of another is based upon the fact that the landowner has notice of prior conduct from which he could reasonably anticipate that such injury might occur. *Edwards v. Hollywood Canteen*, 27 Cal.2d 802, 810, 167 P.2d 729; *Terrell v. Key System*, 69 Cal.App.2d 682, 159 P.2d 704; *Stockwell v. Board of Trustees [Leland Stanford Junior University]*, 64 Cal.App.2d 197, 148 P.2d 405; *Rest.Torts*, sec. 348.

"An injury of the sort which occurred to appellant could only happen if the conduct of the spectator who ran into her so

violently as to knock her down was either negligent or wilful. It is axiomatic that in the absence of conduct to put him on notice to the contrary a person is entitled to assume that others will not act negligently or unlawfully. *Leo v. Dunham*, 41 Cal.2d 712, 715, 264 P.2d 1. We are satisfied that there was no evidence of any facts in this case which would reasonably put respondent on notice that one spectator would run violently into another so as to put the duty upon it to take steps to guard against such contingency. Such cases as have considered a like question in other jurisdictions support this conclusion. *Futterer v. Saratoga Ass'n, etc.* [Breed of Horses], 262 App.Div. 675, 31 N.Y.S.2d 108; *Carr v. Mile High Kennel Club*, 125 Colo. 251, 242 P.2d 238; *Dahna v. Clay County Fair Ass'n*, 232 Iowa 984, 6 N.W.2d 843." 134 Cal.App.2d at page 160, 285 P.2d at page 61.

Of the additional similar cases which could be cited, the following should suffice: *Olson v. Whitthorne & Swan*, 203 Cal. 206, 263 P. 518, 58 A.L.R. 129, customer was hit by swinging door when leaving store, nonsuit affirmed; *Schwerin v. H. C. Capwell Co.*, 140 Cal.App. 1, 34 P.2d 1050, plaintiff going down on an escalator was injured by small boys who were attempting to ascend, nonsuit affirmed; *Worcester v. Theatrical etc., Corp.*, 28 Cal.App.2d 116, 82 P.2d 68, theater patron kicked in back by intoxicated patron, order for judgment notwithstanding the verdict affirmed; *Fitzgerald v. Million Dollar Theatre, Inc.*, 61 Cal.App.2d 17, 141 P.2d 935, plaintiff injured by blow on the head received while viewing a motion picture performance, judgment for defendant affirmed; *Barnes v. J. C. Penney Co.*, 190 Wash. 633, 70 P.2d 311, customer in aisle of store was struck by child riding tricycle that was on display, order for new trial reversed and dismissal of action directed.

Plaintiff's authorities are readily distinguishable. For example, among them

are these: *Harvey v. Machtig*, 73 Cal.App. 667, 239 P. 78, involved an invitee at a public resort who was injured by the collapse of a tree upon which there was a platform used for entertainment purposes and presented factual issues because there was substantial evidence that the tree was decayed to such an extent that the decay was plainly visible to the casual observer. The plaintiff in *Spore v. Washington*, 96 Cal.App. 345, 274 P. 407, a business invitee delivering coal, tripped over a loose board of a wooden walk and the court took notice of the fact that such a structure deteriorates with age and exposure to the weather and observed that a jury might easily have concluded that the slightest inspection would have disclosed to the defendant the conditions actually existing. In *Martin v. Los Angeles Turf Club, Inc.*, 39 Cal.App.2d 338, 103 P.2d 188, 190, a race track patron descending a stairway stepped on a bottle and fell and there was evidence that before and after the accident there was "All kinds of stuff, including beer bottles, pop bottles" etc., on the steps. The plaintiff in *Basye v. Crafts' Golden State Shows*, 43 Cal.App.2d 782, 111 P.2d 746, was hit by a deflected bullet at a shooting gallery and there was evidence of negligent failure to make reasonable inspection to see that the apparatus and the methods of operation were reasonably safe, including evidence that the beaverboard used to prevent this kind of accident was badly perforated and in a deteriorated condition.

[2] Those circumstances were distinctly different from the lack of an evidentiary basis for charging the defendant Waxman with foreseeability of and legal responsibility for the causative factors which operated in the instant case.

The judgment and the order appealed from are reversed with directions to the trial court to grant the defendant's motion for judgment notwithstanding the verdict.

PETERS, P. J., and BRAY, J., concur.

139 Cal.App.2d 777

Charles COYNTON and Robert Boynton,
Plaintiffs and Appellants,

v.

MCKALES, a corporation, and Arthur
Brooks, Defendants and Respondents.
Civ. 16533.

District Court of Appeal, First District,
Division 2, California.
March 12, 1956.

Hearing Denied May 9, 1956.

Minor brought action against driver of automobile and his employer for injuries sustained by minor when struck by automobile while minor was standing next to his parked automobile in traveled portion of highway. The Superior Court, City & County of San Francisco, Harry J. Neubarth, J., entered judgment and orders granting motorist relief from late filing of affidavits in support of motion for new trial and denying employer's motion for judgment notwithstanding the verdict, and order granting motions of motorist and his employer for new trial, and minor appealed, and motorist and his employer cross-appealed. The District Court of Appeal, Nourse, P. J., held that question whether motorist was in scope of employment while returning home in his automobile from a banquet given by his employer was for jury.

Judgment and orders granting motorist relief from late filing of affidavits in support of his motion for new trial and denying his employer's motion for judgment notwithstanding the verdict affirmed, and order granting motions for new trial reversed.

1. New Trial ⇨117(1)

Requirement of statute that motion for new trial be made within five days after motion for judgment notwithstanding the verdict, is not applicable where motion for judgment notwithstanding the verdict does not relate to the party moving for a new trial, and where judgment can be entered in favor of the party moving for a new trial independent of motion for judgment

notwithstanding the verdict. West's Ann. Code Civ.Proc. §§ 578, 579, 629, 659.

2. New Trial ⇨153

The trial court can grant relief from default in filing affidavits in support of motion for new trial, on ground of newly discovered evidence, to the extent to which the trial court could have granted extension in advance. West's Ann.Code Civ. Proc. §§ 473, 659, 659a.

3. Appeal and Error ⇨981 New Trial ⇨99

Though granting or denial of motion for new trial, on ground of newly discovered evidence, is generally a matter within discretion of trial court, and though such an order will be affirmed unless a clear abuse of discretion is shown, the rule has no application where affidavit or other evidence, on which the order is made, furnishes no basis for the exercise of such discretion.

4. New Trial ⇨150(4)

Where affidavits in support of motion for new trial, on ground of newly discovered evidence, did not show diligence, the affidavits were fatally defective, and granting of motion for new trial was improper.

5. New Trial ⇨153

Where plaintiffs continuously took the position that affidavits offered by one of the defendants in support of his motion for new trial, on ground of newly discovered evidence, were fatally defective because they did not show diligence, and when trial court seemed disinclined to deny motion for new trial, on ground that affidavits were fatally defective, plaintiffs filed counter-affidavits to show that by due diligence defendants could have known of the alleged newly discovered evidence, and defendant, who moved for new trial, then offered reply affidavits to rebut new matter contained in counter-affidavits, and the reply affidavits were not offered as supplements to the original affidavits, because 20 day permissible extension period of statute had already passed, reply affidavits could not be considered to aid in supporting order granting new trial.

6. Appeal and Error ⇨854(6)

An order granting a new trial will be affirmed if it may be sustained on any ground.

7. Appeal and Error ⇨761

Failure of plaintiffs to give in their opening brief a negative analysis of all points, which ingeniousness might detect as possible grounds for the granting of motion of one of the defendants for a new trial, would not be punished by an affirmance of erroneous order granting that defendant a new trial, on ground of newly discovered evidence.

8. Trial ⇨260(8)

In action by minor against driver of automobile and his employer for injuries sustained by minor when he was struck by automobile while standing next to his parked automobile in traveled portion of highway, wherein instruction given fully covered subject of concurring cause insofar as involved in the case, trial court did not err in failing to give instruction that two or more causes may be a proximate cause of an occurrence.

9. Automobiles ⇨246(58)

In action by minor against driver of automobile and his employer for injuries sustained by minor when he was struck by automobile while standing next to his parked automobile in traveled portion of highway, wherein minor testified that he parked his automobile with the right wheels in gutter on extreme right of road, and wherein other testimony placed minor's automobile still further to the right with its right wheels on the grass, court properly refused to instruct in language of city park code which required parking on extreme right immediately adjacent to planted portion of road or grounds.

10. Automobiles ⇨221

If motorist was not a pedestrian and was not walking on roadway but was standing next to his parked automobile installing side curtains on left side of automobile, there was no violation of section of the Vehicle Code requiring a pedestrian to walk close to his left hand edge of the roadway. Vehicle Code, § 564.

11. Automobiles ⇨245(72, 83)

In action by minor against driver of automobile and his employer for injuries sustained by minor when he was struck by automobile while standing next to his parked automobile in traveled portion of highway, question whether minor was contributorily negligent on ground that he violated section of the Vehicle Code requiring a pedestrian to walk close to his left hand edge of the roadway, on ground that he violated section of the Vehicle Code forbidding a motorist to leave open an automobile door at side available to moving traffic longer than necessary to load or unload passengers, and on ground that he violated city's park code requiring parking on extreme right, was for jury. Vehicle Code, §§ 564, 596.6.

12. Appeal and Error ⇨418

Where notice of motion for a new trial of defendant employee mentioned among other grounds one of newly discovered evidence, but notice of motion of defendant employer did not mention such ground, and trial judge expressly stated that he wished to grant a new trial, on ground of newly discovered evidence only, but that, if the new trial as to defendant employee was granted on that ground, defendant employer was also entitled to a new trial because he could only be liable on basis of respondeat superior if defendant employee was liable, plaintiffs' appeal extended to defendant employer, though notice of appeal showed that plaintiffs appealed from minute order granting defendant employee's motion for new trial on ground of newly discovered evidence.

13. Master and Servant ⇨302(1)

If employee is not simply on his way from his home to his normal place of work or returning from such place to his home for his own purpose, but is coming from his home or returning to it on a special errand, either as part of his regular duties or at a specific order or request of his employer, employee is considered to be in the scope of his employment from the time that he starts on the errand until he has returned or until he deviates therefrom for personal reasons.

14. Master and Servant ⇨302(1)

For an employee to be within scope of employment, it is not necessary that he is directly engaged in duties which he was employed to perform, but he may be on missions which incidentally or indirectly contribute to the service, and incidentally or indirectly benefit the employer.

15. Master and Servant ⇨302(1)

Attendance of an employee at a social function, though not forming part of the normal duties of the employee, may come under the "special errand rule" so that employee is in the scope of his employment, if the function or the attendance was connected with the employment and for a material part intended to benefit the employer who requested or expected the employee to attend.

16. Automobiles ⇨197(7)

If employee is within scope of his employment when he inflicts injuries with automobile, fact that automobile belonged to employee will not relieve employer from liability if the employee's use of the automobile was with the express or implied consent of the employer.

17. Automobiles ⇨245(30)

If there is any substantial conflict in the evidence on question whether employee was acting in scope of his employment at time of automobile accident, or conflicting inferences can reasonably be drawn from it, it is a question of fact for the jury.

18. Automobiles ⇨245(30)

In action by minor against driver of automobile and his employer for injuries sustained by minor when he was struck by automobile while standing next to his parked automobile in traveled portion of highway, question whether driver, while returning home in his automobile from a banquet given by his employer, was acting within scope of employment was for jury.

Alexander, Bacon & Mundhenk, San Francisco, for respondent Arthur Brooks.

NOURSE, Presiding Justice.

Charles Boynton, then a minor 20 years of age, was seriously injured when standing at night next to his parked car in the traveled portion of the Great Highway in San Francisco. He was hit by the car of defendant Brooks, who at that time was returning home from a banquet given by his employer, McKales, a corporation, to its senior employees. Charles and his father obtained verdicts against both Brooks and McKales. Brooks had pleaded guilty to a charge of violation of section 501 of the Vehicle Code (illegally causing bodily injury when driving under influence of liquor). McKales motions for nonsuit, directed verdict and judgment notwithstanding the verdict, based on the contention that Brooks as a matter of law was not acting within the scope of his employment when the injury occurred, were denied. Both defendants moved for a new trial on several grounds, those of defendant Brooks including "newly discovered evidence," those of defendant McKales not. Both motions were granted by one order on the ground of "newly discovered evidence." The plaintiffs' notice of appeal from said order mentions the granting of the motion of defendant Brooks only. Both defendants cross-appealed as will be stated hereinafter. The plaintiff in singular will herein mean the plaintiff Charles Boynton.

1. Plaintiffs' appeal as to defendant Brooks and Brooks' cross-appeal.

Although plaintiffs' main argument on this appeal is that the court had no discretion to grant a new trial on the ground of "newly discovered evidence" because no affidavit made any showing of diligence in endeavoring to discover the evidence before the trial, two other grievances must be reviewed first.

Vernon W. Humber, John Wynne Heron, San Francisco, for appellants Boynton. Barfield & Barfield, San Francisco, for respondent McKales.

[1] It is contended that Brooks' motion for a new trial was filed after the expiration of the statutory time. Said time is governed by section 659 of the Code of Civil Procedure, which as amended in 1951

reads in part: "The party intending to move for a new trial must, either (1) before the entry of judgment and, where a motion for judgment notwithstanding the verdict is pending, then within five (5) days after the making of said motion, or (2) within ten (10) days after receiving written notice of the entry of the judgment, file with the clerk and serve upon the adverse party a notice of his intention to move for a new trial * * *." On April 1, 1954 defendant McKales made a motion for judgment notwithstanding the verdict but defendant Brooks did not file any such motion. Brooks filed his motion for a new trial in accordance with the first alternative of section 659 before the entry of judgment, but did not file it within five days after McKales made its motion for judgment n. o. v. (McKales filed its motion for a new trial within said five days.) The question is therefore presented whether the requirement of filing within five days applies to all parties to an action if any of them has made a motion for judgment n. o. v. or only to those parties to whom the verdict to be disregarded relates. The question has not been decided before. It would seem that the latter construction is well within the language of the statute as the words "where a motion for judgment notwithstanding the verdict is pending" need not include the pendency of a motion with respect to a verdict or a part of a verdict which does not relate to the party moving for a new trial and independent of which a judgment with respect to the latter party could be entered under sections 578 and 579 of the Code of Civil Procedure. A decision as to Brooks, the direct actor, is possible, independent from a decision as to the liability of McKales under the doctrine of respondeat superior. Compare *Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 248, 116 P. 513; *Fearon v. Fodera*, 169 Cal. 370, 377, 148 P. 200. It seems then more reasonable to restrict the requirement of filing within the above 5 days period to the party who made the motion for judgment n. o. v. and the adverse party or parties to it as mentioned in sections 629 and 659 of the Code of Civil Procedure. In this case Brooks could not be considered to have

an interest adverse to McKales motion for judgment n. o. v.

[2] It is also contended that the affidavits filed by Brooks in support of his motion for a new trial on the ground of "newly discovered evidence" could not be considered at all because they were filed three days late and that the relief granted by the court from said default under section 473 of the Code of Civil Procedure was ineffective. Notice of appeal was filed also with respect to the order granting said relief. The contention is without merit. Section 659a of the Code of Civil Procedure expressly permits the extension by the court of the 10 days period for filing the affidavits for an additional period not exceeding 20 days. The ten day period is then clearly not jurisdictional. In contrast to the period for filing the motion for a new trial the extension of which is expressly prohibited by section 659, the 10 day period for filing affidavits is not so limited. Hence the trial court can grant relief from default under section 473 at any rate to the extent to which it could have granted extension in advance. See *Faeh v. Union Oil Co.*, 107 Cal.App.2d 163, 169, 236 P.2d 667. "In the absence of any express provision to the contrary, the court has power to grant relief from such a default under the broad provisions of section 473." *Lane v. Pacific Greyhound Lines*, 30 Cal.2d 914, 917, 187 P.2d 9, 11; see also 3 Witkin California Procedure 2099. The order granting relief will be affirmed.

[3,4] However, the affidavits filed were fatally defective in that they did not make any showing of diligence. The following language of *Slemons v. Paterson*, 14 Cal.2d 612, at pages 615-616, 96 P.2d 125, 127, is applicable: "While the granting or denial of a motion for a new trial upon the ground of newly discovered evidence is generally a matter within the discretion of the trial court, and such an order will be affirmed unless a clear abuse of discretion is shown, this rule has no application where the affidavit or other evidence upon which the order is made furnishes no basis for the exercise of such discretion. Such is the situation in the case at bar. The affidavit

* * * is so lacking in essential particulars that it afforded no basis for the exercise of the discretion of the trial court in granting the motion. * * * It is a matter of public interest that there be an end to litigation and that a new trial should not be granted for the purpose of enabling a party to produce further evidence unless he has shown some legally justifiable excuse for not having produced such evidence at the former trial. Sec. 657, subd. 4, Code Civ.Proc. The affidavits supporting the motion must show that there has been no lack of diligence. [citations.]” The same rule was applied in reversing an order granting a new trial in *Mowry v. Raabe*, 89 Cal. 606, 609-610, 27 P. 157; *Edwards v. Floyd*, 96 Cal.App.2d 361, 215 P.2d 117; *Henningsen v. Howard*, 117 Cal.App.2d 352, 355, 255 P.2d 837.

In our case no affidavit whatever by either defendant or by any attorney of defendants or by any agent of defendants or their attorneys was filed. The only two affidavits filed were by two persons who stated that they arrived at the place of the accident immediately after it took place and who relate certain observations they made conflicting with some of the evidence received at the trial. The affidavit of one of them contains also the following language on which respondent relies as showing diligence in investigating the evidence: “After the accident, I dismissed the same from my mind and thought nothing more of it until I read an article in one of the local newspapers describing the accident and incident on the Great Highway.” Evidently this statement is wholly without value in showing diligence. Not only does it not state the relation of the time of the reading of the newspaper article, or the time the witness came into contact with respondent, with the time of the trial, but it does not give the slightest indication that respondent or his attorney did not know the affiant, who was present at the time of the accident or could not have timely obtained his name (which was known to the police, but not stated in the report on the accident). Compare *Gaskill v. Pacific Electric Ry. Co.*, 30 Cal.App. 593, 597, 159 P. 200.

[5] Respondent Brooks contends that reply affidavits offered by him but stricken by the court on motion of plaintiffs and not part of the record should be considered to aid in supporting the order granting the new trial on the ground of newly discovered evidence. We do not agree. The record shows that the plaintiffs continuously took the position that the affidavits offered by Brooks were fatally defective in not showing diligence, but that when the court seemed disinclined to deny Brooks’ motion on that ground they filed counter affidavits for the purpose of showing that by due diligence defendants could have known of the affiants in time to hear them as witnesses at the trial, and for the purpose of rebutting the factual statements in their affidavits. Respondent then offered reply affidavits for the alleged purpose of rebutting new matter contained in the counter affidavits. Said affidavits of respondent were not offered as supplements to the original affidavits because the 20 days permissible extension period of section 659a, supra, had already passed. Even if under some circumstances reply affidavits could be permitted although they were not mentioned in the statutory provisions governing the matter to which they relate, as to which point we express no opinion, there was here no error or prejudice in striking the reply affidavits because they were as superfluous as the counter affidavits, the original affidavits being insufficient as a matter of law to support the granting of a new trial on the ground of newly discovered evidence, as held hereinbefore.

[6-8] Respondent Brooks further urges that, even if the order granting a new trial cannot be upheld on the ground of newly discovered evidence on which it was specifically granted, it should be affirmed if it is justified on any other ground stated in his motion, except insufficiency of the evidence or grounds for which supporting affidavits are required which were not filed; that appellant has the burden of affirmatively showing in his opening brief that the order cannot be sustained on any such ground, and that because the opening brief was restricted to the ground of newly discovered evidence the order must be affirmed

irrespective of the actual existence of any such ground. It is true that an order granting a new trial will be affirmed if it may be sustained on any ground, *Mazzotta v. Los Angeles Ry. Corp.*, 25 Cal.2d 165, 169, 153 P.2d 338, but respondent does not cite any authority for his contention that a failure of appellant to give in his opening brief a negative analysis of all points which ingeniousness might detect as possible grounds for a new trial must be punished by affirmance and we will not follow it. The only ground actually urged by respondent in the court below over and above the ground of newly discovered evidence was that "the instructions on proximate cause omitted a concurring cause instruction (BAJI 104A) as requested by defendant Brooks. Since the jury was not instructed that two or more causes may be a proximate cause of an occurrence, in effect, the Court took away from the jury the question of *contributory* negligence by implying that the accident could be due to the fault of one or the other but not both." The contention, repeated on appeal, is without merit. The instruction may sometimes be required where concurrent negligent acts of different defendants may have contributed to the injury, e. g., in *Dieterle v. Yellow Cab Co.*, 53 Cal.App.2d 691, 128 P.2d 132, but such is not the case here. The instruction could only have related to the alleged contributory negligence of plaintiff and on the meaning and legal effect of such contributory negligence the jury were fully instructed. Among other things they were instructed as follows: "An injury may be sustained either through the negligence of the plaintiff or the defendant or through the negligence of both * * *. If you find that the defendant was negligent and that the plaintiff was also negligent, and that the plaintiff's negligence contributed proximately to his injury, the plaintiff cannot recover." This instruction fully covered the subject of concurring cause insofar as involved in this case. It was therefore no error for the trial court not to give the BAJI instruction No. 104-A. We note that we do not find this instruction in the record as offered by defendant Brooks and refused.

[9] Respondent further contends that it was error justifying a new trial to refuse to instruct in the language of section 19 of the San Francisco Park Code, which in substance requires parking on the extreme right immediately adjacent to the planted portion of the road or grounds. Plaintiff testified that he so parked his car with the right wheels in a gutter on the extreme right of the road; other testimony accepted by respondent as true places the car still further to the right with its right wheels on the grass. If this might have been a violation of the ordinance it would have placed the car in a still safer position and could not have contributed to the accident. Hence the refusal of an instruction on this provision was correct.

[10, 11] Finally respondent urges that the order granting a new trial could be sustained on the ground that the verdict was against law in that it was against the instructions as to contributory negligence per se given to the jury, *Hawkinson v. Oesdean*, 61 Cal.App.2d 712, 716, 143 P.2d 967, and because the evidence was insufficient in law and without conflict in any material point in showing that plaintiff was contributorily negligent per se, *Verzola v. Russi*, 135 Cal.App.2d 330, 287 P.2d 166, and cases there cited. Said negligence per se is predicated on violation of sections 564 and 596.6 of the Vehicle Code and the sections of the San Francisco Park Code read to the jury. Section 564, *supra*, requires a pedestrian to walk close to his left hand edge of the roadway. According to the evidence pointed out by respondent himself plaintiff was not a pedestrian and was not walking on the roadway, but standing next to his car installing the side curtains on the left side of his car. If this is so section 564 of the Vehicle Code was not violated and such violation had certainly not been proved without conflict. Section 596.6 of the Vehicle Code among other things forbids leaving open a car door at the side available to moving traffic longer than necessary to load or unload passengers. As plaintiff was installing the side curtains with the door at the traffic side open it may well be that he was in violation of section 596.6, *supra*, but wheth-

er said violation proximately contributed to the accident normally remained a question of fact for the jury, *Satterlee v. Orange Glenn School Dist.*, 29 Cal.2d 581, 590, 177 P.2d 279. It may well be that plaintiff would have been hit in the same way if he had been standing in the same place with the door closed and respondent does not point out any evidence showing that in this case the only possible inference was that the fact that the door was open proximately contributed to the accident. An instruction on proximate cause in relation to violation of statute was given. The question of violation of section 19 of the San Francisco Park Code has been treated before and respondent does not point out any violation of said code of which plaintiff might have been guilty independent from the alleged violation of section 19 which we have rejected.

As no ground justifying the granting of a new trial to defendant Brooks remains, the order granting said new trial will be reversed. Defendant Brooks' cross-appeal from the judgment against him, taken as a precaution in case the order granting a new trial would be reversed, is based on insufficiency of the evidence to support the judgment because plaintiff was contributorily negligent as a matter of law having violated the above mentioned sections of the Vehicle Code and the Park ordinance. No other violations are mentioned than those treated with respect to the appeal from the order for a new trial. As we have found in that respect that there either was no violation or that the question whether the violation proximately contributed to the accident presented a question of fact for the jury as to which conflicting inference could reasonably be made, the appeal is without merit and the judgment as to defendant Brooks will be affirmed.

2. Plaintiffs' appeal as to the granting of a new trial with respect to defendant McKales and the cross-appeal of McKales from the order denying its motion for judgment n. o. v.

[12] The primary question presented in this respect is whether the plaintiffs' appeal extends to McKales. It is the contention

of McKales that it does not and that this court lacks power either to affirm or reverse the order granting a new trial with respect to McKales. The essential part of the order filed on June 2, 1954 reads: "Whereupon it is ordered by the Court that defendants McKales, a corporation and Arthur Brooks' Motions for New Trial be and the same are hereby granted on the grounds of newly discovered evidence." Plaintiffs notice of appeal filed June 20, 1954 shows that they appeal from: "That certain Minute Order granting the defendant Arthur Brooks motion for new trial on the ground of newly discovered evidence, made and entered on the 2nd day of June, 1954."

There was only one minute order of that date and that one order granted the motions for a new trial of both defendants. The question becomes then whether the notice of appeal must be construed as an appeal of the whole order badly described or as an appeal from that part of the order which grants the motion of defendant Brooks only.

The notice of motion for a new trial of defendant Brooks mentioned among other grounds the one of newly discovered evidence but the notice of motion of defendant McKales did not mention said ground. For that reason affidavits of McKales in support of the granting of its motion on the ground of the newly discovered evidence were stricken. (Both McKales and Brooks urged at the hearing of their motions also one or more of the other grounds stated therein.) The trial judge expressly stated that he wished to grant the new trial on the ground of newly discovered evidence only but that, if the new trial as to the employee Brooks was granted on that ground, McKales the employer also was entitled to a new trial because he could only be liable on the basis of respondeat superior if Brooks was liable. Accord: *Hoffmann v. Lane*, 11 Cal.App.2d 655, 661, 54 P.2d 477; *Bishop v. Superior Court*, 59 Cal.App. 46, 209 P. 1012. The notice of appeal seems to have been formulated, without consultation of the actual text of the order, on the theory that the court could not grant a new trial to McKales on the ground of newly dis-

covered evidence, not contained in its notice of motion *Sitkei v. Frimel*, 85 Cal.App.2d 335, 337, 192 P.2d 820, and on the supposition that therefore the new trial on that ground had only been granted to Brooks leaving the liability of McKales to the automatic effect of a possible holding of nonliability of Brooks. It is clear that appellants did not intend to leave an order for a new trial as to defendant McKales intact if they succeeded in obtaining reversal of the order as to Brooks on their appeal and defendants also must have understood this. That defendant McKales was not misled is shown by the fact that after the appeal of plaintiffs it filed a cross-appeal from the order denying motion for judgment notwithstanding the verdict which under section 629 of the Code of Civil Procedure could not be reviewed unless the adverse party appeals from the order granting a new trial. Justice will better be served by a consideration of the whole matter on this appeal. For our construction of the notice of appeal as relating to the whole order of June 2, 1954 we find authority in *Holden v. California Emp. etc. Com.*, 101 Cal.App.2d 427, 225 P.2d 634. In that case the appeal was taken from a judgment which expressly excluded from its operation one of the adverse parties; after the appeal was taken from said judgment a separate formal order was filed concerning the adverse party originally excluded; no appeal was taken from that order. It was held that the notice of appeal was effective as to all respondents considering that it was clear that appellant was seeking full review, that nobody was misled, that notices of appeal are to be liberally construed to permit, if possible, a hearing on the merits and that appeals were held effective notwithstanding misdescription of the judgment or order appealed from 101 Cal.App.2d at pages 430-431, 225 P.2d 634. The case was followed in a similar situation in *Girard v. Monrovia City School Dist.*, 121 Cal.App.2d 737, 264 P.2d 115.

As under our above interpretation there are before us valid appeals both from the order granting a new trial to defendant McKales and from the order denying its motion for a judgment notwithstanding the

verdict, we will first review the appeal from the latter order which is earlier in date.

McKales predicates error in the denial of its motion on the contention that no recovery against it could be had on the basis of respondeat superior because when the accident happened Brooks, in driving home from the banquet he had attended, was as a matter of law not acting in the scope of his employment, the evidence allegedly showing without conflict that said banquet was a social affair, attended by Brooks for his own pleasure without any direct or indirect compulsion from his employer and that for that reason the evidence was insufficient to bring the case within the exception to the "going and coming rule" known as the "special errand rule."

[13-17] If the employee is not simply on his way from his home to his normal place of work or returning from said place to his home for his own purpose, but is coming from his home or returning to it on a special errand either as part of his regular duties or at a specific order or request of his employer, the employee is considered to be in the scope of his employment from the time that he starts on the errand until he has returned or until he deviates therefrom for personal reasons. *Robinson v. George*, 16 Cal.2d 238, 245, 105 P.2d 914; *Los Angeles Jewish Community Council v. Industrial Acc. Comm.*, 94 Cal. App.2d 65, 69, 209 P.2d 991; *London G. & A. Co. v. Industrial Acc. Comm.*, 190 Cal. 587, 589, 213 P. 977; *State Compensation Ins. Fund v. Industrial Acc. Comm.*, 89 Cal.App. 197, 200-201, 264 P. 514. To such special missions the general test as to scope of employment applies. It is not necessary that the servant is directly engaged in the duties which he was employed to perform, but included are also missions which incidentally or indirectly contribute to the service, incidentally or indirectly benefit the employer. *Kish v. California State Automobile Ass'n*, 190 Cal. 246, 249, 212 P. 27; *Dolinar v. Pedone*, 63 Cal.App.2d 169, 175, 146 P.2d 237; *May v. Farrell*, 94 Cal.App. 703, 712-713, 271

P. 789. The attendance at a social function, although not forming part of the normal duties of the employee, may come under the "special errand rule" if the function or the attendance was connected with the employment and for a material part intended to benefit the employer who requested or expected the employee to attend. In *Loos v. Boston Shoe Co.*, 123 Cal.App.2d 564, 266 P.2d 884, in which case there was an evening meeting of salesmen at the employing company's office preceding which the company took the men to dinner, it was stated (obiter) with respect to Carey, one of the salesmen: "It was expected of Carey that he would attend the dinner and the company meeting, and he was acting in the performance of his duties when he went to the company office, joined the other men, went to dinner and returned with them to the office." 123 Cal.App.2d at page 569, 266 P.2d at page 887. (For cases under Workmen's Compensation law see 2 Hanna, *The Law of Employee Injuries and Workmen's Compensation* 171-172; *Irwin v. State Compensation Insurance Fund*, 5 Cal.Comp.Cases 75; *Dykes v. Pacific Indemnity Co.*, 9 Cal.Comp.Cases 288; *Dinwiddie v. Board of Trustees, Geyserville High School*, 8 I.A.C. 143; *McClay v. Shull*, 11 I.A.C. 119, Court hearing denied p. 310; *McCormick v. Glover*, 11 I.A.C. 61. The fact that Brooks was driving his own car when the accident occurred does not present a problem and is correctly not treated as such by the parties. If the employee is within the scope of his employment when he inflicts injuries, the fact that the automobile which caused the injury belonged to the employee will not relieve the employer from liability if the employee's use of his car was with the express or implied consent of the employer. *Ryan v. Farrell*, 208 Cal. 200, 202, 280 P. 945; *Curcic v. Nelson Display Co.*, 19 Cal. App.2d 46, 51-52, 64 P.2d 1153; *Dillon v. Prudential Ins. Co. of America*, 75 Cal. App. 266, 270-271, 242 P. 736. The use of a car by an employee who owns one and has a driver's license has become so normal in California that implied consent will soon be accepted, certainly when like in this case the employee lives somewhat outside the

city at a considerable distance from the location of the special event he is expected to attend. The only decisive question is therefore whether the character of the banquet and the employer's relation to it were such that Brooks' attendance could be reasonably considered within the scope of his employment. If there is any substantial conflict in the evidence in this respect or conflicting inferences can reasonably be drawn from it such is a question of fact for the jury. *Fields v. Sanders*, 29 Cal.2d 834, 835, 842, 180 P.2d 684, 172 A.L.R. 525; *Rest.*, Agency, sec. 228, Comment d., cited in *Loper v. Morrison*, 23 Cal.2d 600, 605, 145 P.2d 1.

The evidence in this case shows that the banquet which defendant Brooks attended was the eleventh Annual "Five-Over" Banquet offered by defendant McKales to those of its employees who had been five years or more in its service. At such a banquet the employees who had been employed for five, ten, fifteen or twenty years were presented with lapel pins with the name of the firm and said number of years. The mimeographed invitations bore the signature of George F. Herrman, District Manager and Vice-President of McKales, in charge of the sales program. It contained the sentence: "Everyone will be looking forward to rejoicing with you on this occasion, but would appreciate your confirming your attendance." Of the 33 employees of sufficient seniority to receive an invitation only one or two failed to attend. Twelve were to receive five year pins, two ten year and two twenty year pins. Brooks received a five year pin. He attended although he did not feel well and had earlier in the day telephoned Mr. Herrman's office that for that reason he would not be able to attend. Over and above the senior employees some representatives of the firms whose products McKales sold were invited. Seven of them attended. Members of the families of employees were not invited. The dinner at \$5.00 a plate was paid by McKales and booked on its wholesale expense account. Liquor was provided and served by Vernon McKale, who was in charge of sales training. He was reimbursed by defendant McKales. At the banquet Mr. Herrman

officiated. He sat at the head of the horse-shoe table, with the guests from business connections and the oldest employees near to him, the others being placed according to seniority. At the end of the dinner the pins were presented with speeches mainly by Mr. Herrman. Each of the employees expressed his appreciation, including also Brooks. In the earlier part of the evening there was some accordion playing by an entertainer and some community singing. Brooks did not take part in it and was generally bored. He knew only four or five of the people present and was friendly with one at most.

[18] Although Mr. Herrman and defendant Brooks, heard under section 2055 of the Code of Civil Procedure, testified that the banquet was purely social, a friendly get-together, without any compulsion to attend, the above evidence is open to the contrary inference, that it was an official company function with close relation to its sales program and intended to benefit the company by increase in the continuity of employment, Compare *Ackerson v. Erwin M. Jennings Co.*, 107 Conn. 393, 140 A. 760, 56 A.L.R. 1127, the attendance at which was at least expected from the employees. Hence the issue whether Brooks' attendance was within the scope of his employment was correctly left to the jury and its implied decision on this point was binding so that the motion for judgment notwithstanding the verdict was correctly denied and will be affirmed.

With respect to plaintiffs' appeal from the order insofar as it grants McKales motion for a new trial, it is clear that, certainly after the reversal of the granting of a new trial as to Brooks, said order cannot be sustained on the ground of newly discovered evidence, a ground not mentioned in the notice of motion of McKales, *Sitkei v. Frimel*, supra. The other grounds propounded by McKales to justify the order are those also offered by respondent Brooks and treated and rejected in the first subdivision of this opinion and the grounds offered in support of McKales motion for judgment n. o. v. also found without merit. As there is no ground on which the granting of a new trial as to McKales can be

sustained the order granting its motion for a new trial must also be reversed.

The judgment and the orders granting Brooks relief from the late filing of the affidavits in support of his motion for a new trial and denying McKales motion for judgment notwithstanding the verdict are affirmed. The order granting Brooks' and McKales' motions for a new trial is reversed.

DOOLING and KAUFMAN, JJ., concur.



139 Cal.App.2d 897

**W. Dan MORGAN and W. W. Broadwell,
Plaintiffs and Appellants,**

v.

**G & N TANK TRUCKING CO., Defendant
and Respondent.**

Civ. 16694.

**District Court of Appeal, First District,
Division 2, California.**

March 19, 1956.

Action by owner of truck against lessee for loss which occurred when truck, which was being used in road-making operation involving lessee and other contractors, burned. The Superior Court, Alameda County, A. T. Shine, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Devine, Justice pro tem., held that evidence supported finding that lessee had shown freedom from negligence, even if lessee had burden of proving freedom from negligence.

Judgment affirmed.

I. Pleading §=370

Allegations which were not pleaded were not involved at trial, even though some reference to general subject was made in evidence.

2. Appeal and Error ⇨712

Appellants' contention that a certain witness was at trial and available to be called by appellees could not be considered where record did not disclose that the witness had been present at trial.

3. Negligence ⇨121(2)

Application of doctrine of *res ipsa loquitur* depends upon defendant's exclusive control of the instrumentality.

4. Ballment ⇨31(1)

In action by owner of truck against lessee for fire loss which occurred when truck, which was being used in road-making operation involving several contractors, burned, evidence as to whether lessee had exclusive control or right to control the heating apparatus on truck was insufficient to invoke doctrine of *res ipsa loquitur*.

5. Ballment ⇨31(3)

In action against lessee of truck for loss which occurred when truck, while being used in road-making operation involving lessee and other contractors, burned, evidence as to whether lessee had duty to keep road beneath truck free of oil was insufficient to require a finding of negligence on part of lessee.

6. Negligence ⇨134(1)

Defendant in a *res ipsa loquitur* case is not required to prove freedom from negligence by preponderance of evidence.

7. Ballment ⇨31(3)

In action by owner of truck against lessee for loss which occurred when truck, which was being used in road-making operation involving lessee and other contractors, burned, evidence supported finding that lessee had shown freedom from negligence, even if lessee had burden of proof on this issue.

H. Sherwood Craig, Oakland, for appellants.

McGilvray, McGilvray & Cameron, Sacramento, for respondent.

DEVINE, Justice pro tem.

The appellants in this cause are the plaintiffs, against whom judgment was rendered

by the trial judge sitting without a jury. Plaintiffs were the owners of a tractor and trailer oil tank, which they rented to defendant, a copartnership, for the purpose of storing road oil needed on a construction job near Hayfork, California. The road construction was being done by N. M. Ball & Sons, a corporation or copartnership, but respondent performed two functions in connection with it, namely, storing of oil in the rented tank trailer, and doing part of the work of spreading the oil on the road.

When the tank arrived at the construction site, a retort was attached to it. The retort was furnished by a third company, H. B. Folsom Co., and that company also did some of the work of spreading oil. There is no evidence as to the identity of those who did the work of connecting the retort with the tank, except the negative testimony of the office manager, the foreman of N. M. Ball & Sons, that employees of their company did not do that work.

The purpose of the retort was to heat the oil to a temperature necessary for its being spread on the road. The operation of withdrawing the oil from the tank, heating it and spreading it on the road went on for some days without incident; but on October 11, 1949, a fire commenced about the retort and completely destroyed plaintiffs' tractor and tank trailer.

At this point it is convenient to interrupt the narration of the facts and to describe the history of the cause, the pleadings and the findings. The complaint was filed against respondent, and against N. M. Ball & Sons and H. B. Folsom Co. The action was dismissed as to the last two; the record before us does not show the reason, but that is immaterial. The complaint alleges the leasing of the truck, the fact that H. B. Folsom Co. attached the retort to the tank, negligence of defendants in connecting and in operating the retort, and that such negligence was a proximate cause of the loss. It goes on to state that plaintiffs are uncertain as to the persons from whom they are entitled to redress, wherefore they have joined the three parties defendant.

The court's essential findings are that it is not true that the connecting of the retort

to the tank or the operation of the retort was done by employees of defendant and that it is not true that negligence of defendant caused the loss.

[1] In the complaint, it is also alleged that no fire protection had been provided around the site, and some mention of that subject is made in appellants' brief; but there was no allegation in the complaint as to duty to provide such protection, and no allegation that such lack of protection was a proximate cause of the loss. Had there been such allegations, these matters no doubt would have been the subject of ample inquiry before the trial court, but as they were not pleaded, the trial was not concerned with them, even though some reference to the general subject was made in the evidence.

The points made by appellants in their brief are: 1. that they made out a case under the doctrine *res ipsa loquitur* which defendant failed to rebut, 2. that there was evidence of oil on the ground under the retort before the fire, and that the failure to remove or cover the oil was negligence per se, and 3. that defendant as a bailee had the burden of showing that the loss was not caused by its negligence, and that it failed to carry that burden.

The recital of the facts is resumed at this point, and is broken into two categories: facts relating to cause of the fire, and facts relating to the personnel on the job.

The facts known about the fire are few. Floyd Anderson, foreman for N. M. Ball & Sons, testified that he saw a man named Essex, an employee of his company, not of defendant, operating the retort, and that he, Anderson, turned off the fuel supply on the retort because it did not seem "like it was circulating right." The fire in the retort was completely extinguished. Anderson told Essex not to light it again, and then Anderson drove away. He had gone about a mile, when he noticed the fire. He returned at once. Essex was still there, and others were at hand.

Prior to the fire, Anderson saw some oil on the ground, but not any more than "what is generally always—that happens to run

down." Edwin J. Collins, an office manager for N. M. Ball & Sons, saw Essex operating the retort, and a little later, saw the fire burning the retort and the ground adjacent to it. Collins testified that "there was oil around that area," that is, the area around the tank and the retort, before the fire, though he did not tell the quantity. He testified that "the fire, as I saw, was the black, oily substance."

The facts relating to the employment of those operating the retort are these: John Newman, one of the partners of G & N Tank Trucking Co., respondent, testified that his men did not operate the retort, and there is no testimony from any witness that any employee of respondent did so. Edwin J. Collins, called by plaintiffs, testified that the superintendent, Irving, directed "our people", that is, employees of N. M. Ball & Sons to watch the retort. There is testimony given by Anderson, the N. M. Ball & Sons foreman, that when the retort was first started, it was operated by the men who were spreading the oil, and appellants argue that these were either defendant's own employees or those of the Folsom Co., who, say appellants, are also employees of defendant because they were doing work for it. This does not follow, for from all that appears, the Folsom Co. was an independent contractor whose contract, it would appear, at least as probably as otherwise, was not with defendant, but with the general contractor, N. M. Ball & Sons. In any case, the testimony of Anderson related to the early operation of the retort. Just before the fire, the retort was being operated by Essex, as appears from the testimony of the witnesses Anderson and Collins.

[2] As to Essex, the N. M. Ball & Sons employee, it was testified by Anderson that Essex took orders from Irving, the superintendent of that company. Essex did not appear as a witness. Appellants state in their brief that Essex was present in court, at respondent's request, and argues that respondent's failure to call him as a witness militates against respondent. There is no evidence in the record that Essex was in court, and respondent denies that he was. We must, of course, give no consideration

to appellants' assertion which is unsupported by the record.

It was testified by the witness Collins that it is an unwritten law of the construction business that, in order to get the job done, if one contractor needs help or gets behind in his work, another will lend his employees to help him out, and that the superintendent on this job, an N. M. Ball & Sons employee, was one who would do anything reasonable to get the job done, and did direct his own men to watch the retort while "the other two men" (presumably, but not certainly, defendant's employees) were out spreading oil. The exact arrangements made, what instructions were given, by whom, and how they were carried out, are subjects which were not covered. Mr. Irving, who was closest to all those matters, died before the trial and had not testified by deposition.

[3] Considering the doctrine of *res ipsa loquitur*, we address ourselves to the subject of control of the instrumentality in question. That instrumentality is the retort and its connections with the tank. For the doctrine to apply, it is necessary that the instrumentality be in what is called "exclusive control" of the defendant.

Of course, the exclusive control may be that of the employees of a defendant. That defendant's employees did not, in this case, exclusively control the retort and its connections, is manifest. The man last seen operating it, shortly before the fire, was an employee, not of defendant, but of N. M. Ball & Sons, and it was the foreman of that company who shut off the operation.

If we consider the facts in the light of the rule that it is the right of control of the instrumentality, rather than actual control, which determines the applicability of *res ipsa loquitur*, *Metz v. Southern Pac. Co.*, 51 Cal.App.2d 260, 124 P.2d 670; *Ybarra v. Spangard*, 25 Cal.2d 486, 493, 154 P.2d 687, 162 A.L.R. 1258, still there is nothing to show that such right of control belonged to defendant. The retort was not rented to defendant, but to the Folsom Co. The witness Newman, one of the partners of the defendant partnership, testified that the retort was never operated by defendant's employees. Collins, a witness called by plaintiffs, testified that Essex, who was operating

the retort just before the fire, took orders from Irving, general supervisor of N. M. Ball & Sons, and in the arrangements for the rental, Newman of the defendant partnership told Morgan that Irving would be the sole operator of the retort.

[4] The doctrine *res ipsa loquitur* does not apply, if otherwise it would, because of lack of control and of the right of control, by defendant.

[5] Plaintiffs next proposition is that no inference could be drawn except that of negligence because, they say, dangerous material was allowed to remain on the road under the retort. Here, again, proof of duty on the part of defendant as distinguished from other parties, to keep the road free of oil, is absent. Besides, the cases on which they rely, *Feeney v. Standard Oil Co.*, 58 Cal.App. 587, 209 P. 85 and *Harrison v. Harter*, 129 Cal.App. 22, 18 P.2d 436, have to do with gasoline, which is subject to the rules governing explosives. In this case, there was testimony that the gasoline storage was far removed from the site of the fire, and that the gasoline was not ignited. What the burning quality of the oil was, except that it was inflammable, we do not know. Not a word about its flash point was produced. We do know that the fire about the equipment burned three or four hours, which would indicate that the oil was not an explosive.

[6] Finally, appellants contend that, there having been a mutual benefit bailment, the burden of proving that the equipment was not lost by negligence rests on defendant. This proposition which would go beyond plaintiffs' first proposition, in which negligence based on the doctrine of *res ipsa loquitur* was relied upon, for, although a *prima facie* case made out under that doctrine must be met by at least equal evidence on the part of the defense, *Burr v. Sherwin Williams Co.*, 42 Cal.2d 682, 268 P.2d 1041, the defendant in such a case is not required to prove freedom from negligence by preponderance of the evidence. *Williams v. City of Long Beach*, 42 Cal.2d 716, 268 P.2d 1061.

Respondent replies that the cause was based on the theory of negligence, not of

contract as shown by the complaint. It has been held, however, that the burden of proof of freedom from negligence is on the defendant in a mutual benefit bailment case, whether plaintiff frames his complaint on negligence or on a breach of warranty theory. *Downey v. Martin Aircraft Service*, 96 Cal.App.2d 94, 98, 214 P.2d 581.

[7] There was ample evidence upon which the court could base its finding that defendant had not failed to exercise ordinary care, even considering the burden of proof to have rested on the defense. The management of the retort, it may fairly be inferred from all the evidence, was placed in Irving, a man in whom one of the plaintiffs had expressed confidence, who was employed by N. M. Ball & Sons. It may reasonably be inferred, too, that whatever caused the fire was an act or omission of the N. M. Ball & Sons employees who operated and controlled it at least in the time immediately prior to the fire.

The judgment is affirmed.

DOOLING, Acting P. J., and KAUFMAN, J., concur.



140 Cal.App.2d 10

Calvin COOK and Bertha M. Cook,
Plaintiffs and Appellants,

v.

Joyce MEHLBERG et al., Defendants
and Respondents.

Civ. 4983.

District Court of Appeal, Fourth District,
California.

March 19, 1956.

Action by husband and wife for damages incurred to the automobile in which they were riding when husband attempted to pass defendant's westbound automobile as it was turning south at an intersection, and in avoiding a collision with defendant's

vehicle which turned south and struck a telephone pole. The Superior Court, Kern County, R. B. Lambert, J., entered judgment for defendant and wife appealed. The District Court of Appeal, Barnard, P. J., held that where there was no evidence that the automobile in which wife was riding was community property of husband and wife and wife's pleadings stated it was her automobile, and no offer of proof, and no request for permission to amend her pleadings was made, trial court did not err in rejecting evidence as to the community ownership of the automobile and in not instructing on imputing negligence of a husband to a wife where an automobile involved in an accident was the community property of husband and wife.

Judgment affirmed.

1. Automobiles ⇨242(5)

Where an automobile was registered in the name of wife, there was a presumption that she was its owner. *West's Ann. Civ.Code*, § 164.

2. Pleading ⇨69

Where wife's complaint alleged that she was the owner of an automobile damaged allegedly as the result of defendant's negligence, and defendant's answer also alleged that the automobile in question was the property of wife and was being driven by her husband with her permission, such admission in wife's pleadings had considerable force in determining ownership of the vehicle.

3. Automobiles ⇨240(2) Trial ⇨252(8)

Where there was no evidence that automobile in which wife was riding was community property of husband and wife, and wife's pleadings stated it was her automobile, and no offer of proof, and no request for permission to amend her pleadings was made, trial court did not err in rejecting evidence as to the community ownership of the automobile and in not instructing on imputing negligence of a husband to a wife where an automobile involved in an accident was the community of husband and wife.

4. Appeal and Error ⇨1031(4)

Prejudice by trial court in refusing to admit evidence as to community ownership of an automobile would not be presumed especially in view of wife's verified complaint alleging she was the owner of the automobile in question and in view of wife's testimony that she was the owner of the automobile.

5. New Trial ⇨97

Where fact that a witness for plaintiff had left the state was discovered by plaintiff on second day of trial, and no request for a continuance or for an opportunity to take his deposition was ever made, trial court neither erred nor abused its discretion in refusing plaintiff a new trial on the ground of surprise because of such witness' absence.

Conron, Heard & James, Bakersfield, for appellants.

P. R. Borton, Bakersfield, for respondents.

BARNARD, Presiding Justice.

This is an action for damages arising out of a non-collision accident. The accident happened about 4:00 p. m. on December 26, 1953, two miles west of Wasco, at the intersection of Highway 466 and Central Avenue. Highway 466 is a two-way paved highway, each lane being 12 feet wide and with a white line in the center. There was a 6-foot shoulder on each side, and 12 feet of smooth dirt between the south shoulder and the south edge of the road. Central Avenue comes into Highway 466 from the south and is also paved.

The plaintiffs, Mr. and Mrs. Cook, were traveling west on Highway 466 at about 40 miles an hour with several cars ahead of them, one of these being driven by the defendant. The evidence indicates that as the defendant was turning to go south on Central Mr. Cook, who was driving plaintiff's car, attempted to pass the defendant's car and the car behind it, with the result that he crashed into a telephone pole which stood at a point 24 feet south of the pavement on Highway 466, and 22 feet west of

the west edge of the pavement on Central Avenue. His car left skid marks about 120 feet long which started south of the white line on Highway 466 at a point about 90 feet east of Central Avenue, and continued in a southwesterly direction over the pavement, shoulder and smooth dirt to the east edge of Central Avenue, across Central, and to the car as it rested against the pole. His car did not strike the defendant's car and it appears, without conflict, that the defendant stopped her car at or near the white line on Highway 466 as she was trying to turn into Central. Mrs. Cook was seriously injured and Mr. Cook received slight injuries.

This action was filed on March 16, 1954. The complaint contained four causes of action. The first cause alleged that Mrs. Cook was at all times the owner of a 1950 Hudson which was being driven by Mr. Cook; that defendant's car was so negligently driven as to force plaintiffs' car off the highway and into the power pole; and that as a direct result "the automobile of the said Bertha M. Cook was damaged" in the sum of \$650. The second, third and fourth causes of action realleged those facts. The prayer was for certain damages for Mrs. Cook, certain damages for Mr. Cook, and for \$650 for expense incurred by Mrs. Cook "for repairs to her said vehicle." The answer alleged, among other things, that the Hudson was the property of Mrs. Cook, and was being driven by Mr. Cook with her permission, and set up the usual affirmative defenses.

Mr. Cook's deposition was taken on June 30, 1954, and he died on August 31, 1954, from causes entirely unconnected with this accident. Mrs. Cook, as administratrix of his estate, was substituted in his place in the action. The action was tried on November 19, 22, 23 and 25, 1954, and it was dismissed as to Mr. Cook on November 23. A jury returned a unanimous verdict in favor of the defendant. Mrs. Cook has appealed from the judgment.

There was strong evidence in favor of the defendant. The defendant testified that she was traveling west on Highway 466 at about 40 miles an hour, and intended to turn and go south on Central; that she had

noticed a car behind her for some distance; that about 300 feet from the corner she slowed down and then put on her blinker for a left turn; that the car behind her slowed down also; that as she started to turn the wheel she saw the Cook car, which was then 20 or 30 feet away to the side and on the left of the center line; that her front wheels were on the white line when the Cook car went past her; and that she came to a stop after the Cook car hit the pole, and when she stopped three-fourths of her car was across the white line. This was corroborated by four adults who testified that they were traveling west on 466, in another car, about 50 feet behind defendant's car; that the Cook car was behind them; that as the defendant approached Central she slowed down to five or ten miles an hour and they saw her blink her lights signaling for a left turn; that their car was also slowed down and almost came to a stop; that the Cook car came up from behind on the left side and went around their car and around the defendant's car; that as the defendant's car was starting to turn they saw the Cook car hit the pole; that when the Cook car went around the defendant's car the defendant stopped immediately; that one front wheel of the defendant's car was across the center line; that the defendant stopped her car in the center of the road, where you would naturally start to make your turn; and that after they saw the Cook car hit the pole they pulled around defendant's car on the right and stopped on the right shoulder.

Mrs. Cook testified that as they were proceeding westerly on 466 there were two or three cars ahead of them; that she did not know whether or not there was another car between their car and the defendant's car; that she was paying no attention to the cars and had been calling the attention of her grandchildren in the rear seat to some lambs; that as she turned back "a car turned crossways in front of us"; that her husband turned to the left, put on his brakes, and the car skidded; and that she did not notice any signal or the blinker on the defendant's car. Mr. Cook through his deposition, testified that there were about four cars driving along together;

that he was about 50 feet behind the defendant's car and there were no cars between them; that the defendant made a left-hand turn in front of him "right at the intersection"; that the defendant gave no signal and he observed no flashing of a signal light; that the defendant was slowing down when he first noticed her; that this was close to the intersection; that "she just turned right square off the line"; that he applied his brakes "and she was crosswise, she was headed south"; that the defendant had passed the east edge of Central when she made her turn; that when she crossed the line he was about 50 feet from her; that he just rolled along at 40 to 45 miles an hour; that he swerved his car to the left; that the defendant stopped the minute he applied his brakes; that his car went in front of hers; that he was going 45 miles an hour when he applied his brakes; that "I thought I could make the turn" and go south; that he was about 50 feet east of her when she stopped; that she made practically a 90-degree turn to go south; that she slowed down but gave no signal; and that she stopped with the rear end of her car "right close" to the white line. A written statement made by Mr. Cook to a highway patrol officer an hour or two after the accident, and signed by him, was introduced in evidence. It reads:

"I was proceeding West on U S-466 at approx 40 M-P-H. I attempted to pass a vehicle ahead. As my cars front end came about even with rear of vehicle ahead, it suddenly turned left without hand signal or warning of any kinds. I turned left attempting to avoid a collision. The corner was too sharp to turn left, so I turned onto left shoulder, but struck a power pole."

Appellant's main contention is that Mr. Cook's negligence could not be imputed to his wife, and that the court erred in rejecting evidence of community ownership of the Hudson car, in instructing the jury that the negligence of the deceased husband driver was imputed to the wife as owner of the car under the theory that he was driving with her consent, and in refusing to instruct the jury that the negligence of the deceased husband could not be imputed

to the wife. The appellant in his opening brief relied on *Flores v. Brown*, 39 Cal.2d 622, 248 P.2d 922; *Kesler v. Pabst*, 43 Cal.2d 254, 273 P.2d 257; *Carroll v. Beavers*, 126 Cal.App.2d 828, 273 P.2d 56; and *Solko v. Jones*, 117 Cal.App. 372, 3 P.2d 1028, and argues that a different rule should prevail with respect to imputing the negligence of the husband to a wife where the car involved was the community property of the husband and wife, and where the husband dies after the action is filed but before it is tried. The question thus presented need not be decided here since no evidence was received showing that this Hudson was the community property of Mr. and Mrs. Cook, and since the only instruction given relating to the doctrine of imputed negligence rested, in accordance with the pleadings, upon the theory of ownership and permissive use as set forth in section 402 of the Vehicle Code, and not upon the husband and wife relationship. It seems to be conceded by the appellant that no evidence was received showing that the Hudson was the community property of the Cooks. In her closing brief it is admitted that the instructions as given by the court were sufficient in form and were "under the state of the evidence properly given." It is then stated that the controlling question is whether or not the court erred in rejecting evidence pertaining to the nature and character of the ownership of the Hudson.

[1,2] The undisputed evidence is that this car was registered in the name of Mrs. Cook, and the presumption is that she was its owner. Civ.Code, § 164. The complaint alleged four times that Mrs. Cook was the owner and in four other places alleged that her car was damaged in the sum of \$650, and the prayer asked that that amount be awarded to her "for repairs to her said vehicle." The answer also alleged that this car was the property of Mrs. Cook and was being driven by Mr. Cook with her permission. Not only was no issue presented in this connection, but this admission in the pleadings has considerable force. *Meyer v. State Board of Equalization*, 42 Cal.2d 376, 267 P.2d 257; *Wennerholm v. Stanford University School of Medicine*, 20 Cal.

2d 713, 128 P.2d 522, 141 A.L.R. 1358. A bill for repairs to the Cook car, dated January 18, 1954, was admitted in evidence, which was made out to Bertha M. Cook. Mr. Cook, in his deposition, was asked who owned the Hudson and he replied "My wife." He was then asked whether his wife had purchased the car new and he replied that she had. On appellant's motion for a new trial, which was denied, her counsel filed an affidavit confined to the matter of surprise in being unable to produce a witness, Albert Lequieu, at the trial and said nothing concerning the ownership of the car. In his points and authorities in support of that motion one point is thus stated: "The court erred in including (sic) evidence in respect to whether or not the car registered in the name of Bertha M. Cook was the community property of the parties." While the appeal was pending counsel for appellant requested that the record be augmented by adding his affidavit dated April 19, 1955, in which he stated that during the trial and before Mrs. Cook was called to the stand, in a conference in the judge's chambers, he stated that he intended to and was prepared to prove by her testimony that this automobile was considered community property. The motion to thus augment the record was granted.

This community property matter was referred to only twice during the trial, and then only incidentally. On the first day of the trial a highway patrol officer was asked by respondents' counsel on cross-examination whether his investigation indicated who was the owner of the Cooks automobile. Appellant's counsel objected and the court stated that it was not necessary to go into the ownership matter, that it was alleged in the pleadings and not denied that it belonged to the plaintiff, and that "you can't show a fact contrary to a pleading." On the same day, Mrs. Cook testified that the car was registered in her name. She was then asked "Where did the money come from that was used to purchase it?" An objection was made that this was not material and the court stated "She alleges in the complaint it is hers," and sustained the objection saying "We have to go according to the pleadings." Appellant's

counsel then said "My only thought in that regard was those pleadings were framed when that point wasn't so material." The court replied "You allege in the complaint it was her car, registered in her name, and we can't change the pleadings in this action here."

[3,4] In view of the strong evidence that there was no negligence on the part of the respondent it seems unlikely that the matter of contributory negligence was a controlling element in the reaching of a verdict. However, it cannot be so held as a matter of law, and the matter of whether or not this car was the community property of Mr. and Mrs. Cook would be material if it could be proved. There was no evidence that it was community property, and the only question in this regard is as to whether the court improperly rejected any such evidence. There was no offer of proof in that regard and no request for permission to amend, and counsel's objection when the matter was first suggested, during the cross-examination of the highway patrol officer, indicated that he was satisfied with the pleadings and did not consider the matter material. The court's remarks when Mrs. Cook was on the stand referred to the pleadings and in saying that "We can't change the pleadings" he was talking about the situation as it then existed. This cannot reasonably be deemed a refusal to permit an amendment when no such request was made, and doesn't excuse the appellant from asking for permission to amend or from making an offer of proof. The request for augmentation of the record indicates only that appellant's counsel had the matter in mind early in the trial, and it is not alleged that the court refused to permit him to amend. The rulings were made on the first day of the trial, and although the trial lasted four days no serious attempt was made to establish that this Hudson was the community property of Mr. and Mrs. Cook. As matters stood at the time the court ruled correctly, and no error appears in the court's failure to permit something which was not asked for. Prejudice is not to be presumed, especially

in view of the verified complaint and Mrs. Cook's evidence.

The only other point raised is that the court refused to grant a new trial on the ground of surprise. At the close of the taking of evidence the court's attention was called to the fact that a witness who had been subpoenaed had "gone to Oregon", and counsel for appellant stated "I want the record to show I called him as a witness." The case was then argued to the jury. On his motion for a new trial counsel for appellant presented his own affidavit stating that he had told this witness that he would call him when his testimony was desired; that on November 22, he learned that the witness had gone to Oregon; that he got in touch with the witness on the night of November 23, and the witness said he could not return in time for the trial; that he has since contacted the witness, who is willing to return at a future date or give a deposition; and that affiant has in his possession a written statement by this witness stating certain facts, some of which would be favorable to the appellant and some favorable to the respondent. A counteraffidavit was filed stating that on November 22 a conference was held in the chambers of the trial judge, during which counsel for appellant advised the judge that this witness had left the state; that the suggestion was then made that any motion for a continuance should be presented at that time, and that counsel for appellant then stated that he did not feel that it was necessary to ask for a continuance; and that the trial then proceeded through three days without a continuance being requested at any time.

[5] It appears that the fact that this witness had left the state was discovered on the second day of the trial and no request for a continuance or for an opportunity to take his deposition was ever made. Neither error nor abuse of discretion appears in this connection.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

139 Cal.App.2d 712

**George W. RIGGINS, Plaintiff and
Appellant,**
v.

**Sadie Ruth RIGGINS, by S. Ernest Roll, the
District Attorney of Los Angeles County,
Her Guardian ad litem, Defendant and
Respondent.**

Civ. 21250.

District Court of Appeal, Second District,
Division 3, California.
March 6, 1956.

Action for a divorce and custody of children and for awarding of community property to the husband on the ground of incurable insanity of the wife. From a judgment of dismissal of the Superior Court of Los Angeles County, Alfred E. Paonessa, J., sustaining a demurrer to an amended complaint of the plaintiff, the plaintiff appealed. The District Court of Appeal, by the court, held that the statute requiring proof of confinement under order of court as part of proof to obtain divorce on ground of incurable insanity of a spouse is not unconstitutional.

Judgment affirmed.

1. Constitutional Law ⇨208(1)

Wide discretion is vested in a legislature in making classification.

2. Constitutional Law ⇨208(1)

Decision of the legislature as to what is a sufficient distinction to warrant a classification will not be overturned by the courts unless it is palpably arbitrary.

3. Constitutional Law ⇨208(1)

Classification should be reasonable and have a substantial relation to a legitimate object to be accomplished.

4. Divorce ⇨4, 13

Legislature has power to specify incurable insanity as a ground of divorce and to establish requirements as to proof thereof. West's Ann.Civ.Code, §§ 92, 108; Welfare and Institutions Code, §§ 5000-5189.

5. Constitutional Law ⇨208(1)

Circumstances^{*} prevailing at the time of enactment of a statute are to be considered in determining whether a classification is arbitrary or unrelated to the object of the statute.

6. Divorce ⇨4

Where the legislature in making incurable insanity as grounds for divorce was for the first time permitting a divorce upon the ground involving no fault of the defendant, the legislature did not act unreasonably in requiring strict proof as to that additional ground. West's Ann.Civ. Code, §§ 92, 108.

7. Constitutional Law ⇨208(1)

The legislature need not in order to lend support to constitutional validity of a regulation extend it to all cases which it might possibly reach.

8. Constitutional Law ⇨50, 82, 208(16), 249
Divorce ⇨4

The statute requiring proof of the confinement under order of court as part of the proof in order to obtain a divorce on ground of incurable insanity of a spouse is not unconstitutional for unreasonable classification of insane persons thereby denying equal protection; nor violative of provision that government is for the protection of the people; that special privileges shall not be granted and the provision respecting a legislative department. West's Ann. Civ.Code, § 108; Welfare and Institutions Code, §§ 5000-5189, 6602, 6605-6605.6, 6610-6612; U.S.C.A.Const. Amend. 14; West's Ann.Const. art. 1, §§ 2, 21; art. 4, § 1 et seq.

9. Divorce ⇨23

A husband was not entitled to a divorce for the alleged incurable insanity of the wife where it appeared she entered a state hospital as a voluntary patient on a voluntary basis and there was no proof of confinement under order of court. West's Ann. Civ.Code, §§ 92, 108; Welfare and Institutions Code, §§ 5000-5189.

Hubert W. Swender, Reseda, for appellant.

Harold W. Kennedy, County Counsel, and A. Thomas Grazer, Deputy County Counsel, Los Angeles, for respondent.

PER CURIAM.

Plaintiff appeals from a judgment of dismissal based upon an order sustaining demurrer to amended complaint and upon the failure of plaintiff to amend with the time allowed for amending.

The amended complaint alleged that plaintiff is and for more than one year last past has been a resident of Los Angeles County, California; plaintiff and defendant were married on June 29, 1940, and ever since have been husband and wife; the date of separation was August 1, 1950; two children were born of the marriage. Said complaint contained adequate allegations for the statistical purposes required by section 426a of the Code of Civil Procedure. It was also alleged in said complaint that there is community real property in Los Angeles County standing in the names of the parties as joint tenants (description and value being alleged); more than three years prior to the filing of said action, to wit: about August 7, 1951, defendant entered Camarillo State Hospital for the insane for treatment as a voluntary patient on a voluntary basis; defendant at said time was diagnosed as dementia praecox, paranoid, and the defendant ever since said date has been and now is confined in said institution or under the jurisdiction of the institution; said insanity of defendant still exists; about June 30, 1954, the patient appeared at diagnostic staff conference before the staff of said hospital, and on said date the medical superintendent and medical director of said hospital certified that defendant is incurably mentally ill and has been at all times since her entry and confinement in said hospital incurably mentally ill; defendant has no general guardian or guardian of her person; plaintiff has reasonable ability to support the insane spouse, so far as any obligation imposed by law as a result of the marriage is concerned, for the remainder of the life expectancy of said spouse; the two minor children are in the custody of plaintiff and the plaintiff is a fit and proper person to be awarded

the custody of the children. The prayer of said complaint was for judgment granting a decree of divorce to plaintiff, awarding custody of the children to plaintiff, and awarding the community property to plaintiff. The prayer was also for an order appointing the District Attorney of Los Angeles County, or such other person as the court might deem proper, guardian ad litem of defendant for the purpose of said action.

S. Ernest Roll, the District Attorney of Los Angeles County, as guardian ad litem of defendant, demurred to said amended complaint on the ground that said complaint fails to allege facts sufficient to constitute a cause of action. On December 16, 1954, the demurrer was sustained with leave to amend within 10 days. A notice of said order sustaining the demurrer was served upon the attorney for plaintiff on January 10, 1955. The plaintiff failed to amend said amended complaint, and on February 18, 1955, a judgment of dismissal was entered.

Section 92 of the Civil Code provides: "Divorces may be granted for any of the following causes: * * * Seven. Incurable insanity." Section 108 of the Civil Code provides: "A divorce may be granted on the grounds of incurable insanity only upon proof that the insane spouse has been incurably insane for a continuous period of three years immediately preceding the filing of the action and has been confined to an institution, or under the jurisdiction of the institution, under the provisions of Chapter 1, Part 1, Division 6 of the Welfare and Institutions Code or under the provisions of Section 1026 of the Penal Code or Chapter 6, Title 10, Part 2 of the Penal Code, for a period of at least three continuous years immediately preceding the filing of the action and upon the testimony of a member of the medical staff of said institution that such spouse is incurably insane." (The Penal Code provisions, referred to in said section 108, are not involved herein.) Said part 1 of the Welfare and Institutions Code, referred to in said section 108 of the Civil Code, is entitled "Commitments." Said chapter 1 of said part 1 is entitled "Mentally Ill Persons and Insane Persons." That chapter comprises sections 5000 to 5189, in-

clusive. It may be said generally that those sections pertain to apprehension, examination, commitment by court, and hospitalization of mentally ill and insane persons. Stated in another way, it may be said generally that those sections pertain to court commitment procedure or procedure whereby a mentally ill person enters a state hospital under order of court or involuntarily. Under other sections of the Welfare and Institutions Code a mentally ill person may (1) voluntarily enter a state hospital for treatment, § 6602; (2) enter a state hospital upon an application in his behalf by a health officer, §§ 6610-6612; and (3) be temporarily admitted to such a hospital upon application in his behalf by a relative or other designated persons, §§ 6605-6605.6.

Respondent (defendant) asserts in effect that the demurrer was properly sustained because the amended complaint shows that the defendant entered the state hospital as a voluntary patient on a voluntary basis. In other words, respondent asserts in effect that said complaint does not show that defendant was confined to the hospital under the provisions of chapter 1, part 1, division 6, of the Welfare and Institutions Code, §§ 5000-5189—under court procedure, that is, involuntarily.

Appellant contends that the portion of section 108 of the Civil Code requiring that the confinement be under the provisions of chapter 1, part 1, division 6, of the Welfare and Institutions Code is unconstitutional for the reason that it results in an unreasonable and discriminating classification of insane persons confined in state institutions, thus violating the equal protection clause of the Fourteenth Amendment of the United States Constitution, and provisions of the California Constitution, namely: article I, § 2 (that government is for protection of the people); and article I, § 21 (that special privileges shall not be granted); and article IV (re Legislative Department). He quotes from *Morganti v. Morganti*, 99 Cal. App.2d 512, 517, 222 P.2d 78, 80, to the effect that a purpose of said section 108 is "to provide the manner of proof where the ground for divorce is the incurable insanity of the defendant spouse." He argues that the method of entry into a state hospital

in California, whether voluntary or under court commitment, has no bearing on that purpose or object of section 108; and that the method of entry into the hospital has no bearing on the question or manner of proving incurable insanity where the defendant has been certified, by the medical superintendent of the hospital, to be incurably insane for over three years and has been confined in the hospital for over three years. He also argues that said portion of said section 108, which restricts the ground of divorce (incurable insanity) to those persons whose insane spouses entered the hospital involuntarily, does not bear equally upon all persons whose spouses are incurably insane.

[1-3] *Dribin v. Superior Court*, 37 Cal. 2d 345, 231 P.2d 809, 24 A.L.R.2d 864, involved the question as to whether the Legislature, in enacting section 108, acting within its constitutional power in limiting divorce on the ground of incurable insanity to cases wherein there was proof of confinement under said sections 5000 to 5189, that is, confinement in this state as distinguished from confinement outside this state. It was held therein that the requirement of proof of confinement in this state was constitutional. Principles of law with respect to determining the constitutionality of a statute are stated in that case in 37 Cal.2d at pages 351 and 352, 231 P.2d at page 813. Some of those principles are: "Wide discretion is vested in the Legislature in making the classification." The "decision of the Legislature as to what is a sufficient distinction to warrant the classification will not be overthrown by the courts unless it is palpably arbitrary * * *." "A distinction in legislation is not arbitrary if any set of facts reasonably can be conceived that would sustain it." "The classification should be reasonable; i. e. 'have a substantial relation to a legitimate object to be accomplished * * * [I]t is not our concern whether the Legislature has adopted what we might think to be the wisest and most suitable means of accomplishing its objects.'"

[4, 5] Incurable insanity was not a ground for divorce in California until 1941, when that additional ground was added to

the grounds for divorce stated in section 92 of the Civil Code. In section 108 of the Civil Code, also enacted in 1941, it was provided that a divorce on the ground of incurable insanity might be granted "only upon proof" that the defendant had been incurably insane for a certain time and had been confined in a certain place "under the provisions" of certain sections of the Welfare and Institutions Code. The confinement referred to in those sections is confinement under order of court. It thus appears that the Legislature excluded voluntary confinement or admission in its determination as to the proof that should be required. (Voluntary admission is provided for in a different section—section 6602.) "The power of the legislature to specify incurable insanity as a ground of divorce and to establish requirements as to the proof thereof cannot be challenged." 16 Cal.Jur.2d, p. 309, § 13; see also *Morganti v. Morganti*, supra, 99 Cal.App.2d 512, 515, 222 P.2d 78.

[6, 7] As stated in *Dribin v. Superior Court*, supra, 37 Cal.2d at page 352, 231 P.2d at page 813: "The insane have always been regarded as subject to control on the part of the state, both for their protection and for the protection of others." It was said further therein, 37 Cal.2d at page 352, 231 P.2d at page 814, that the Welfare and Institutions Code "throws about an alleged insane or incompetent person various safeguards by way of notice, service of process, hearings, evidence, jury trial, etc., before an adjudication of insanity and commitment therefor may be made." The Legislature in requiring proof of confinement under an order of court might have considered that such requirement was necessary in order to protect or safeguard the personal and property rights of the alleged incurably insane defendant. It might have considered that such requirement would be a protection or safeguard in the event a spouse, with a view to creating a possible basis for divorce, were inclined to unduly persuade the other spouse to voluntarily enter a state hospital. Also the Legislature might have considered that evidence as to incurable insanity of the defendant would be more reliable and trustworthy if the evidence in-

cluded an adjudication of insanity (at the time of entering the hospital) in addition to testimony of a medical staff member as to incurable insanity. Circumstances prevailing at the time of enactment of a statute are to be considered in determining whether a classification is arbitrary or unrelated to the object of the statute. *Pacific Gas & Elec. Co. v. Moore*, 37 Cal.App.2d 91, 97, 98 P.2d 819. Prior to the enactment making incurable insanity a ground for divorce, the existing grounds for divorce involved fault or wrongdoing on the part of the defendant. The new or additional ground of incurable insanity involved no element of fault of the defendant. In view of the fact that, in making incurable insanity a ground for divorce, the Legislature was for the first time permitting a divorce upon a ground which involved no fault on the part of defendant, it was not unreasonable to require strict proof as to that additional ground.

[8, 9] As above stated, "A distinction in legislation is not arbitrary if any set of facts reasonably can be conceived that would sustain it." It appears, as above shown, that there were considerations which reasonably would have warranted the Legislature in making a distinction, in the matter of divorce on the ground of incurable insanity, between proof of confinement under order of court and proof of voluntary confinement. In view of such considerations, it cannot be said as a matter of law that the Legislature did not have the constitutional right to require proof of confinement under order of court, as a part of the proof, in order to obtain a divorce on the ground of incurable insanity. As counsel for appellant suggests, the legislation is favorable to a person whose spouse entered the institution involuntarily and is unfavorable to a person whose spouse entered the institution voluntarily. However, as stated in *Leland v. Lowery*, 26 Cal.2d 224, 232, 157 P.2d 639, 645, 175 A.L.R. 1109, "[T]he legislature is not bound, in order to support the constitutional validity of its regulation, to extend it to all cases which it might possibly reach." It cannot be said as a matter of law that the Legislature made an arbitrary classification in requiring proof of

confinement under order of court; nor can it be said that the classification had no bearing on the object to be accomplished by said section 108. The portion of said section 108 of the Civil Code requiring proof of confinement under the provisions of chapter 1, part 1, division 6 of the Welfare and Institutions Code (sections 5000 to 5189, inclusive) is not unconstitutional.

In view of the above conclusion, it is not necessary to discuss the other assertion of respondent to the effect that if said portion of section 108 is unconstitutional that portion is not severable from the remainder of the section.

The judgment is affirmed.



139 Cal.App.2d 884

Isabelle C. ROGERS, as Special Administratrix of the Estate of Michael C. Courtney, Plaintiff and Appellant,

v.

Kenneth F. COURTNEY, Defendant and Respondent.
Civ. 16573.

District Court of Appeal, First District,
Division 2, California.

March 19, 1956.

Rehearing Denied April 18, 1956.

Hearing Denied May 15, 1956.

Quiet title action by administratrix, individually, and as deceased's heir, against co-heir. The Superior Court, Alameda County, A. T. Shine, J., entered judgment for other heir, and plaintiff appealed. The District Court of Appeal, Kaufman, J., held that, where affidavit in support of motion for leave to amend complaint showed that plaintiff knew from time she filed original complaint that defendant was in possession of the premises, and no excuse was offered to show why plaintiff waited until eve of trial and until after defendant had moved to have case stricken from jury trial to ask for amendment to add the allegation that plaintiff was out of possession and

that defendant was in possession of the land involved, denial of leave to amend did not constitute an abuse of trial court's discretion.

Judgment affirmed.

1. Jury ⇐14(2)

Where there is an allegation seeking recovery of possession of land, right to jury trial is not defeated because the action has been brought in an equitable form.

2. Jury ⇐14(9)

In quiet title action by administratrix and heir of deceased, complaint, which alleged that certain realty was property of deceased at time of his death, and that defendant claimed to have some right or interest in it adverse to ownership of estate and that such claim was without foundation, would not be sufficient to entitle administratrix to a jury trial.

3. Quieting Title ⇐42

Where affidavit in support of motion for leave to amend complaint in quiet title action showed that plaintiff knew from time she filed original complaint that defendant was in possession of the premises, and no excuse was offered to show why plaintiff waited until eve of trial and until after defendant had moved to have case stricken from jury trial to ask for amendment to add the allegation that plaintiff was out of possession and that defendant was in possession of the land involved, denial of leave to amend did not constitute an abuse of trial court's discretion.

4. Executors and Administrators ⇐129(3)

In absence of allegation, in complaint in quiet title action by administratrix and heir against another heir, that land, which had belonged to decedent, and which was in possession of other heir, was necessary for payment of debts, legacies, or accrued administration expenses or for distribution to some other heir, devisee, or legatee entitled thereto, administratrix could not have made a recovery of the property. West's Ann.Probate Code, § 581.

5. Appeal and Error ⇐197(3), 679(1)

Plaintiff, who had not made any attack upon the findings and had not furnished

record of trial, would not be heard to complain on appeal that trial court had tried case on theory and facts alleged in proposed amended complaint, even though trial court had not permitted her to so amend complaint.

Robertson & Hammer, Charles W. Robertson, Edward A. Hammer, San Francisco, for appellant.

Robert A. Kaiser, Oakland, for respondent.

KAUFMAN, Justice.

Plaintiff appeals from a judgment in a quiet title suit rendered in favor of defendant, decreeing that appellant Isabelle C. Rogers has no right, title or interest in the real property in question either individually or as Special Administratrix of the Estate of Michael C. Courtney, deceased, or otherwise.

Appellant and respondent were the daughter and son of Michael C. Courtney, deceased. The only remaining heir was another daughter. Michael C. Courtney died on July 9, 1952. Appellant was appointed Special Administratrix on July 25, 1952, and General Administratrix on August 4, 1952. Letters of administration were issued on August 4, 1952, and first publication to creditors was made on the following day. At the time of trial, which began on May 24, 1954, the time to file claims had expired more than fifteen months previously with no claims against the estate having been filed.

In her complaint to quiet title filed on July 25, 1952, appellant alleged on information and belief that a certain parcel of real property was the property of Michael C. Courtney at the time of his death, that defendant claimed to have some right or interest in it adverse to the ownership of the estate and that such claim was without foundation. The answer was a general denial of appellant's claim.

On October 16, 1952, appellant's attorney had filed a memorandum of motion to set the cause for trial and a demand for a jury. On February 3, 1954, a stipulation was filed by the attorney for the parties in

regard to advancing the date for trial, waiving notice of the date of trial, and forfeiting jury fees in the event a jury trial was not had.

On April 2, 1954, Notice of motion to strike the cause from the jury calendar was made by respondent. Appellant filed Notice of motion for leave to amend her complaint on April 6, 1954. Both motions were heard on April 6, 1954. Appellant's motion for leave to amend the complaint was denied, and respondent's motion to strike the cause from the jury calendar was granted.

The amendment which appellant sought to make to the complaint was the additional allegation that "plaintiff is out of possession and defendant is in possession, of said premises." The supporting affidavit of appellant's attorney stated that respondent had been in possession of said premises since the death of decedent.

On April 9, 1954, appellant petitioned this court for a Writ of Prohibition to stop the trial before the court without a jury. The petition was denied on April 19, 1954.

The cause was then assigned to Department 12 of the Superior Court for trial without a jury. Appellant again moved for and demanded jury trial which motion was denied.

Appellant herein bases her appeal on the ground that prejudicial error was committed by the trial court in denying her a jury trial, and that the court abused its discretion in denying her leave to amend her complaint.

[1] Undoubtedly, if the amendment had been added to the complaint, appellant would have been entitled to a jury trial, for where there is an allegation seeking recovery of possession of land, the right to a jury trial is not defeated because the action is brought in on equitable form. *Thomson v. Thomson*, 7 Cal.2d 671, 678, 62 P.2d 358, 117 A.L.R. 1; *Angus v. Craven*, 132 Cal. 691, 696, 64 P. 1091.

[2, 3] The above question, however, cannot be reached if the trial court did not abuse its discretion in denying leave to amend, for under the original complaint, appellant clearly was not entitled to a jury

trial. The affidavit in support of the motion for leave to amend shows that appellant knew from the time she filed the original complaint that respondent was in possession of the premises, and no excuse is offered to show why she waited till the eve of trial and until after respondent had moved to have the case stricken from the jury calendar, to ask for the amendment. It has been held in cases where a similar fact situation existed, that the court did not abuse its discretion in denying leave to amend.

In *Peterson v. Peterson*, 74 Cal.App.2d 312, 323, 168 P.2d 474, 479, it was said that "The granting or denying of such a motion to amend is largely a matter of judicial discretion, and the ruling will not be disturbed on appeal in the absence of a clear abuse of such discretion. No such abuse is here shown or suggested. No explanation is offered as to the plaintiff's tardiness in making the request to further amend and no showing is made of how such an amendment would be in furtherance of justice." And, see, *Moss Estate Co. v. Adler*, 41 Cal.2d 581, 586, 261 P.2d 732; *Lewis & Queen v. S. Edmondson & Sons*, 113 Cal.App.2d 705, 711, 248 P.2d 973; *Associated Tel. Co. v. Greenman*, 111 Cal.App.2d 193, 196, 244 P.2d 15.

[4] It is further to be noted in this case that there is no allegation in the original complaint to the effect that the recovery is necessary for the payment of debts of the estate. Section 581, Probate Code, provides that after the time to file or present claims has expired, the administrator "is not entitled to recover the possession of any property of the estate from any heir who has succeeded to the property in his possession * * * unless he proves that the same is necessary for the payment of debts or legacies, or of expenses of administration already accrued, or for distribution to some other heir, devisee or legatee entitled thereto." No claims had been filed in this state, and fifteen months had passed since the time to file claims had expired. Without the allegation required by section 581 and proof thereof, appellant could not possibly have made a recovery of the property. See *Pailhe v. Pailhe*, 113 Cal.App.2d

53, 247 P.2d 838. Furthermore, the original complaint did not contain an allegation alleging that the administratrix was seeking recovery of the rents, profits and issues of the property of decedent, as she would be entitled to do under section 581, *supra*, until the time of settlement of the estate.

[5] The arguments now raised by appellant appear to be the same as those presented to this court at the time the Writ of Prohibition was denied. She states that the trial court tried the case on the theory and facts alleged in the proposed amended complaint, but since she has made no attack upon the findings and has furnished no record of the trial this court is not required to consider this contention. 3 Cal.Jur.2d 759, sec. 248. There is clearly no merit in the appeal.

The judgment affirmed.

NOURSE, P. J., and DOOLING, J., concur.



140 Cal.App.2d 50

Ernest V. BERRY, Plaintiff and Appellant,
v.

**Blanche Beatrice BERRY, Defendant
and Respondent.**

**Ernest V. BERRY, Plaintiff, Respondent,
and Cross-Appellant,**

v.

**Blanche Beatrice BERRY, Defendant,
Appellant, and Cross-Respondent.**

Civ. 20974.

District Court of Appeal, Second District,
Division 3, California.

March 20, 1956.

Divorce action. From judgment and orders of the Superior Court of Los Angeles County, Kenneth L. Holaday, J., parties take cross-appeals. The District Court of Appeal, Vallée, J., held that it was error to enter final decree nunc pro tunc in the

absence of a showing of mistake, negligence or inadvertence, and that certain orders entered by the court were nonappealable and that the appeals therefrom should be dismissed.

Judgment in accordance with the opinion.

See also 294 P.2d 766.

1. Divorce ⇨255

When an interlocutory decree of divorce becomes final, it is *res judicata* on all questions determined thereby, including, generally, the rights of the parties in community property then existing. West's Ann.Civ.Code, §§ 132, 133.

2. Divorce ⇨315

An interlocutory decree of divorce does not terminate the marriage relation. West's Ann.Civ.Code, §§ 132, 133.

3. Husband and Wife ⇨265

The interest of the wife in community property during continuance of the marriage relation is a present, existing interest, and a vested interest. West's Ann.Civ. Code, § 161a.

4. Husband and Wife ⇨249

Property acquired by one of the spouses in the interim between an interlocutory decree of divorce and a final decree may be community property when it is not acquired as a separate property of either. West's Ann.Civ.Code, § 687.

5. Divorce ⇨255

Where interlocutory decree of divorce made a complete disposal of the property rights of the parties then existing, and an appeal was taken from that decree and affirmed, decree, when affirmed, constituted a conclusive adjudication of all rights of the parties in all community property existing on the date of its entry. West's Ann. Civ.Code, §§ 161a, 687.

6. Divorce ⇨255

An interlocutory decree of divorce does not purport to adjudicate property rights of the spouses that might be acquired after its entry, and it should not be so construed. West's Ann.Civ.Code, §§ 161a, 687.

7. Divorce ⇨162

The Code section authorizing the court, whenever either party in a divorce action is entitled under the law to a final judgment but by mistake or inadvertence same has not been signed or entered, to cause a final judgment to be entered *nunc pro tunc*, is the sole authority for the entry of a final decree *nunc pro tunc* in divorce action where on the facts the court is without inherent power to enter such a decree, but there must be a showing of mistake, negligence or inadvertence, and in the absence of such a showing, the court cannot enter the final decree *nunc pro tunc*. West's Ann.Civ.Code, § 133.

8. Divorce ⇨162

A "mistake of fact" authorizing entry of judgment *nunc pro tunc* in divorce action occurs when a person understands the facts to be other than they are, while a "mistake of law" is when a person knows the facts as they really are but has a mistaken belief as to the legal consequences of those facts. West's Ann.Civ.Code, § 133.

See publication Words and Phrases, for other judicial constructions and definitions of "Mistake of Fact" and "Mistake of Law".

9. Divorce ⇨162

"Inadvertence" authorizing court to enter judgment *nunc pro tunc* in divorce actions is a lack of heedfulness or attentiveness, inattention, fault from negligence. West's Ann.Civ.Code, § 133.

See publication Words and Phrases, for other judicial constructions and definitions of "Inadvertence".

10. Divorce ⇨162

"Negligence" with respect to entry of a judgment *nunc pro tunc* in a divorce action may be passive in character, and may consist in heedlessly refraining from doing the proper thing, and when the circumstances call for activity, one who does not do what he should do is negligent. West's Ann.Civ.Code, § 133.

See publication Words and Phrases, for other judicial constructions and definitions of "Negligence".

11. Negligence ⇨3, 4

"Negligence" is the failure to use ordinary care in the management of one's person or property and the essence thereof is the failure to exercise due care and take proper precaution in a particular case.

12. Negligence ⇨1

In determining the presence or absence of negligence, the test is what would a reasonably prudent person do under similar circumstances, and negligence relates to some circumstances of time, place, or person.

13. Divorce ⇨162

The mere failure of a party to apply for a final decree does not constitute mistake, negligence or inadvertence so as to authorize court to enter judgment nunc pro tunc in a divorce action. West's Ann.Civ. Code, § 133.

14. Divorce ⇨162

Where an interlocutory decree of divorce was entered in favor of the wife, granting the husband's motion to enter a final decree of divorce in his favor nunc pro tunc was error where there was no showing of mistake, negligence or inadvertence. West's Ann.Civ.Code, §§ 132, 133; West's Ann.Superior Court Rules, rule 20.

15. Divorce ⇨162

Where the wife had a vested right in community property acquired subsequent to the entry of an interlocutory decree of divorce, such right could not be divested by entry of a final decree in the husband's favor nunc pro tunc, without a showing of mistake, negligence or inadvertence. West's Ann.Civ.Code, §§ 132, 133.

16. Divorce ⇨280

An order adjudging husband not to be in contempt for failure to comply with order entered in a divorce action was nonappealable and the appeal therefrom will be dismissed.

17. Divorce ⇨280

Where interlocutory decree of divorce was entered for the wife, an order requiring an accounting by the husband of gains attributable to his ability and capacity in

order to determine the community property was nonappealable, and appeal therefrom must be dismissed.

18. Appeal and Error ⇨66

No appeal lies from an interlocutory or intermediate order unless the order is designated by the statute as one of those from which an appeal may be taken.

19. Appeal and Error ⇨76(1)

Where an order requires the payment of money by party complaining, or the doing of an act by or against him, the order in effect is final as against such party and may be appealed from by him.

20. Appeal and Error ⇨80(3)

If an order be in its nature such as to be subject before enforcement to the further action of the court, either by decree or later order, the order complained of is not final, and review must be sought by appeal from the decree or order subsequently entered.

21. Appeal and Error ⇨80(4)

When an order directs an accounting, fixes no rights of the parties, contemplates that the accounting shall be returned to the court, and when further judicial action is necessary even though not specified in the order, the determination is not a "final judgment" and the order is not appealable, and rule applies whether the order for an accounting is proper or erroneous.

See publication Words and Phrases, for other judicial constructions and definitions of "Final Judgment".

22. Divorce ⇨286

Where order in divorce action contemplated a future determination of whether any community property had been acquired in the interim between the interlocutory and the final decrees and, if so, how it should be divided, and did not finally determine any rights, the order if erroneous as the wife contended was subject to an appeal from the final order after the accounting.

Frederick I. Frischling, Los Angeles, for
Ernest V. Berry.

Jerry Giesler and Harold C. Holland, Beverly Hills, for Blanche Beatrice Berry.

VALLÉE, Justice.

These are cross-appeals. Defendant appeals from a final decree of divorce; from an order adjudging plaintiff not to be in contempt; and from orders directing that an accounting be taken to determine half the net earnings of plaintiff from his personal services from January 1, 1950 to December 31, 1951 and other gains of his attributable to his energy, ability, and capacity from the operation of his business for the period from January 8, 1951 to July 7, 1953, to determine the community property, if any, appointing an auditor, fixing his fees, and awarding attorney's fees. Plaintiff appeals from part of the order directing that an accounting be taken.

On January 8, 1951 an interlocutory decree was entered granting defendant, as cross-complainant, a divorce from plaintiff. The decree ordered plaintiff to pay defendant for her support and maintenance \$150 a month for twelve months only. It ordered plaintiff to pay defendant \$39,410, described as community property, in 36 equal monthly installments "without interest, and in addition thereto cross-complainant shall be and is awarded $\frac{1}{2}$ of plaintiff's net earnings from his personal services from January 1st, 1950 to December 31, 1951." Defendant appealed from the property provisions of the interlocutory decree. The decree was affirmed. *Berry v. Berry*, 117 Cal.App.2d 624, 256 P.2d 646. The remittitur was filed in the superior court on July 7, 1953.

On May 12, 1954, on application of defendant, two orders to show cause issued: one directing plaintiff to show cause why he should not be adjudged in contempt for failing to pay \$660, the balance of the \$39,410 he was ordered to pay defendant by the interlocutory decree, and for failing to render an accounting of his net earnings from his personal services for the period from January 1, 1950 to December 31, 1951, and for attorney's fees incident to a hearing on that order; the other directing plaintiff to show cause why he should not render an accounting "to determine the community

property, if any, attributable to the personal character, energy, ability and capacity of Mr. Berry, where he has contributed his personal services to the operation of the business" for the period from January 1, 1950 to the entry of the final decree, which had not then been entered, and for attorney's fees and costs incident to that order. On July 7, 1954 plaintiff filed a notice of motion to enter a final decree *nunc pro tunc* as of January 9, 1952, which date was just one year after entry of the interlocutory decree. The ground of the motion was that the interlocutory decree was entered January 8, 1951, that all the provisions of the decree had been executed save one, and that a hearing to enforce that provision was pending.

Prior to the hearing of the orders to show cause plaintiff paid defendant the \$660. The orders to show cause and the motion were heard together commencing on July 20, 1954. The minutes of July 20, 1954 say, "On the court's own motion the matter of the payment of \$660.00 as related to the contempt action is dismissed." Plaintiff withdrew his motion for the entry of a final decree *nunc pro tunc* as of January 9, 1952 and moved that it be entered as of July 7, 1953, the date the remittitur on the appeal from the interlocutory decree was filed in the superior court.

On July 21, 1954 the court, by minute order, granted plaintiff's motion to enter the final decree *nunc pro tunc* as of July 7, 1953, and ordered "that an accounting be taken to determine $\frac{1}{2}$ the net earnings of the plaintiff for personal services from January 1, 1950 till December 31, 1951, and the gains attributable to the energy, ability and capacity of Mr. Berry from the operation of the business from January 8, 1951 to July 7, 1953 to determine the community property, if any." On July 22, 1954, by minute order, the court granted defendant's motion for an audit of plaintiff's books from January 1, 1950 until July 7, 1953, appointed an auditor "to make the accounting," ordered plaintiff to pay the auditor \$1,875, and ordered plaintiff to pay defendant's attorney \$1,000 for his services in the proceeding. On July 28, 1954 the final decree was entered as previously ordered.

It assigns the property of the parties in accord with the interlocutory decree and contains this provision:

"It is further ordered and adjudged that pursuant to paragraph VIII of said interlocutory judgment, plaintiff pay to defendant one-half of plaintiff's net earnings, if any, from his personal services from January 1, 1950 to December 31, 1951, and it is further ordered that an accounting be had to determine the amount due, if any, under this provision of this judgment."

No mention is made in the final decree of that part of the minute order of July 21 requiring plaintiff to account for gains attributable to his energy, ability, and capacity from the operation of his business for the period from January 8, 1951, the date of entry of the interlocutory decree, to July 7, 1953, the retroactive date of entry of the final decree, nor is mention made of the order of July 22 granting defendant's motion for an audit and appointing an auditor.

Appeal of Defendant

Defendant's claim is that it was error to enter the final decree *nunc pro tunc* in the absence of a showing of mistake, negligence, or inadvertence; that the final decree should have been entered at the time of the determination of the accounting for determination of community property, if any, accumulated after the interlocutory decree. Plaintiff replies that the court properly entered the final decree *nunc pro tunc* as of the date the remittitur was filed in the superior court, namely, July 7, 1953, and that the period of accounting should have been confined to the period set out in the interlocutory and final decrees, namely, from January 1, 1950 to December 31, 1951. It is not contended the final decree was entered pursuant to the inherent power of a court to antedate a judgment under certain circumstances. See *Mather v. Mather*, 22 Cal.2d 713, 719, 140 P.2d 808; *Phillips v. Phillips*, 41 Cal.

2d 869, 875, 264 P.2d 926; *Corbett v. Corbett*, 113 Cal.App. 595, 600, 298 P. 819.

Civil Code, section 132, provides:

"When one year has expired after the entry of such interlocutory judgment, the court on motion of either party, or upon its own motion, may enter the final judgment granting the divorce * * * and such other and further relief as may be necessary to complete disposition of the action, but if any appeal is taken from the interlocutory judgment or motion for a new trial made, final judgment shall not be entered until such motion or appeal has been finally disposed of, nor then, if the motion has been granted or judgment reversed."

Civil Code, section 133, provides:

"Whenever either of the parties in a divorce action is, under the law, entitled to a final judgment, but by mistake, negligence or inadvertence the same has not been signed, filed and entered, if no appeal has been taken from the interlocutory judgment * * * the court, on the motion of either party thereto or upon its own motion, may cause a final judgment to be signed, dated, filed and entered therein granting the divorce as of the date when the same could have been given or made by the court if applied for."

Nolte v. Nolte, 29 Cal.App. 126, 154 P. 873, and *Harris v. Superior Court*, 10 Cal. App.2d 586, 52 P.2d 605, held the court had no power to enter an interlocutory decree *nunc pro tunc* as of a prior date.¹ In *Corbett v. Corbett*, 113 Cal.App. 595, 298 P. 819, decided prior to the enactment of section 133 in 1935, the interlocutory decree was entered June 29, 1926. There was no appeal. The final decree was rendered February 6, 1928. It directed that it be entered *nunc pro tunc* as of July 2, 1927. It was held the trial court had no authority to make the *nunc pro tunc* order and that it was void. A marriage of one of the spouses between entry of the interlocutory decree

interlocutory decree *nunc pro tunc* under certain circumstances.

1. These cases were decided before section 131.5 was added to the Civil Code in 1939 authorizing the granting of an

and actual entry of the final decree was held void. It would appear that section 133 was enacted to avoid recurrence of the result in the Corbett case. In re Estate of Hughes, 80 Cal.App.2d 550, 553, 182 P.2d 253; Macedo v. Macedo, 29 Cal.App.2d 387, 390, 84 P.2d 552.

[1-6] Speaking of section 133, the court, in Macedo v. Macedo, supra, 29 Cal. App.2d 387, at page 391, 84 P.2d 552, at page 554, said:

"The act is both curative and remedial, and the retroactive operation of such statute should be given effect unless it disturbs some vested right or impairs the obligation of some contract."

When an interlocutory decree of divorce becomes final it is *res judicata* on all questions determined thereby including, generally, the rights of the parties in community property then existing. Dupont v. Dupont, 4 Cal.2d 227, 228, 48 P.2d 677; Leupe v. Leupe, 21 Cal.2d 145, 148, 130 P.2d 697. An interlocutory decree does not terminate the marriage relation. The interest of the wife in community property during continuance of the marriage relation is a present, existing interest. Civ.Code, § 161a. It is a vested interest. Cooke v. Cooke, 65 Cal.App.2d 260, 265-266, 150 P.2d 514; Wissner v. Wissner, 89 Cal.App.2d 759, 764, 201 P.2d 837; Horton v. Horton, 115 Cal. App.2d 360, 363-364, 252 P.2d 397; In re Estate of Kelley, 122 Cal.App.2d 42, 264 P. 2d 210. Hence property acquired by one of the spouses in the interim between the interlocutory and final decrees may be community property when it is not acquired as the separate property of either. Civ. Code, § 687; Brown v. Brown, 170 Cal. 1, 4, 147 P. 1168; Hiltbrand v. Hiltbrand, 13 Cal.App.2d 330, 334-335, 56 P.2d 1292; Babcock v. Babcock, 63 Cal.App.2d 94, 101, 146 P.2d 279; Franklin v. Franklin, 67 Cal. App.2d 717, 720-721, 155 P.2d 637. In the present case the interlocutory decree made a complete disposal of the property rights of the parties then existing. An appeal was taken from that decree and it was affirmed. When affirmed, it constituted a conclusive adjudication of all rights of

the parties in all community property existing on the date of its entry. Wilson v. Wilson, 76 Cal.App.2d 119, 130, 172 P.2d 568; see 16 Cal.Jur.2d 408, §§ 119, 120. The interlocutory decree did not purport to adjudicate property rights that might be acquired after its entry, and it should not be so construed. Webster v. Webster, 216 Cal. 485, 493, 14 P.2d 522; Davis v. Davis, 123 Cal.App.2d 753, 756-757, 267 P.2d 403.

Both parties rely on Harrold v. Harrold, 43 Cal.2d 77, 271 P.2d 489. In Harrold the interlocutory decree was entered on February 15, 1949. An appeal was taken from the financial provisions of the decree only. The judgment on appeal was "the interlocutory judgment is affirmed, except * * * as to that portion relating to a division of the community estate, which is remanded to the trial court with instructions to determine the division of the amount of the community estate as indicated herein." Harrold v. Harrold, 100 Cal.App.2d 601, 609, 224 P.2d 66, 71. Following retrial of the issue specified, the court ordered that the final decree be entered on November 1, 1951, the day of the judgment on the retrial. It was entered accordingly. It divided the community property acquired by the parties prior to the date thereof. The plaintiff appealed from that part of the final decree awarding her part of the community property. The Supreme Court said it was held on the prior appeal "that the trial court should have considered the earnings of the defendant accruing prior to the entry of the final decree in determining the community estate." Harrold v. Harrold, 43 Cal.2d 77, 79, 271 P.2d 489, 490. One of the contentions on the second appeal was "that under the mandate on the prior appeal the trial court erred in not entering a new interlocutory decree, and in entering the final decree on November 1, 1951." The court declared, 43 Cal.2d at page 83, 271 P.2d at page 493:

"Section 132, as interpreted by the Webster and other cases, provides that the final decree cannot be entered at certain designated times but it does not specify when it may be entered following a reversal on appeal. Here it was

entered on the same day as the judgment on retrial of the designated financial issues. Neither Section 132 nor the cases construing it expressly prohibit the entry at that time. The question is whether the Legislature intended by implication or otherwise to delay the entry of the final judgment beyond such a time, when it enacted the section. * * *

"[43 Cal.2d at page 84, 271 P.2d at page 494.] We are not concerned in the present case with an appeal from the interlocutory decree as such. That decree, insofar as it ordered the dissolution of the bonds of matrimony, was affirmed and became the law of the case. Any question in connection therewith was and is no longer open, including the right to the final decree as affected by property matters. Such matters, involving items of the additional accounting period and the pro rata division of the community property, were adjudicated on the subsequent hearing as directed by the District Court of Appeal. This appeal from that adjudication does not in any proper sense constitute an appeal as contemplated by the Legislature in enacting Section 132 such as would stay the entry of the final decree, since none of the stated purposes of such a stay are here applicable. [Citations.]

"From the foregoing it is apparent that there is no sufficient reason why the trial court should delay the entry of the final decree beyond the express prohibitions of Section 132. Furthermore there appears to be good reason for its entry at the time of judgment in the accounting determination. If, as the plaintiff seeks to accomplish, the prohibitions of Section 132 are applied to the present appeal in the same manner as to the interlocutory decree heretofore affirmed, the final decree could not be entered until any appeal taken herefrom had been determined or the time for appeal had expired. * * *

"[34 Cal.2d at page 85, 271 P.2d at page 494.] There is nothing in Section 132 of the Civil Code, nor in the

cases dealing with the problem, which indicates that under the circumstances here presented a new interlocutory decree should be entered."

As we read the Harrold case, 43 Cal.2d 77, 271 P.2d 489, it holds that a final decree may be entered at any time when one year has expired after the interlocutory decree has become final, and indicates there is good reason for its entry at the time of judgment in an accounting determination after the year has expired. It does not pass on when a final decree may be entered *nunc pro tunc*.

[7-12] The remittitur on the appeal from the interlocutory decree in the present case was filed in the superior court on July 7, 1953. The final decree could not have been entered prior to that date. Civ. Code, § 132. No application for entry of the final decree was made until July 20, 1954. In support of his motion for a final decree *nunc pro tunc*, plaintiff filed an affidavit substantially in the form provided by Rule 20 of the Rules for Superior Courts. 33 Cal.2d 9, 10. Rule 20 provides that an affidavit for a final decree of divorce shall state that all the requirements of the interlocutory decree have been fully complied with on the part of the moving party and he is not in default in any thereof. The rule also provides that the affidavit shall contain substantially the information in the form prescribed "or so much thereof as the court under the circumstances may require." The affidavit of plaintiff stated he had not complied with that part of the interlocutory decree awarding defendant half of his net earnings from his personal services from January 1, 1950 to December 31, 1951, "it being contended by affiant that there were no earnings from personal services during said period and affiant therefore having fully complied with the interlocutory judgment." There was nothing in the affidavit, nor was there any evidence introduced at the hearing, showing that the final decree had not been signed, filed and entered "by mistake, negligence or inadvertence" during the interim between July 7, 1953 and July 20, 1954. Unless it may be held that the mere failure to have the final decree signed, filed and

entered within that interim constitutes "mistake, negligence or inadvertence," it was error to enter it *nunc pro tunc* as of July 7, 1953. Civil Code, section 133, is the sole authority for the entry of a final decree *nunc pro tunc* where on the facts the court is without inherent power to enter such a decree. It may be that it is the only authority—a question we need not decide. There must be a showing of mistake, negligence, or inadvertence. Cf. *Hull v. Hull*, 102 Cal.App.2d 382, 227 P.2d 546; *Nemer v. Nemer*, 117 Cal.App.2d 35, 254 P.2d 661. In the absence of such a showing the court is without power to enter the final decree *nunc pro tunc*. "A mistake of fact is when a person understands the facts to be other than they are; a mistake of law is when a person knows the facts as they really are but has a mistaken belief as to the legal consequences of those facts. *People v. Kelly*, 35 Cal.App. 2d 571, 574, 96 P.2d 372. Inadvertence is defined as lack of heedfulness or attentiveness, inattention, fault from negligence. Webster's New Inter. Dict., 2d Ed.; *Greene v. Montana Brewing Co.*, 32 Mont. 102, 79 P. 693, 694." *Baratti v. Baratti*, 109 Cal.App.2d 917, 921, 242 P.2d 22, 24. Negligence may be passive in character: it may consist in heedlessly refraining from doing the proper thing. When the circumstances call for activity, one who does not do what he should is negligent. *Basler v. Sacramento Gas & Elec. Co.*, 158 Cal. 514, 518, 111 P. 530. Negligence is sometimes defined as the failure to use ordinary care in the management of one's person or property. *Jolley v. Clemens*, 28 Cal.App.2d 55, 66, 82 P.2d 51. The essence of negligence is the failure to exercise due care and take proper precaution in a particular case. *Davidson v. American Liquid Gas Corp.*, 32 Cal.App.2d 382, 386, 89 P.2d 1103. In determining the presence or absence of negligence the test is: what would a reasonably prudent person do under similar circumstances? *Martin v. Fox W. C. Theatres Corp.*, 41 Cal.App.2d 925, 930, 105 P.2d 29. Negligence always relates to some circumstance of time, place, or person. *Spear v. Leuenberger*, 44 Cal.App. 2d 236, 246, 112 P.2d 43.

[13-15] There is no rule of law which compels a party to apply for a final decree and the circumstances may be such that a party does not wish to apply for one. Many factors may prompt inaction, i. e., there may have been a reconciliation or there may be hope of one. There was no showing in the present case of any mistake or inadvertence; or of any circumstances which called for activity on the part of plaintiff between July 7, 1953 and July 20, 1954; or of failure on his part to exercise ordinary care; or that a reasonably prudent person would have applied for the final decree within that period. In short, there was no showing of "mistake, negligence or inadvertence." The mere failure of a party to apply for a final decree does not constitute mistake, negligence, or inadvertence. Defendant had a vested right in community property acquired subsequent to the entry of the interlocutory decree and such right could not be divested by entry of the final decree *nunc pro tunc* without a showing of mistake, negligence, or inadvertence. The court erred in entering the final decree *nunc pro tunc* as of July 7, 1953.

[16] The order adjudging plaintiff not to be in contempt is nonappealable and the appeal therefrom will be dismissed. *John Breuner Co. v. Bryant*, 36 Cal.2d 877, 229 P.2d 356.

[17] As we have noted, defendant also appealed from the order which she describes as requiring "an accounting to be taken of the net earnings of plaintiff and cross-defendant from his personal services and other gains attributable to his energy, ability and capacity from the operation of his business for the period January 1, 1950 to July 7, 1953." No complaint is made insofar as the order required plaintiff to account for his net earnings from his personal services for the period from January 1, 1950 to December 31, 1951. By that proceeding defendant merely sought to enforce the interlocutory decree which had then become final. See *Becker v. Becker*, 36 Cal.2d 324, 326, 223 P.2d 479. Insofar as the order requires an accounting of the gains attributable to the energy, ability

and capacity of plaintiff from the operation of his business from January 8, 1951 to July 7, 1953 to determine the community property, if any, it is nonappealable and the appeal therefrom must be dismissed.

[18-21] It has long been settled that no appeal lies from an interlocutory or intermediate order unless the order be designated by statute as one of those from which an appeal may be taken. *Title Insurance & Trust Co. v. California Development Co.*, 159 Cal. 484, 486, 114 P. 838. There is no statute authorizing an appeal from an order of the nature of that requiring an accounting of gains attributable to plaintiff's energy, ability, and capacity from the operation of his business. Where the order requires the payment of money by the party complaining, or the doing of an act by or against him, the order is in effect final as against such party and may be appealed from by him. If on the other hand the order be in its nature such as to be subject, before enforcement or execution, to the further action of the court, either by decree or later order, the order complained of is not final and review must be sought by appeal from the decree or order subsequently entered. *Id.*, 159 Cal. 491, 114 P. 838. When an order directs an accounting, fixes no rights of the parties, contemplates that the accounting shall be returned to the court, and when further judicial action is necessary even though not specified in the order, the determination is not a final judgment and the order is not appealable. The foregoing is true whether the order for an accounting is proper or erroneous. *Doudell v. Shoo*, 159 Cal. 448, 453, 114 P. 579; *Clement v. Duncan*, 191 Cal. 209, 215, 215 P. 1025; *Gunder v. Gunder*, 208 Cal. 559, 561, 282 P. 794; *Di Blasi v. Di Blasi*, 209 Cal. 753, 290 P. 7; *Middleton v. Finney*, 214 Cal. 523, 525-526, 6 P.2d 938, 78 A.L.R. 1104; *Sjoberg v. Hastorf*, 33 Cal.2d 116, 119, 199 P.2d 668; *Lacey v. Bertone*, 33 Cal.2d 649, 653, 203 P.2d 755; *In re Los Angeles County Pioneer Society*, 40 Cal.2d 852, 857-858, 257 P.2d 1; *Shirley v. Cook*, 119 Cal.App.2d 220, 222, 259 P.2d

25; 15 So.Cal.L.Rev. 504; annotation, 3 A.L.R.2d 342.

[22] The order complained of did not direct the payment of any money by plaintiff, cf. *Grant v. Superior Court*, 106 Cal. 324, 39 P. 604; *Grant v. Los Angeles & P. Ry. Co.*, 116 Cal. 71, 47 P. 872, nor did it direct the performance of any act by or against him. It did not finally determine any rights. It required further judicial action. It contemplated a future determination of whether any community property had been acquired in the interim between the interlocutory and the final decrees and, if there was any, how it should be divided. If the order is erroneous, as defendant contends, she may assert it on appeal from the final order after the accounting. See *Clement v. Duncan*, 191 Cal. 209, 215, 215 P. 1025.

Appeal of Plaintiff

Plaintiff only appealed from that part of the minute order of July 21, 1954 requiring an accounting of "the gains attributable to the energy, ability and capacity of Mr. Berry from the operation of the business from January 8, 1951 to July 7, 1953 to determine the community property, if any." For the reasons we have stated on defendant's appeal from that order, it is nonappealable and the appeal therefrom must be dismissed.

The appeal from the order adjudging plaintiff not to be in contempt is dismissed; the appeals of plaintiff and defendant from the order directing an accounting of the gains attributable to the energy, ability and capacity of plaintiff from the operation of his business from January 8, 1951 to July 7, 1953 to determine the community property, if any, are dismissed; the order directing that an accounting be taken to determine half the net earnings of plaintiff from his personal services from January 1, 1950 to December 31, 1951 is affirmed; the final decree is reversed. Plaintiff shall bear defendant's costs on appeal.

SHINN, P. J., and PARKER WOOD, J., concur.

140 Cal.App.2d 63

Ernest V. BERRY, Plaintiff and
Respondent,
v.

Blanche Beatrice BERRY, Defendant
and Appellant.

Civ. 21186.

District Court of Appeal, Second District,
Division 3, California.

March 20, 1956.

Divorce action. From orders of the Superior Court of Los Angeles County, Elmer D. Doyle, J., denying the wife's application for an allowance for attorney's fees and costs on appeal, the wife appealed. The District Court of Appeal, Vallée, J., held that the record did not establish an abuse of discretion in denying the application for additional attorney's fees and that the question regarding costs was moot.

Orders affirmed.

1. Divorce ⇨225

Previous allowances of attorney's fees may afford support for the trial court's conclusion in a divorce action that no need exists for any additional allowance. West's Ann.Code Civ.Proc. § 259a, subd. 2.

2. Divorce ⇨223, 286

The rejection of an application for an additional allowance for attorney's fees in divorce action on ground of previous allowances lies within the sound discretion of the trial court and in order to set aside its order refusing the application a very strong case must be made in favor of the applicant. West's Ann.Code Civ.Proc. § 259a, subd. 2.

3. Divorce ⇨223

In divorce action record did not establish that the trial court abused its discretion in denying an application of the wife for additional attorney's fees on ground that the fees previously awarded were adequate. West's Ann.Code Civ.Proc. § 259a, subd. 2.

4. Divorce ⇨184(1)

In divorce action, where no order was made on the wife's application for costs on appeal, but on appeal in companion case the

court ordered the husband to bear the wife's costs on appeal, question of costs was moot, and the effect of error in that respect need not be considered.

Jerry Giesler and Harold C. Holland,
Beverly Hills, for appellant.

Frederick I. Frischling, Los Angeles, for
respondent.

VALLÉE, Justice.

This is a companion case to *Berry v. Berry*, Cal.App., 294 P.2d 757. Defendant appeals from orders denying her application for an allowance for attorney's fees and costs on appeal. The nature of the appeals and the facts relative thereto appear in that opinion.

After defendant had filed her notice of appeal in the companion case, she applied for costs and attorney's fees for the purpose of prosecuting her appeals and defending against plaintiff's cross-appeal. Her application was referred to a commissioner who recommended that the application be denied. On that recommendation the court on November 23, 1954 made this order: "Motion for attorney's fees denied." No order was made with respect to the application for costs. Defendant thereafter filed exceptions to the findings and recommendations of the commissioner. Code Civ.Proc., § 259a(2). On December 8, 1954 the exceptions were denied and the order of November 23 was affirmed. Defendant appeals from the orders of November 23 and December 8, 1954.

The application was denied on each of the following grounds: 1. The appeal from the order that the final decree of divorce be entered *nunc pro tunc* as of July 7, 1953 was not bona fide because plaintiff was entitled to a final decree at the time the remittitur was filed in the superior court on July 7, 1953. 2. The attorney's fees previously ordered are adequate. 3. The appeal from the order finding plaintiff not guilty of contempt is one which defendant has sufficient funds to prosecute, in that she has approximately \$17,000 in a savings account and owns stocks valued at about

\$8,000; and the question of property and alimony between the parties was properly settled and is *res judicata* under the decision in *Berry v. Berry*, 117 Cal.App.2d 624, 256 P.2d 646.

As we have reversed the final decree in the companion case, it is apparent that the appeal from that decree was taken in good faith. It is also apparent from our opinion in that case that all property questions were not settled by *Berry v. Berry*, 117 Cal.App.2d 624, 256 P.2d 646. Notwithstanding the fact that the conclusions of the court in those respects were erroneous, we have the question whether the conclusion that attorney's fees previously ordered are adequate is supported.

We do not have a reporter's transcript. It appears from the record, however, that defendant's counsel were paid \$5,000 in fees by plaintiff for trial of the divorce action and \$3,000 in fees by plaintiff for prosecuting the appeal from the interlocutory decree. *Berry v. Berry*, 117 Cal.App.2d 624, 256 P.2d 646. They were paid \$1,000 in fees by plaintiff for services in the accounting proceeding referred to in the opinion in the companion case. The fees were paid pursuant to orders in the divorce action.

[1-3] Previous allowances of attorney's fees may afford support for a trial court's conclusion that no need exists for any additional allowance. *Leupe v. Leupe*, 21 Cal. 2d 145, 153, 130 P.2d 697; *Harrold v. Harrold*, 117 Cal.App.2d 664, 666, 256 P.2d 626. The rejection of an application on that ground lies within the sound discretion of the trial court, and in order to set aside its order refusing the application a very strong case must be made in favor of the applicant. *Kellett v. Kellett*, 2 Cal.2d 45, 49-50, 39 P.2d 203. On the very meager record before us it cannot be held as a matter of law that the trial court abused its discretion in denying the application on the ground attorney's fees previously ordered were adequate.

[4] As we have observed, no order was made on defendant's application for costs on appeal. On the appeals in the

companion case we have ordered that plaintiff shall bear defendant's costs on those appeals. The question of costs is therefore moot and the effect of the error in that respect need not be considered.

The orders appealed from are affirmed. Plaintiff shall bear defendant's costs on these appeals.

SHINN, P. J., and PARKER WOOD, J., concur.



Stephen C. VYN, doing business as The Vyn
Moving and Storage, Plaintiff and
Respondent,

v.

NORTHWEST CASUALTY COMPANY, a
corporation, et al., Defendants,

Norwich Union Fire Insurance Society, etc.
Defendant, Cross-Complainant and
Appellant.

St. Paul Mercury Indemnity Company and
Royal Indemnity Company, Cross-
Defendants and Respondents.*

No. 16595.

District Court of Appeal, First District,
Division 1, California.

March 16, 1956.

'Action by a highway carrier against two public liability insurers, one of which filed a cross-complaint against two other such insurers. A judgment of the Superior Court, City and County of San Francisco, for plaintiff against defendant cross-complainant and for the other defendant against plaintiff for costs was reversed by the District Court of Appeal, 293 P.2d 527, and on such other defendant's petition for rehearing, the District Court of Appeal, Per Curiam, held that since both portions of judgment turned on finding that plaintiff's

* Opinion vacated 301 P.2d 869.

insurance contracts with petitioner and cross-defendants contained "other insurance" clauses, whereas cross-complainant's policy did not, reversal of judgment for plaintiff on ground that he had no contract with cross-complainant removed base for each portion of judgment and authorized reversal of judgment for other defendant; District Court of Appeal having jurisdiction to review entire judgment.

Petition denied.

Appeal and Error — 1173(1)

Where both portions of superior court's judgment for plaintiff highway carrier against defendant public liability insurer, filing cross-complaint against two other such insurers, and in favor of cross-complainant's codefendant against plaintiff for costs, turned on finding that such codefendant's and cross-defendants' policies contained "other insurance" clauses, whereas cross-complainant's policy did not, reversal of plaintiff's judgment on ground that he had no contract with cross-complainant removed base for each portion of judgment and authorized reversal of portion favorable to codefendant; District Court of Appeal having jurisdiction to review entire judgment.

Foley, Bramson & Limpert, San Mateo, for appellant.

Edward A. Friend, San Francisco, for respondents.

PER CURIAM.

Defendant-respondent Northwest Casualty Company has petitioned for a rehearing, claiming that the portion of the judgment in its favor (that it recover against the plaintiff on the complaint for its costs) is sep-

arate and independent from the portion of the judgment which awarded plaintiff \$6,600, plus costs, against defendant-appellant Norwich Union Fire Insurance Society, Limited, and that the reversal of the latter portion does not authorize reversal of the former portion, particularly in view of the fact that the plaintiff did not appeal.

Petitioner overlooks the principles enunciated in *Osborn v. Osborn*, 42 Cal.2d 358, 366-367, 267 P.2d 333, and cases there cited, principles which we are persuaded apply here. "(T)he failure to take an appeal demonstrates only satisfaction with the judgment *as is*, not as changed by a partial reversal. One may elect to stand upon a judgment which, he believes, although largely in his favor, does not give him all of the benefits to which he is entitled. To avoid the time and expense of further litigation, he may be persuaded to permit the unfavorable portions to stand in reliance upon the benefits received in the other parts." *American Enterprise, Inc., v. Van Winkle*, 39 Cal.2d 210, 221, 246 P.2d 935, 940." At page 367 of 42 Cal.2d, at page 338 of 267 P.2d. Both portions of the judgment in the instant case turned on the finding that plaintiff had insurance contracts with the Northwest, the St. Paul and the Norwich companies but that the Northwest and the St. Paul policies had "other insurance" clauses whereas the Norwich policy did not. Reversal upon the ground that plaintiff had no contract with Norwich, removes the base for each portion of the judgment. As said in the *Osborn* case, "Since both parts of the judgment embrace the identical issue * * * we have jurisdiction to review the entire judgment." At page 367 of 42 Cal.2d, at page 338 of 267 P.2d.

The petition for a rehearing is denied.

139 Cal.App.2d 909

STATE of California, Plaintiff and
Respondent,

v.

Jules J. AGOSTINI, Jr., Mary De Bow Agos-
tini, and Laurence E. Land, Defendants
and Appellants.

Civ. 16878.

District Court of Appeal, First District,
Division 2, California.

March 19, 1956.

Rehearing Denied April 18, 1956.

Hearing Denied May 15, 1956.

Action for specific performance of contract to convey real property, arising out of alleged exercise of option granted the State by terms of a lease. The Superior Court, County of Alameda, A. T. Shine, J., decreed specific performance and the optionors appealed. The District Court of Appeal, Kaufman, J., held, inter alia, that evidence sustained the trial court's finding that circumstances authorized use of the mails in making tender of the purchase price.

Affirmed.

1. Vendor and Purchaser ⇨18(3)

Acceptance of an option must be unconditional and unconditional and according to terms of the option.

2. Appeal and Error ⇨991

Where option provision in lease was a fully integrated written agreement and no extrinsic evidence was offered by parties explanatory of terms of the provision, its interpretation was a question of law for District Court of Appeal on review.

3. Vendor and Purchaser ⇨18(3)

Tender of money is such acceptance of an option-offer as will create an enforceable contract, and an offer in writing dispenses with actual production and tender of the property itself. West's Ann.Civ.Code, § 1496; West's Ann.Code Civ.Proc. § 2074.

4. Contracts ⇨23

Though acceptance of an offer must be unconditional, it need not be free of conditions which other party is bound to perform.

5. Landlord and Tenant ⇨92(1)

Acceptance of option was not conditional, within rule that acceptance of option must be unconditional and unqualified, merely because optionee, in accepting and in tendering payment, tendered payment subject to optionors' compliance with terms and conditions required of optionors by option provision of lease.

6. Contracts ⇨26

Acceptance of offer to enter into bilateral contract is effective as soon as deposited in regular course of mail if offer was made by mail, or if circumstances are such that an acceptance by mail would be authorized.

7. Contracts ⇨29

Whether, in accepting offer to enter into a bilateral contract, acceptance by mail is authorized by circumstances, is always a fact question.

8. Specific Performance ⇨121(9)

In action for specific performance of contract to convey real property, arising out of exercise of option, evidence sustained finding that use of mails was contemplated in making tender of purchase price.

9. Tender ⇨13(1)

Under statute providing that offer in writing to pay, when not accepted, is equivalent to production and tender of money, such offer, where circumstances authorized use of mails, was effective when deposited in the mail and was equivalent to tender on the date of mailing. West's Ann.Code Civ.Proc. § 2074.

10. States ⇨132

Under statute appropriating money for exercise of State's option to purchase building and stating that appropriation was to be expended during 1952-1953 fiscal year, and under Government Code section stating that an appropriation shall be deemed expended at time encumbered by creation of valid obligation on part of State, State's tender, on June 30, of performance of option agreement created "valid obligation" within terms of the Government Code section. St.1953, p. 2909; West's Ann.Code

Civ.Proc. § 2074; West's Ann.Gov.Code, § 16304.

See publication Words and Phrases, for other judicial constructions and definitions of "Valid Obligation".

11. Tender ⇨15(6)

An objection to medium of payment on the ground that it is not legal tender is waived by a refusal of tender on other grounds, as well as by a general refusal which does not specify that ground of refusal is character of the medium of payment.

12. Tender ⇨15(6)

Where optionors made no objection to State's tender of warrant in payment of purchase price of building which State had option to purchase, they waived right to object to medium of payment on ground that it was not legal tender. West's Ann.Const. art. 4, § 22.

13. Specific Performance ⇨57

Valid and rejected tender of purchase price specified in option provision of lease created contract of sale which itself could be specifically enforced, and lease provision providing sole remedy for breach of lease was inapplicable.

14. States ⇨139

Where State warrant deposited in court by State in course of its action for specific performance of contract to convey realty was dated June 30, 1953, it would remain valid until June 30, 1957. West's Ann.Gov. Code, § 17070.

Frederick M. Fisk, Chickering & Gregory, San Francisco, John P. Macmeeken, San Francisco, of counsel, for appellants.

Edmund G. Brown, Atty. Gen. of the State of Cal., Leonard M. Friedman, Deputy Atty. Gen., for respondent.

KAUFMAN, Justice.

This is an appeal from a judgment decreeing specific performance of a contract to convey real property arising out of the alleged exercise of an option granted to respondent State of California by the terms of a lease.

In October, 1946, respondent and appellants entered into a lease under which the State of California rented an office building in Oakland from appellants for a ten year period at a monthly rental of \$4,800. An option to purchase the building at any time after the beginning of the seventh year of tenancy was granted by paragraph 9 of the lease for the sum of \$250,000. According to stipulations made during trial, the State had made all payments due under the lease prior to the time of the alleged exercise of its option.

The seventh year of tenancy commenced on January 1, 1953. On June 25, 1953, Chapter 1349, California Statutes of 1953, p. 2909, became effective. That statute appropriated \$250,000 to the State Department of Finance "to be expended during the 1952-1953 Fiscal Year" for the purchase of the property herein.

The following day, appellant Jules J. Agostini wrote to the State Director of Finance stating that the option had no force or effect inasmuch as the Department of Finance had no statutory authority authorizing them to so contract.

On Monday, June 29, the State Department of Finance addressed a letter to Mr. Agostini and the other two appellants notifying them that the State thereby exercised its option to purchase the leased premises in accordance with the provisions of paragraph 9. It was stated that a warrant in the sum of \$250,000 would be transmitted to an authorized title insurance company with instructions to turn over the warrant to appellants upon deposit of a deed of grant conveying good and merchantable title, and upon issuance of a title insurance policy in the sum of \$250,000.

On June 30, 1953, another letter was prepared and addressed to appellants at 2124 Kittredge Street, Berkeley, which was the office of appellant Agostini, and which is described in paragraph 5 of the lease as the address of the lessors, reading in part as follows:

"The State Department of Finance now has in its hands State of California Warrant No. 3147947, dated June 30, 1953, payable to you. You are hereby notified that,

pursuant to the option to purchase contained in paragraph 9 of said lease, the State of California elects to purchase the leased premises on the terms therein specified. The State of California hereby offers to pay to you the sum of Two Hundred Fifty Thousand Dollars (\$250,000) plus any sum payable to you under paragraph 6(b) of said lease and any other sums due you under the term of said lease upon compliance by you with the terms and conditions required of you by paragraph 9 of said lease, and such compliance is hereby demanded of you."

It was then stated that appellants could, if they wished, close the transaction through a title insurance company to be designated by them, and requested that they disregard that part of the letter of June 29, 1953, which stated that the State would deposit the money in a title company. The letter continued: "We are now tendering direct payment to you, if such is your desire, upon compliance with the conditions of said paragraph 9." This letter came into Mr. Agostini's hands on July 1 or 2, but no reply to either the letters of June 29 or 30 was made. One month later the State commenced this action, and deposited in court the rental for the month of July 1953, in case the court should find appellants entitled thereto. During trial, the warrant for \$250,000 was deposited with the clerk of court.

The trial court found that by the letter of June 30, 1953, the State had notified appellants of its election to purchase said real property pursuant to the option in paragraph 9 of the lease; that appellants received this communication after June 30, 1953; that by said communication the State tendered to appellants the sum of \$250,000 and demanded that appellants comply with the terms and conditions of paragraph 9 of the lease; that the tender was in good faith, and that on or before June 30, 1953, the State had paid appellants all sums which had accrued under said paragraph 9. It was further found that appellants refused said tender, and that none of them communicated to respondent any objection to the tender. It was found that \$250,000 was alleged by respondent and admitted by

appellants to be the fair and reasonable market value of said real property.

Appellants contend that as a matter of law respondent failed to exercise its option in accordance with the requirements of paragraph 9 of the lease. Paragraph 9 reads as follows:

"9. The State shall have the exclusive right, option and privilege to purchase the premises herein demised at any time during the seventh, eighth, ninth or tenth years of the term of this lease upon payment by the State to the Lessor of the sum of Two Hundred and Fifty Thousand Dollars (\$250,000.00) lawful money of the United States of America, plus any sums owing the Lessor under the provisions of paragraph 6(b) hereof. In the event the State exercises its option to purchase the demised premises, the Lessor shall convey or cause to be conveyed said premises to the State by a deed of grant, conveying good and merchantable title, free and clear of all liens and encumbrances except taxes and assessments then current. Title insurance, in the amount of Two Hundred Fifty Thousand Dollars (\$250,000.00), issued by an authorized title insurance company of the State of California, shall be provided to the State at the time of closing, insuring title to said premises in the State free and clear of all defects, liens and encumbrances except taxes and assessments then current. The premium on such title insurance policy and any escrow fees shall be paid by the Lessor."

[1] It is basic that the acceptance of an option must be unqualified and unconditional and according to the terms of the option. *Flickinger v. Heck*, 187 Cal. 111, 113, 200 P. 1045; *Hicks v. Christeson*, 174 Cal. 712, 164 P. 395; *Callisch v. Farnham*, 83 Cal.App.2d 427, 430, 188 P.2d 775. Appellants argue that the parties may, if they wish, contract that an option may be exercised by payment, and a contract then arises only by payment. *Gordon v. Swan*, 43 Cal. 564. Appellant claims that the letter of June 30, 1953, stating that a warrant had been drawn in the sum of \$250,000 payable to appellants deliverable upon compliance by appellants with the condi-

tions of paragraph 9 was a mere counter-offer. It is appellants' position that payment into their hands of the \$250,000 would have to be made before any contract of purchase and sale was created. They cite *Bartone v. Taylor-Benson-Jones Co.*, 119 Cal.App.2d 79, 258 P.2d 1054, a case wherein it was held that there was no acceptance by defendants of an offer to them to purchase certain realty with the condition attached that the present owner retain the oil rights when they signed escrow instructions for fee title to the property and not for surface rights only. In the present case respondent asked only that appellants comply with the obligations they had previously agreed to assume under paragraph 9 if the option were exercised.

[2] No extrinsic evidence was offered by the parties explanatory of the terms of the option provision in the lease. Respondent conceded that it was a fully integrated written agreement. In *re Estate of Gaines*, 15 Cal.2d 255, 100 P.2d 1055. Its interpretation is therefore a question of law for this court. In *re Estate of Platt*, 21 Cal.2d 343, 352, 131 P.2d 825; *Trubowitch v. Riverbank Canning Co.*, 30 Cal.2d 335, 182 P.2d 182.

[3] The State does not contend that it actually made payment of the \$250,000 to appellants, but maintains that by its letter of June 30, 1953, it tendered payment of that sum which is sufficient for the exercise of the option and which gave rise to a binding contract of purchase and sale. Section 2074, Code of Civil Procedure provides that "An offer in writing to pay a particular sum of money, or to deliver a written instrument of specific personal property, is, if not accepted, equivalent to the actual production and tender of the money, instrument, or property." It is well settled that tender of money is such acceptance of an option-offer as will create an enforceable contract. *Mott v. Cline*, 200 Cal. 434, 253 P. 718; *Kelley v. Russell*, 50 Cal.App.2d 520, 123 P.2d 606; *Bourdieu v. Baker*, 6 Cal.App.2d 150, 44 P.2d 587. Section 1496 of the Civil Code providing that actual production of the thing to be delivered is unnecessary unless the offer is accepted, and

Section 2074 of the Code of Civil Procedure make it clear that such an offer in writing dispenses with actual production and tender of the property itself. *Doak v. Bruson*, 152 Cal. 17, 20, 91 P. 1001; *Backus v. Sessions*, 17 Cal.2d 380, 110 P.2d 51; *Johnson v. Broadway Bros.*, 90 Cal.App. 260, 265, 265 P. 855.

It is undisputed that in the present case respondent's written offer which was mailed at Sacramento on June 30, 1953, addressed to all three appellants at the Kittredge Street address in Berkeley, was received by Agostini on July 1st or 2nd. Appellants made no reply to this communication. That appellant Agostini did not wish in any event to be bound by the option is clear from a letter written by him on June 26, 1953, (the day after the appropriation bill became law) stating that the bill had been passed presuming that the State had an option, but that such option had "no force or effect for there is no statutory authority authorizing the Department of Finance to so contract." In view of this information, the State chose the wiser course of making a written offer of tender as permitted by the statute, rather than actual tender of the money.

Appellant argues that the option was an offer to create a unilateral contract. Respondent concedes this, but contends that once an offer of performance of such unilateral contract was made, mutuality of remedy then existed. It was held in *Murfee v. Porter*, 96 Cal.App.2d 9, 18, 214 P.2d 543, that once an option to purchase is exercised, the option and lease no longer exist, and a binding contract of purchase and sale comes into existence. And, see *Kerr v. Moore*, 6 Cal.App. 305, 307, 92 P. 107. Section 45 of the Restatement of Contracts states: "If an offer for a unilateral contract is made, and part of the consideration requested in the offer is given *or tendered* by the offeree in response thereto, the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being offered *or tendered* * * *" (Emphasis ours). Williston states that if an option makes an offer for a unilateral contract, performance must be *tendered* within the

stated period. (3 Williston on Contracts, sec. 853.)

In the closing paragraphs of their reply brief appellants attempt to distinguish several of the authorities cited by respondent, *Kelley v. Russell*, 50 Cal.App.2d 520, 123 P.2d 606; *Kofoed v. Gordon*, 122 Cal. 314, 54 P. 1115; *Cates v. McNeil*, 169 Cal. 697, 147 P. 944; *Marshall v. Hilton*, 209 Cal. 531, 289 P. 165, on the ground that the issue of tender presented in those cases, unlike that raised by respondent herein, was addressed solely to the question of *performance* and not *acceptance*. It will be recalled that appellants have argued that the offer of the option was an offer for a unilateral contract and that an acceptance to make the exercise of such option binding must be by *performance* of an act, namely by payment or tender of payment of the sum of \$250,000.

[4, 5] Appellants maintain that there was no tender in conformity with paragraph 9 of the lease, but that a counter offer was made when the State in its offer to pay the \$250,000 asked for compliance by appellants with the terms and conditions required of appellants by said paragraph. This condition, they claim, was unauthorized, and therefore the letter was a mere counteroffer, unavailing until accepted by appellants. It is true that acceptance of an offer must be unconditional, but that only means free of conditions which the other party is not bound to perform. There is no merit in this contention of appellants. 12 Cal.Jur.2d 213, p. 433; *Wadleigh v. Phelps*, 149 Cal. 627, 87 P. 93; *Gervaise v. Brookins*, 156 Cal. 103, 106, 103 P. 329.

[6-8] It is well established that an acceptance of an offer to enter into a bilateral contract is effective and deemed communicated as soon as deposited in the regular course of mail if the offer was made by mail, or if the circumstances are such that an acceptance by mail would be authorized. Whether such circumstances exist is always a fact question, and the court herein was justified in concluding that the use of the mail was contemplated in making tender.

[9] Williston says, "If an offer for a unilateral contract calls for the perform-

ance of an act by the offeree and that act can be performed by dispatching something through the mail, on well recognized principles of the law of sales, title will pass and the act of the offeree will be complete as soon as the thing requested is sent. If instead of goods the offeree is requested to send money, the result is the same. As soon as the money is sent it becomes the property of the offeror, and he is bound to perform his promise for which the money was the consideration." (1 Williston on Contracts, sec. 81.) Therefore, if the warrant had actually been mailed with the letter, the transfer of the warrant to appellants would have become effective and complete at the moment it was dropped in the mail on June 30th. The property in the warrant would on that date have been appellants, and he could not contend that the notice in the letter to perform his promises was an attempt to make a qualified and conditional acceptance. Since under Section 2074, Code of Civil Procedure, the offer in writing to pay, when not accepted, is equivalent to the production and tender of the money, such an offer should likewise be deemed effective when deposited in the mail on June 30th. This being true, tender had been made on that date, and was improperly refused by appellants.

[10] Appellants have argued that since the appropriation bill specifically stated that it was "to be expended during the 1952-1953 Fiscal Year", and since Government Code, section 16304 provides that an appropriation shall be available for expenditure during the period specified therein, and unless otherwise specifically provided, it shall be "deemed to be expended at the time and to the extent that it has been encumbered by the creation of a valid obligation on the part of the State of California", the money was unavailable on July 1st or 2nd when the letter was received, the Fiscal Year having expired on June 30th without a valid obligation having been incurred. Since it has been held above that a valid obligation was incurred by the tender of performance on June 30th, there is no force in this argument.

[11, 12] It was urged by appellant at the trial that even if the warrant is valid, ten-

der has not been sufficient, because paragraph 9 calls for payment of "lawful money of the United States." He apparently does not raise that issue here, but in any event the laws of the State affecting the rights of the parties enter into the contract as if they were incorporated therein. *Brown v. Ferdon*, 5 Cal.2d 226, 231, 54 P.2d 712. Article IV, § 22 of the California Constitution provides that "no money shall be drawn from the Treasury but in consequence of appropriation made by law, and upon warrants duly drawn thereon by the Controller * * *." It has been held that this provision is mandatory and parties dealing with money in the State Treasury are bound by it. *Gillum v. Johnson*, 7 Cal.2d 744, 759, 62 P.2d 1037, 63 P.2d 810, 108 A.L.R. 595. An objection to the medium of payment on the ground that it is not legal tender is waived by a refusal of the tender on other grounds, as well as by a general refusal not specifying that the ground of refusal is the character of the medium of payment. (6 Williston, Rev.Ed., sec. 1819.) Clearly, objection to the tender in the form of a warrant was clearly waived, for the trial court found that none of appellants made any objection to the tender. And, see, *Stevens v. Hines*, 63 Cal. App. 80, 84, 218 P. 57.

[13] Finally, appellants contend that paragraph 18 of the lease precludes the granting of specific performance since in that paragraph it is provided that "any provisions in this lease notwithstanding, this lease may be terminated only by mutual consent or by acquisition of title by the State in the manner hereinbefore provided, * * * and no breach of any provision of this lease shall work a forfeiture of this lease, and in the event that any provision of this lease is breached the sole remedy of the party damaged shall be for damages proximately caused by said breach." It was found by the trial court that the State requested defendants to comply with the terms and conditions of paragraph 9. However, the respondent is not asking for specific performance of the lease nor of the option provision therein. It is specific performance of the contract of sale created by the valid and rejected tender

which respondent is seeking in this action. See *Murfee v. Porter*, supra; *Walter G. Reece Co. v. House*, 162 Cal. 740, 744, 124 P. 442. Once the option was exercised the lease no longer existed.

[14] There can be no question but that the warrant deposited in the trial court is still available to appellants in payment of the sum of \$250,000. A warrant drawn by the Controller is good for four years, and at the end of that time if not presented to the Treasurer it must be cancelled. Gov. Code, § 17070. This warrant is therefore good until June 30, 1957.

The judgment therefore must be affirmed.
Judgment affirmed.

NOURSE, P. J., and DOOLING, J.,
concur.



139 Cal.App.2d 903

E. A. TALIAFERRO, also known as Eugene A. Taliaferro, Plaintiff and Cross-Defendant (Appellant),

v.

Joseph COLASSO, Henriquita Mendes Colasso, also known respectively as Joseph Colasso and Henriquita Mendes Collaso, Defendants and Cross-Complainants (Respondents).

Civ. 16738.

District Court of Appeal, First District,
Division 2, California.

March 19, 1956.

Action to quiet title to land and for eviction from premises of defendants who had in good faith occupied and improved house which had mistakenly been built on wrong lot. The Superior Court, County of Contra Costa, Benjamin C. Jones, J., rendered judgment quieting title on condition that plaintiff pay lien impressed on property for value of improvements defendants had made. Plaintiff appealed from conditional

part of judgment. The District Court of Appeal, Devine, Justice pro tem., held that the so-called "betterment statute", affording good faith improver of another's land only limited relief, is such improver's exclusive remedy in state, and that, in view of denial of owner's claim for damages, defendants could not set-off or impress lien on property for value of improvements under such statute.

Affirmed in part, reversed in part.

1. Ejectment ⇨143

Under so-called "betterment statute", good faith improver of another's land is allowed to offset value of improvements against damages for withholding, where possessor, or his predecessors, held under color of title adversely to owner. West's Ann.Code Civ.Proc. § 741.

2. Ejectment ⇨143

Improvements ⇨4(6)

Quieting Title ⇨51

Under so-called "betterment statute", the only award that can be made to good faith improver of another's land is an offset to damages sought for wrongful withholding; and, when such damages are not sought, or are not awarded, no affirmative judgment in favor of improver can be made, whether action is one at law, or in equity to quiet title. West's Ann.Code Civ.Proc. § 741.

3. Ejectment ⇨143

Quieting Title ⇨51

Where persons mistakenly occupied and improved house on lot belonging to another, upon action by owner of lot to quiet title to lot and for eviction, in view of denial of owner's claim for damages, defendants could not offset or impress lien on property for value of improvements. West's Ann. Civ.Code, §§ 1013, 1013.5; West's Ann. Code Civ.Proc. § 741.

4. Improvements ⇨4(6)

The so-called "betterment statute", affording good faith improver of another's land only limited relief, is such improver's exclusive remedy in California. West's Ann.Code Civ.Proc. § 741.

5. Estoppel ⇨70(1)

An owner of real property is not estopped from asserting title unless he was apprised of true state of his own title, and omitted to assert title with intent to deceive or with such culpable negligence as to amount to constructive fraud, and other party was not only destitute of knowledge of state of title, but also of means of acquiring knowledge, and other party relied on admission to his damage. West's Ann. Code Civ.Proc. § 741.

6. Estoppel ⇨118

In action to quiet title to land and for eviction from premises of defendants who had in good faith occupied an improved house which had mistakenly been built on wrong lot, evidence would have been insufficient to warrant finding that owner, though he may have known house had been constructed on his property, was estopped to assert title. West's Ann.Code Civ.Proc. § 741.

7. Estoppel ⇨93(1)

Though owner of real property knows that another has occupied and is making improvements on property on good faith, through mistaken assumption that he owns property, and owner remains silent, owner is not thereby estopped from asserting title where private realty is involved and there is no fiduciary relation between parties. West's Ann.Code Civ.Proc. § 741.

8. Estoppel ⇨93(1)

To estop owner of realty from asserting title against person who has occupied and improved premises on good faith, but mistaken assumption that he owns property, owner must have actively participated in mistake by, for example, selling materials for improvements, working on improvements, or similar acts of wilfulness and culpability. West's Ann.Code Civ.Proc. § 741.

E. A. Taliaferro, in pro. per.

Benjamin F. Marlowe, Oakland, for respondents.

DEVINE, Justice pro tem.

Plaintiff brought this action to quiet title to a parcel of real property and for eviction

and he was awarded judgment quieting title and for eviction, on condition, however, that he pay to defendants and cross-complainants the sum of \$3,000. The judgment impresses a lien on the property as security for the \$3,000, and awards costs to defendants. Both parties to the action agree that plaintiff is and has been the owner of the property at all times relevant to the cause. The appeal is from that part of the judgment which awards the \$3,000 and makes payment thereof a condition for right of possession, and impresses the lien.

The case is one involving persons who are of that unfortunate and, in this state, unfavored class known as innocent improvers of real property, and has to do with their position with relation to that of the true owner. Plaintiff bought the land in question at a tax sale in 1942, and he has never parted with title to it. It is true that he, in turn, became delinquent in paying taxes, and the property was sold to the state. It was redeemed by plaintiff during the course of the trial. However, no point is raised of plaintiff's ownership.

The lot is described as lot 20 in Block 12, Richmond Pullman Pueblo Tract. In about 1944 someone built a house on lot 20 and it is this house which has been occupied by defendants. It is probable that the owner of lot 21, who bought that lot from plaintiff, by mistake built the house on the wrong lot. Lot 21 was sold several times, the last time being in 1947, when defendants bought from one Kramer and received a deed which described it properly. They thought, however, and so did the seller, who also testified, that the house was on lot 21. No survey was made. Defendants went into possession, and remained undisturbed until 1949, when plaintiff made demand for possession. While they were in possession, and before they discovered the mistake, they made certain improvements about the house and its walks.

Plaintiff testified that although he saw the building on the lot, he did not know which lot it was on; that he had purchased 100 or 125 lots at tax sales; that he did not know the boundaries of the lots.

The findings are in part specific and in part an assent to the truthfulness of the allegation contained in the second cause of action in the cross-complaint. There is a specific finding that defendants were put in possession and allowed to remain in possession through the neglect, fault and lack of diligence of plaintiff. From the court's general finding that all of the allegations of the second cause of action are true, there would be deducible findings that during the occupancy by defendants, plaintiff "observed or had an opportunity to observe and should have observed" the improvements that were made by defendants; that plaintiff made no claim of ownership until July, 1949; that \$3,000 was spent for improvements, repair and upkeep; that defendant acted in bad faith.

Plaintiff had sought damages amounting to rental value, but the court concluded he was not entitled to such damages.

Legal title to the house passed to plaintiff. § 1013, Civil Code.

Unless plaintiff was in some way estopped to assert his title, a subject later discussed, his ownership to the lot and the house is unassailable. We turn to the question of the judgment on the cross-complaint.

Innocent improvers of land receive very circumscribed relief under the laws of this state. At early common law no award or set-off for improvements could be allowed, no matter what color of title the occupier had acted upon. 31 C.J. 313; 42 C.J.S., Improvements, § 6; *Ford v. Holton*, 5 Cal. 319, 321.

However, three movements towards relief for innocent improvers occurred: 1. The common law itself was modified to allow an off-set to claims for damages for withholding, 31 C.J. 313, sec. 14; 42 C.J.S., Improvements, § 6.

2. Courts of equity, following the practice of the civil law, commenced to impress an equitable lien for improvements when the owner sought some equitable relief, such as quieting of title, on the principle that he who seeks equity must do equity. (*Pomeroy*, Equity Juris., 5th Ed. Vol. 4, sec. 1241.)

3. Statutes, known as betterment statutes, were enacted which allow measures of relief varying in the different states.

[1-3] A limited measure of relief to improvers is allowed under section 741 of the Code of Civil Procedure. This section, a "betterment statute", allows the value of the improvements to be off-set against damages for withholding, where the possessor of the land (or his predecessors) held under color of title adversely to plaintiff made improvements in good faith. The only award that can be made to the defendant under that section is an off-set to damages sought for wrongful withholding, and when such damages are not sought, or are not awarded, no affirmative judgment in favor of the defendant can be made. *Ford v. Holton*, 5 Cal. 319; *Huse v. Den*, 85 Cal. 390, 24 P. 790; *Kinard v. Kaelin*, 22 Cal.App. 383, 389, 134 P. 370, and this is so not only in an action at law, but also where the plaintiff seeks to quiet title. *Wood v. Henley*, 88 Cal.App. 441, 263 P. 870. Damages for withholding having been denied in the instant case, no judgment for damages in defendants' favor was allowable according to the terms of the section.

[4] If it were to be argued that section 741 is not exclusive, and that the general equity power of the court could be brought into play, on the ground that in this case defendants did not claim under color of title at all, but merely made a mistake as to location, the argument could not avail, on grounds both of logic and of authority. It would be illogical to hold that one who did not have color of title stood in better position than one who was no more than an unwitting trespasser. In the case of *Trower v. Rentsch*, 94 Cal.App. 168, 270 P. 749, 750, it was held that the section 741 prevents the application of the general principle that "he who seeks equity must do equity" to this type of case the statute being the exclusive remedy. Thus, in this state the remedy being the exclusive one set forth in the statute, is no greater than that allowed under the modified common law rule, precluding from the removal of the improve-

ments under the recent law mentioned below.

Although a larger measure of amelioration is allowed in many other jurisdictions, see cases collected in 104 A.L.R. 577 note, and although an appeal was made as long ago as 1927 for a broader statute, and one which would cover cases of persons who mistakenly built on another's land: (See *W. W. Ferrier, Jr., A Proposed California Statute Compensating Innocent Improvers of Realty*, 15 Cal.Law Rev. 189 et seq.), section 741 has not been changed. It was the opinion of Professor Ferrier, as stated in that article, at p. 190, that it is not improbable that had our betterment statutes, section 741 of the Code of Civil Procedure and its predecessor in the practice act, not been passed, the civil law rule in time would have been followed.

In 1953, section 1013.5 was added to the Civil Code to allow removal of improvements to land under certain conditions, but that section has not been invoked in the case. The fact that the legislature did provide for this kind of relief is some evidence that no enlargement of the relief provided by section 741 of the Code of Civil Procedure, as that section has been construed by the courts, was intended by the legislature.

The parts of the judgment allowing relief to the cross-complainants must be set aside.

That part of the judgment which quiets title in plaintiff is to be affirmed. Although defendants have not appealed, being satisfied to stand on the judgment with the relief it would grant them, nevertheless, in affirming the element of the judgment quieting title while we set aside the award for improvements, we deem it appropriate to observe that no estoppel against plaintiff's assertion of title was made out by the evidence. If, therefore, the trial court had decided that positive relief could not be given to defendants and cross-complainants, the court could not have withheld judgment quieting title in plaintiff, so that separation of the parts of the judgment works no injustice.

[5] It has been the rule in this state since the case of *Boggs v. Merced Mining Co.*, 14 Cal. 279, that in order to bring about an estoppel against assertion of ownership of real property, four conditions against the owner of real property are necessary: 1. that the party to be estopped was apprised of the true state of his own title; 2. that he made the omission with intent to deceive or with such culpable negligence as to amount to constructive fraud; 3. that the other party was not only destitute of knowledge of the state of the title, but also of the means of acquiring knowledge; and 4. that he relied on the admission to his damage.

[6,7] It would seem that almost all, if not quite all, of the elements of estoppel necessary in real property cases are missing. There is very slight evidence to support an inference that plaintiff actually knew that the building was on his land, the most that was shown being that he drove by the property about once a year. However, assuming it were shown that he had such knowledge and remained silent that would be insufficient, when private real property is involved and there is no fiduciary relationship by the owner. *Leonard v. Flynn*, 89 Cal. 535, 26 P. 1097; *Verdugo Canon Water Co. v. Verdugo*, 152 Cal. 655, 674, 93 P. 1021; *Stevens v. Oakdale Irrigation District*, 13 Cal.2d 343, 353, 90 P.2d 58.

[8] There must be an active participation by the owner such as selling materials for the improvements, *Beardsley v. Clem*, 137 Cal. 328, 70 P. 175, working on the improvement, *Holmes v. Snow Mountain Water & Power Co.*, 36 Cal.App. 394, 172 P. 178, or similar acts of wilfulness and culpability. Moreover, equal opportunity to learn the true state of affairs was available to defendants, whose deed contained no misdescription. The real cause of their troubles was not the silence of plaintiff but their assumption and *Kramer's* that the house was built on the lot they bought.

The judgment is affirmed so far as it decrees quieting of title in plaintiff and issuance of a writ of possession, but is reversed in so far as it awards damages to

cross-complainants and imposes a lien on plaintiff's property and requires payment as a condition of a writ of possession, and awards costs to cross-complainants.

DOOLING, Acting P. J., and KAUFMAN, J., concur.



139 Cal.App.2d 874

Anahid KARAGEOZIAN, Plaintiff and Appellant,

v.

Dr. Crawford BOST, Anton R. Kochever and John Duncan Gillis, Defendants and Respondents.

Civ. 16521.

District Court of Appeal, First District, Division 2, California.

March 19, 1956.

Action by wife, who, as passenger in husband's automobile, sustained personal injuries following series of rear-end automobile collisions, against owners and operators of colliding vehicles. The Superior Court, City and County of San Francisco, Frank T. Deasy, J., entered judgment upon a verdict for defendants, and plaintiff appealed. The District Court of Appeal, Dooling, J., held, in part, that in view of testimony that all defendants were following automobiles ahead of them at from 20 to 120 feet, question of negligence of each of several defendants was properly submitted to jury.

Judgment affirmed.

I. Automobiles ⇐172(7)

An automobile driver is not necessarily guilty of negligence because he collides with the rear of another vehicle, notwithstanding Vehicle Code provision requiring him to keep at such distance and to maintain such control over his vehicle as will

enable him to stop without striking the vehicle ahead. Vehicle Code, § 531.

2. Automobiles ⇨245(15)

In action by wife, who, as passenger in husband's automobile, sustained personal injuries following series of rear-end automobile collisions, against owners and operators of colliding vehicles, in view of testimony that all defendants were following automobiles ahead of them at from 20 to 120 feet, question of negligence of each of several defendants was properly submitted to jury. Vehicle Code, § 531.

3. Negligence ⇨93(2)

Contributory negligence of husband would be imputed to wife, in action by wife for personal injuries sustained as passenger in husband's automobile against owners and operators of other vehicles involved in series of rear-end collisions.

4. Negligence ⇨136(26)

Question of contributory negligence is rarely one of law; general rule is that it normally presents factual question for determination by jury.

5. Negligence ⇨136(30)

In action by wife, who, as passenger in husband's automobile, sustained personal injuries following series of rear-end automobile collisions, against owners and operators of colliding vehicles, in view of evidence that husband was traveling at 35 miles per hour at distance of 25 feet behind automobile ahead and stopped suddenly, question of contributory negligence of husband, as imputed to wife, in driving too fast, in following too closely, in failing to keep proper lookout, or in stopping too suddenly, was properly submitted to jury.

6. Appeal and Error ⇨1046(5)

Where trial court, in automobile personal injury action, commented that defendant-witness was correct, in reference to defendant's misunderstanding of question asked on deposition as to speed of defendant's vehicle at time it collided with one in which plaintiff was riding, comment, though unfortunate, was not prejudicial to plaintiff, in view of apparency of misunderstanding from reading of deposition, and trial court's

subsequent instruction admonishing jury to disregard any such comment. West's Ann. Code Civ.Proc. § 2055.

7. Trial ⇨296(3)

In action by wife, who, as passenger in husband's automobile, sustained personal injuries following series of rear-end automobile collisions, against owners and operators of colliding vehicles, in light of other instructions, instruction on proximate cause, the effect of which was to instruct jury that if negligence of any of defendants was not proximate cause because sole proximate cause was negligence of some other defendant, jury should not find against defendant whose negligence was not proximate cause, was not misleading.

8. Trial ⇨296(1)

The criticized instruction must be read in the light of the other instructions.

9. Trial ⇨295(7)

In action by wife, who, as passenger in husband's automobile, sustained personal injuries following series of rear-end automobile collisions, against owners and operators of colliding vehicles, instruction on contributory negligence, though it mentioned contributory negligence of wife herself, when case contained no such issue, as a whole, properly presented question of husband's negligence, imputable to wife, to jury.

10. Automobiles ⇨246(22)

In action by wife, who, as passenger in husband's automobile, sustained personal injuries following series of rear-end automobile collisions, against owners and operators of colliding vehicles, instruction on doctrine that negligence is not based upon possibility of avoiding accident, which stated that a defendant would not be liable if he had done all that ordinarily prudent person would have done under circumstances for protection of his own safety and to avoid accident and injury, was proper, and did not improperly introduce element of care for defendant's own safety, since such words did not detract from otherwise correct instruction.

11. Appeal and Error §1064(1)

Some repetition in substance of instructions will not alone justify reversal of case.

12. Appeal and Error §1051(1)

Where medical expert, who examined medical report made by other doctors, for purpose of testifying for defendants in automobile personal injury action, stated in summary of report, which had been introduced in evidence during testimony of doctor who had participated in preparation, that doctors had felt that plaintiff's complaint was psychiatric in nature, admission of such evidence, though hearsay and opinion evidence, was not prejudicial to plaintiff, in view of fact that summary was substantially borne out by report.

Shirley, Saroyan, Calvert & Peterson, S. M. Saroyan, Harry P. Calvert, San Francisco, for appellant.

Pelton, Gunther, Durney & Gudmundson, San Francisco, for respondent Dr. Crawford Bost.

Alexander, Bacon & Mundhenk, Herbert Chamberlin, San Francisco, for respondent Anton R. Kochever.

Lamb, Hoge & Killion, San Francisco, for respondent John Duncan Gillis.

DOOLING, Justice.

This is an appeal by plaintiff from a judgment pursuant to a jury verdict in favor of defendants Bost, Kochever and Gillis.

Appellant by this action sought to recover for personal injuries alleged to have been incurred as a result of a series of rear-end automobile collisions.

The accident occurred Sunday evening, August 10, 1952, at about 10:30 p. m. on United States Highway 101 in Marin County. It was a clear, dry night and the road was straight with a slight downgrade. The traffic was heavy at about the time of the accident. All of the vehicles involved were traveling in a southerly direction towards San Francisco in the inner lane of the four lane highway.

Appellant was riding in a 1952 Chrysler automobile driven by her husband. She was sitting next to him on the front seat. Just prior to the accident this automobile was traveling at a speed of 30 to 35 miles per hour and was from 20 to 25 feet behind the southbound automobile immediately ahead of it in the same traffic lane.

Respondent Bost was driving a 1950 Chevrolet automobile at a speed of about 30 to 35 miles per hour at a distance of from 20 to 40 feet behind the automobile in which appellant was riding.

Respondent Gillis was driving a 1951 Chevrolet behind that of respondent Bost. He was traveling at a speed of about 35 miles per hour and was approximately 120 feet behind the Bost automobile.

The third respondent, Kochever, was driving a 1952 Chevrolet behind the car driven by respondent Gillis. He testified that he was traveling at about 40 miles per hour and was about 100 feet from the Gillis car when he noticed that it was stopped. He then started to slow down. He stated that he was barely moving, going perhaps a couple of miles per hour, when he bumped the rear end of the car ahead of him. He testified that at the time his car came into contact with the Gillis car that it did not push the Gillis car into the rear of the Bost automobile.

Respondent Bost testified that a southbound automobile directly in front of the car in which appellant was riding (the Karageozian automobile) suddenly moved out of the lane in which it was traveling into the northbound traffic lane; that the Karageozian automobile in front of him suddenly stopped on the highway; and that he immediately applied his brakes and the collision with the auto ahead occurred when his speed was from 5 to 10 miles per hour.

After this first collision a second impact occurred. The Gillis automobile collided with the rear end of the Bost automobile and apparently forced it again into contact with the Karageozian automobile. Respondent Gillis claimed that he was pushed into the Bost automobile by the force of the impact of respondent Kochever's car with his but Kochever denied this. Respondent

Gillis testified that he heard the Karageozian-Bost crash and saw the stop lights flash on the Bost automobile. He stated that he then applied his brakes and brought his car to a stop 10 to 15 feet behind the Bost automobile when he was struck by the respondent Kochever.

[1,2] Appellant first argues that the evidence is insufficient to support the verdict and judgment. She contends that the respondents were guilty of negligence as a matter of law and that the record is devoid of evidence to support the defense of contributory negligence. She states, relying on California Vehicle Code, section 531, that respondents were required to keep at such a distance and to maintain such control over their vehicles as would enable them to stop without striking the vehicles ahead of each of them. However, even in the cases relied on by appellant, it is recognized that an automobile driver is not necessarily guilty of negligence because he collides with the rear of another vehicle. *Elford v. Hiltabrand*, 63 Cal.App. 2d 65, 74, 146 P.2d 510. The question whether the respondents were operating their respective cars in a careful and prudent manner would seem to present a question of fact to be determined by the jury. *Landrum v. Severin*, 37 Cal.2d 24, 230 P.2d 337; *Lowenthal v. Mortimer*, 125 Cal.App.2d 636, 270 P.2d 942. In *Giles v. Happely*, 123 Cal.App.2d 894, 899-900, 267 P.2d 1051, it was stated that a question of fact and not law was presented as to whether a car following another at a distance of 18 feet was following unreasonably close under the circumstances. Here there was testimony that all respondents were following the cars ahead of them at greater distances than 18 feet.

[3-5] The defense of contributory negligence also presented a question of fact. The contributory negligence of appellant's husband, Avedis Karageozian, would be imputable to appellant. *Johnson v. Warner*, 116 Cal.App.2d 598, 604, 254 P.2d 124. Appellant admits that this question is rarely one of law and the general rule is that it normally presents a factual question for determination by the jury. *Van Cise v.*

Lencioni, 106 Cal.App.2d 341, 346, 235 P.2d 236. Here there was testimony that the car in which appellant was riding was traveling at a speed of 35 miles per hour at a distance of 25 feet behind another car traveling immediately ahead of it in the same lane of traffic and stopped suddenly. On this record the jury might have found that appellant's husband was contributively negligent in driving too fast under the circumstances, in following the car ahead too closely, in failing to keep a proper lookout, or in stopping too suddenly.

[6] Appellant's next major contention is that the trial court erroneously and prejudicially made certain positive statements thereby withdrawing from the jury several of the crucial issues of fact to be determined from the testimony and evidence. It appears that her counsel in questioning respondent Bost under Code of Civil Procedure, section 2055, asked him how fast he was traveling at the time of the impact of his car with that of appellant. Respondent answered "somewhere around five to ten miles an hour." The following then occurred:

"Q. I will ask you to read from Page 12 of your deposition, Line 6, through Line 7, Doctor, and ask you if you were asked those questions and gave those answers.

"Mr. Phelps (Respondent's attorney): Now I think that is unfair—

"A. It is corrected on the next page.

"Mr. Phelps: I will show your Honor the deposition.

"The Court: Well, I haven't read it. I think the Doctor said yes. A. May I read it?

"The Court: Yes.

"Mr. Calvert: Lines 6 and 7 of Page 12.

"A. (Reading) 'Q. What was your approximate speed at the time of impact? A. 30 to 35 miles an hour.'

* * *

"Mr. Calvert: Thank you, Doctor.

"A. Now just a minute.

"Mr. Calvert: Just a moment—

"The Witness: Judge, I don't think this is fair. I didn't understand his question, and I corrected myself immediately after, and Mr. Calvert knows it.

"Mr. Calvert: It is a rather simple question.

"The Witness: Mr. Calvert, I didn't understand the question.

"Mr. Phelps: Just a minute, Doctor.

"The Court: (After examination of deposition) Oh, yes, the Doctor is correct (reading):

"Q. What was your approximate speed at the time of impace? (sic) A. 30 to 35 miles an hour.

"Mr. Durney (respondent's attorney): I don't think you answered the question, Doctor.

"The Witness: At the time of the impact?

"Mr. Durney: When you actually hit him.

"A. At the time of the impact, I hit the other car? At the time of impact; is that your question?

"Mr. Calvert: Yes.

"A. I should think five to ten miles an hour.' That is the way it reads.

"Mr. Calvert: Your Honor, may I make a record on this? I think it is a matter of argument, and I want the record to show an exception to the statement of the Court.

"The Court: No, it's a misunderstanding, a point at which the speed was to be estimated, and as he went along and questions were asked by the examining counsel, he came to the conclusion that the point asked for was a different point, and he said five to ten. However, that deposition may be offered in evidence and may be admitted in evidence in order to encompass any argument, if you think there is any."

Appellant claims that respondent Bost in substance by the above stated: that appel-

lant was unfair in the trial of this case; that he did not understand the question as asked at the time of his deposition; that he was only going 5 to 10 miles per hour at the time of the impact; and that he was not going 35 miles per hour at the time of the impact. She further asserts that by the statement "Oh, yes, the Doctor is correct" the court told the jury that the above was true. The court's comments were unfortunately framed but we cannot see that appellant was prejudiced. The deposition itself was clear that defendant Bost had almost immediately corrected his testimony at the time that the deposition was being taken. This matter was brought up again by appellant's counsel over the objection of respondent's attorney and at that time Bost again explained his initial misunderstanding. Further the court instructed the jury "* * * if the Court, in discussing with counsel any objection or motion, made any statement which seemed to you to reflect upon counsel, or seemed to you to indicate that the Court had some opinion upon the merits of the case or upon some fact or issue involved in the case, then the Court admonishes you to disregard any such statement, if such statement was made, in reaching a verdict in this case."

[7,8] Appellant complains of the following instruction given by the trial court:

"The law looks to the proximate cause and not to remote or secondary causes. If you find that the sole proximate cause of the accident was the negligence of some defendant other than the defendant Gillis, or Bost, or Koch-ever, then you must decide that no negligence on the part of defendant Gillis, or Bost, or Kochever, as you should find, proximately caused the accident. Even if there was negligence on the part of either of these defendants, he would not be responsible if between his negligence, if any negligence there was, and the accident, the act or omission of some other person or persons intervened and proximately caused the accident."

She claims that the court by this instruction told the jury that they should find that no negligence on the part of any of the re-

spondents proximately caused the accident and in effect directed a verdict for respondents. The instruction is rather clumsily framed but, particularly when taken with the other instructions, it cannot have misled the jury. The jury was fairly instructed that it must consider the case against each defendant separately, that to find against any particular defendant it must find that that defendant was guilty of negligence which was a proximate cause of the accident, that it might find against one defendant whose negligence was a proximate cause of the accident and in favor of another who was not at fault, and that if the accident was proximately caused by the concurrent negligence of two or more defendants recovery might be had against all whose negligence concurred to cause the accident. The criticized instruction must be read in the light of the other instructions. It is in the alternative, not the conjunctive. It treats separately the possible liability of "Gillis, or Bost, or Kochever" (not Gillis and Bost and Kochever). Its effect was to instruct the jury that if the negligence of any one of the defendants, "as you should find," was not the proximate cause because the sole proximate cause was the negligence of some other defendant, they should not bring in a verdict against the defendant whose negligence was not a proximate cause.

[9] Appellant attacks the following instruction on contributory negligence:

"Now these three defendants in their pleadings have alleged negligence on the part of the plaintiff in this action, which we define under the law to be contributory negligence, and we will seek to discover what is meant by that. When the negligence of the injured party, that is the lady plaintiff in this case, if any, contributes proximately to the injuries complained of, the law would give her no redress; and if you find in this case that she, the plaintiff, was herself negligent, and such negligence contributed proximately to the injuries complained of, of course she could not recover from the defendant or defendants, or any of them, for it is the law in order to avoid injury to herself, plaintiff was bound to have exer-

cised reasonable care to have avoided the same—that is, she was bound to use such care and diligence as a reasonable and prudent person would have exercised under like circumstances. Now of course she was not driving the car, but inasmuch as she and her husband are of course husband and wife, if you find that either one was negligent, and that such negligence contributed as a proximate cause to the accident, then under the law she, the wife, could not recover, although one may have been wholly innocent of any negligent conduct. That you may appreciate the reason for this rule, let me inform you that it is a rule that grows out of the rule of community property. Anything that either plaintiff may recover in this action would under the law of California be community property; that is, it would be property of both. Thus if you should make an award namely to one only, the other would have a community interest in the judgment, and if the other were guilty of contributory negligence you therefore would then be rewarding him or her for an accident for which he or she would be partly to blame."

She claims that this instruction was erroneous because it interjected the question of the possibility of appellant's personal contributory negligence into the case when such question was not an issue. The instruction itself pointed out that plaintiff was not driving the car but that because of the community property law her husband's contributory negligence would bar her cause of action. The court followed this immediately with the following:

"In other words, contributory negligence is such an act or an omission on the part of the injured party plaintiff—that would be the husband here of plaintiff—but, because of the community property act * * * as amounted to a want of ordinary care, etc."

The instruction as a whole made it clear that the question of the husband's negligence was the one before the jury in this case.

Appellant next contends that the trial court erroneously and prejudicially instructed the jury on the doctrine that negligence is not based upon the possibility of avoiding an accident. Two instructions were given by the court on this subject. Appellant concedes that one of them was a correct statement of the law but argues that the giving of the other only served to over-emphasize this defense to her prejudice. The instruction read:

"A finding of negligence cannot be based upon a possibility of avoiding an accident. If you find from the evidence that defendant Dr. Crawford Bost obeyed the law and did all that an ordinarily prudent person would have done under the circumstances for the protection of his own safety and to avoid the accident and injury, defendant Dr. Crawford Bost is not chargeable with negligence."

[10, 11] It is claimed that this was an incorrect statement of the law on the subject because by it the jurors' attention was centered on whether respondent Bost exercised care on his own behalf rather than on whether he exercised care not to injure others. However, it is clear from a reading of the entire instruction that the court did instruct that respondent Bost must have done all that an ordinarily prudent person would have done under the circumstances "to avoid the accident and injury." That was a correct statement of the law and the words "for * * * his own safety" do not detract from, but only add another element to, the otherwise correct instruction. Some repetition in the substance of instructions alone will not justify the reversal of a case. *Dick v. Schoener*, 120 Cal. App.2d 230, 260 P.2d 965.

[12] Appellant's last contention is that the court erroneously and prejudicially permitted hearsay and opinion evidence over her objection. Dr. Knox H. Finley was called as a witness on behalf of the respondents. He testified that he received a medical report made out by Dr. Arthur R. Hartwig in making his diagnosis and examination of appellant. (The latter doc-

tor had previously testified for respondents.) Respondents' attorney then proceeded to question Dr. Finley:

"Q. Did you make a summary of Dr. Hartwig's report? A. I did in my report.

"Q. Have you got that? A. Yes.

"Q. What is it?

"Mr. Calvert: Well, your Honor, Dr. Hartwig has been here and testified, and we have examined his report. It would be his mere conclusion as to what his report showed. Dr. Hartwig has already testified and told us that.

"The Court: He has examined it only to come to his diagnostical opinion. That is part of the survey he made.

"Mr. Hoge: Q. What do you have, Doctor? A. Well, Drs. Fourcade and Hartwig examined the patient on November 2 of last year, and they were unable to account for her complaints on the basis of orthopedic findings, and they felt it probably was of a psychiatric nature, and thought that she should be examined by a psychiatrist."

Appellant objects that the court thus allowed Dr. Finley to give a damaging and prejudicial opinion and conclusion as to facts upon which the best evidence had previously been introduced. Dr. Hartwig had testified that from an orthopedic point of view, as far as appellant's neck and upper extremities were concerned, appellant did not have positive findings and disability. He further stated that he did recommend that appellant have further examination "on the basis of her remarkable complaints that were not borne out by objective findings, and her easy 'weepsiness' in the examining room." There is nothing in Dr. Finley's summarization of Dr. Hartwig's report which is not substantially borne out by Dr. Hartwig's own testimony. We can find no prejudice in this incident.

Judgment affirmed.

NOURSE, P. J., and KAUFMAN, J., concur.

139 Cal.App.2d Supp. 941

**William C. THOMAS, Plaintiff and
Appellant,**

v.

**Franklyn KRUG and Gladys Krug,
Defendants and Respondents.**

Civ. A. 8882.

Appellate Department, Superior Court,
Los Angeles County, California.

March 14, 1956.

Purchaser brought action against vendors to rescind, on ground of mistake, a contract for purchase of realty, and to recover amount paid by purchaser on account of the purchase price thereof. The Municipal Court of Los Angeles Judicial District, Elisabeth Eberhard Zeigler, J., entered a judgment in favor of the vendors and an order adverse to the purchaser, and the purchaser appealed. The Appellate Department, Patrosso, J., held that where escrow agreement provided that purchaser of realty was expressly subject to purchaser being able to operate a ready mix plant on the realty with approval of city planning commission, and commission granted purchaser authority to operate the plant, and purchaser notified escrow agent that purchaser had obtained approval from commission, and escrow agent closed the escrow and delivered cash down payment, note and trust deed to vendors, and thereafter within the time and in accordance with provisions of city zoning ordinance, property owners appealed to city council, which after a hearing reversed the action of the commission, evidence established, as a matter of law, that both purchaser and vendors acted on a mutual mistake, and purchaser was entitled to rescind, whether the mistake be regarded as a mistake of fact or a mistake of law.

Judgment reversed, and appeal from order dismissed.

I. Vendor and Purchaser ⇨31, 45

Where escrow agreement provided that purchase of realty was expressly subject to purchaser being able to operate ready-mix plant on realty with approval of city plan-

ning commission, and commission granted purchaser authority to operate plant, and purchaser notified escrow agent that purchaser had obtained approval from commission, and escrow agent closed escrow and delivered cash down payment, note and trust deed to vendors, and thereafter property owners appealed to city council, which reversed action of commission, evidence established, as a matter of law, that both purchaser and vendors acted on a mutual mistake, and purchaser was entitled to rescind, whether mistake be regarded as a mistake of fact or a mistake of law.

2. Vendor and Purchaser ⇨31, 33

It is not essential to right to rescind a contract for purchase of realty that purchaser should be able to show that realty was worth less than he paid for it, and purchaser need not plead or prove pecuniary loss so long as there was injury or prejudice resulting from fraud or mistake.

On Petition for Rehearing

3. Evidence ⇨32

The Appellate Department of the Superior Court of the County of Los Angeles would take judicial notice of ordinance of the City of San Fernando, which is within the Los Angeles Judicial District.

Matranga & Abrams, El Monte, for appellant.

Mantolica, Barclay & Teegarden, Los Angeles, for respondents.

PATROSSO, Judge.

Plaintiff instituted this action to rescind, upon the ground of mistake, a contract for the purchase of a parcel of real property, and to recover the amount paid by him on account of the purchase price thereof. From a judgment in favor of defendants, the plaintiff appeals.

The agreement in question which consisted in part of a receipt evidencing a deposit of \$500 and an escrow agreement provides for the purchase of the property by plaintiff for the total sum of \$11,000 payable \$2,200 in cash and the balance to be evidenced by a promissory note secured

by a trust deed upon the subject property, payable in monthly installments, but expressly "subject to buyers being able to operate a ready mix plant on this property subject to the approval of the San Fernando City Planning Commission." Following the opening of the escrow, application was made to the Planning Commission for authority to operate a ready-mix plant upon the property which, after a hearing, was granted and plaintiff notified thereof, whereupon plaintiff delivered a written notice to the escrow agent, reading as follows: "This is to notify you that we are able to operate a ready mix plant on subject property and that we have the approval of the San Fernando City Planning Commission," whereupon the escrow agent closed the escrow and delivered to defendants the \$1,700 deposited by plaintiff, as well as the promissory note and trust deed executed by him in accordance with the agreement. However, thereafter within the time and in accordance with the provisions of the zoning ordinance of the City of San Fernando, copy of which has been filed with us pursuant to stipulation of the parties, certain property owners opposing the granting of the variance appealed to the City Council, which after a hearing reversed the action of the Planning Commission and refused to grant the variance. It is conceded that as a result plaintiff was not able to operate a ready-mix plant upon the property. Plaintiff thereupon gave written notice of rescission and demanded return of the money paid by him, and upon refusal of defendants to do so instituted this action. Subsequent thereto and prior to trial, defendants foreclosed the trust deed given by plaintiff and became purchasers of the property.

The court found the facts as hereinbefore recited, but further found to be untrue the allegation in plaintiff's complaint that plaintiff and defendants at all times prior to the action of the City Council in reversing the order of the Planning Commission "mistakenly believed that authority from the San Fernando Planning Commission was the only permission required by plaintiff for the operation of a ready mix plant on the above described property." The court fur-

ther found that plaintiff by authorizing the escrow agent to make payment and deliver the note and trust deed to defendants upon being advised of the action of the Planning Commission thereby accepted the same "as satisfaction of the condition of the escrow agreement." From these findings the court drew the following conclusions of law: "Said escrow agreement was fully executed and performed. Plaintiff did not execute and perform the escrow agreement under any mistake of law or fact and plaintiff did not suffer any damage. The possibility of said permit being revoked was readily foreseeable and was reasonably foreseeable by plaintiff."

Plaintiff contends that the findings averted to above are unsupported by the evidence, and the conclusions of law based thereon are erroneous. We agree and accordingly are reversing the judgment.

[1,2] The evidence admits of no other conclusion but that the parties both understood that the plaintiff did not desire to purchase the property, which was located in the Pacoima Wash, unless the zoning thereof should be changed to permit the operation thereon of a ready-mix plant. Likewise, both parties believed that the granting of the variance for this purpose by the Planning Commission was final and all that was required to permit such use. The defendant Franklyn King expressly so testified, and while defendants claim that there is no testimony by plaintiff to this effect, that he so understood and believed is evidenced by the notice which he delivered to the escrow agent to the effect that "we are able to operate a ready mix plant on subject property and that we have the approval of the San Fernando City Planning Commission." That such evidence establishes, as a matter of law, that both parties acted upon a mutual mistake may not be gainsaid, and whether regarded as a mistake of fact or law, *Adams v. Heinsch*, 1948, 89 Cal.App.2d 300, 303, 200 P.2d 796, plaintiff was entitled to rescind. Nor is it of consequence, as the trial court found, that the property was of a market value equal to the price which plaintiff agreed to pay therefor. It is not essential to the right to rescind a contract for the purchase

of property that the purchaser should be able to show that the property purchased was worth less than he paid for it, and plaintiff need not plead or prove pecuniary loss so long as there was injury or prejudice resulting from the fraud or mistake. *Hefferan v. Freebairn*, 1950, 34 Cal.2d 715, 721, 214 P.2d 386; Annotation 106 A.L.R. 125. Here the plaintiff was desirous of purchasing the property only if he could legally operate a ready-mix plant thereon, and it is clear that he suffered prejudice when this purpose was rendered impossible of accomplishment.

The judgment is reversed. The appeal from the order is dismissed.

SWAIN, Acting P. J., and KAUFFMAN, J., concur.

Before SWAIN, Acting P. J., and PATROSSO and KAUFFMAN, JJ.

Order Denying Rehearing

BY THE COURT.

Respondents' petition for rehearing after judgment of this court on appeal, in the above entitled matter, having been filed, and having been duly considered,

Said petition is hereby denied.

Memorandum

Defendants assert that our opinion is in error in asserting that the action of the

Planning Commission in granting the permit was not final. The trial court, however, expressly found that as a result of the action of the City Council in annulling the order of the Commission plaintiff "was not able to operate a ready mix plant on said real property," which necessarily implies that the action of the Planning Commission was not final. Moreover, with respect to this finding, defendants, in their brief, state: "Finding No. V recites the revocation of the permit by the City Council. *This, too, is admitted by the pleadings and supported by plaintiff's Exhibits A and 5, which recite the action of the City Council.*" In the light of this, it is difficult to understand the argument advanced in the petition for rehearing to the effect that the action of the Commission was final and hence not subject to review upon appeal to the City Council. If such is now the position of the defendants and appropriate amendment is made to their answer so as to raise this issue, nothing said in our opinion shall be deemed as foreclosing the defendants upon a retrial from urging their present contention.

[3] With respect to defendants' complaint of our taking cognizance of the ordinance of the City of San Fernando, we desire to note that, contrary to some statements made from the bench at the time of the oral argument, we take judicial notice thereof because the City of San Fernando is within the Los Angeles Judicial District.

46 Cal.2d 367

**Harold B. LEVY et al., Plaintiffs and
Respondents,**
v.

C. LeRoy WOLFF, Defendant and Appellant.
S. F. 19434.

Supreme Court of California,
In Bank.

March 22, 1956.

Action by purchasers against vendor of unimproved realty for damages for diminution in value of property due to parties' honest mistake concerning existence of lease. The Superior Court, Contra Costa County, Homer W. Patterson, J., rendered judgment for plaintiffs, and defendant appealed. The Supreme Court, McComb, J., held that where, due to honest mistake of parties to land purchase transaction, no effective lease of property existed, though purchasers as defendants in other action recovered certain amount as reasonable rental from tenants, purchasers could recover from vendor as damages diminution in value of property because of nonexistence of lease, less net amount recovered from tenants, latter being difference between rent recovered and expenses incurred in making such recovery.

Judgment affirmed.

Opinion, 288 P.2d 608, vacated.

1. Money Received ⇨6(8)

A person who has paid money to another as full performance of contract voidable by payor for mistake, and who has received a part of agreed exchange is entitled, at his election, to keep what he has received, and to have restitution of so much of his payment as has not been compensated for by other's part performance.

2. Specific Performance ⇨10(1)

Vendor and Purchaser ⇨174

If vendor has any interest in property he has contracted to convey, purchaser at his option may enforce contract with respect to whatever interest vendor possesses, and may also receive compensation for deficiency in performance.

3. Vendor and Purchaser ⇨343(1)

Purchaser, under land purchase contract which vendor can only partly perform, has same right to compensation when he brings action for insufficiency, as he has when he brings an action for specific performance with concomitant assertion of right to compensation for deficiency.

4. Vendor and Purchaser ⇨120

Provision of Civil Code relating to election to rescind or pay full price upon destruction of goods contracted to be sold, does not apply to contracts concerning real property which has not been destroyed. West's Ann.Civ.Code, § 1728, subd. 2.

5. Vendor and Purchaser ⇨351(1)

Where, due to honest mistake of parties to land purchase transaction, no effective lease of property existed, though purchasers as defendants in another action recovered certain amount as reasonable rental from tenants, purchasers could recover from vendor as damages diminution in value of property because of nonexistence of lease, less net amount recovered from tenants, latter being difference between rent recovered and expenses incurred in making such recovery.

Breed, Robinson & Stewart, Oakland,
Hoey, Hall & Conti, Martinez, and Ned
Robinson, Oakland, for appellant.

Edmund S. Barnett, Walnut Creek, for
respondents.

McCOMB, Justice.

Defendant appeals from a money judgment for plaintiffs based on findings to the following effect: Plaintiffs paid to defendant \$16,500 cash for certain unimproved real property in Contra Costa County together with a lease thereof. Both parties honestly believed the lease to be in existence, but in proceedings instituted by a third party in which the plaintiffs were defendants it was found that said lease had never been binding or in force. In that action, these plaintiffs were, however, held entitled to recover from the tenants the sum of approximately \$4,400, being the reasonable rental value for the period of the

tenants' occupancy. Plaintiffs incurred expenses in connection with that action in the sum of approximately \$1,100, including costs and counsel fees.

The judgment appealed from here awarded plaintiffs as damages the diminution in the value of the property because of the nonexistence of the lease in the sum of approximately \$5,800, less the net amount recovered in the other action, being the difference between the rent recovered by plaintiffs from the tenants and the expense incurred by plaintiffs in making that recovery.

Defendant contends:

First, that if the decision was based on honest mutual mistakes he could not be liable for damages and that if there was partial failure of consideration, plaintiffs had, in accordance with section 1728, subdivision 2, of the Civil Code (relating to the destruction of goods, contracted to be sold) the election, either to rescind the contract, or to uphold it and to pay the full price, the contract being indivisible.

[1] This contention is erroneous. A person who has paid money to another as full performance of a contract voidable by the payor for mistake and who has received a part of the agreed exchange is entitled, at his election, to keep what he has received and to have restitution of so much of his payment as has not been compensated for by the other's part performance. (Rest., Restitution (1937), § 25, p. 113; Butte Creek Consol. Dredging Co. v. Olney, 173 Cal. 697, 705 et seq., 161 P. 260; Cf. Quarg v. Scher, 136 Cal. 406, 411, 69 P. 96; Anderson v. Willson, 48 Cal.App. 289, 294, 191 P. 1016; Milkes v. Smith, 91 Cal. App.2d 79, 82, 204 P.2d 419.)

[2] In *Milkes v. Smith*, 91 Cal.App.2d 79, at page 82 [4], 204 P.2d 419, at page 420, it is said: "if a vendor has any interest in the property he has contracted to convey, the vendee at his option may enforce the contract with respect to whatever interest the vendor possesses, and may also receive compensation for the deficiency in performance."

[3] No good reason appears why the same right to compensation for a deficiency in performance should not apply when an action for insufficiency takes place without action for specific performance.

[4] Section 1728 of the Civil Code on which defendant relies is a rule applicable in the case of destruction of personal property, contracted to be sold. It is not applicable in this case, in which the contract relates to real property which has not been destroyed.

Second, that the trial court should not have taken into consideration in computing the damages the sum of \$1,109 which plaintiffs incurred in the prior action instituted by a third party to cancel the lease which plaintiffs and defendant believed was upon the property.

[5] This contention is likewise not sound. The trial court found, supported by substantial evidence, that the portion of plaintiffs' payment that was not compensated for because of the nonexistence of the lease was \$5,800. From that amount the trial court deducted the "net advantage" to plaintiffs from the rent they recovered from the third party. In computing this "net advantage" the trial court subtracted from the \$4,400 judgment the \$1,100 costs and fees expended by the plaintiffs. Thus the trial court awarded them \$5,800 less the difference between \$4,400 and \$1,100 or approximately \$2,500. This sum clearly represented the amount plaintiffs were out of pocket because of the nonexistence of the lease. It is fair and just that in the calculation of compensation due plaintiffs, defendant is entitled to the deduction only of the net advantage which plaintiffs obtained from the property in connection with the ostensible lease. It is thus immaterial whether the costs which diminished the advantage were costs of suit, execution, or other costs.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

46 Cal.2d 364

G. MATHYS, Plaintiff and Appellant

v.

Richard H. TURNER, also known as R. H. Turner, Defendant and Respondent.

L. A. 23897.

Supreme Court of California,

In Bank.

March 22, 1956.

Rehearing Denied April 18, 1956.

Action to recover for legal services rendered by the plaintiff's assignor and for investigation costs. The Superior Court of Los Angeles County, Clarence M. Hanson, J., entered judgment for plaintiff for in an allegedly inadequate amount and the plaintiff appeals. The Supreme Court, Gibson, C. J., held that plaintiff's acts in accepting payment and executing and authorizing the filing of a complete satisfaction constituted a waiver of the right to appeal.

Appeal dismissed.

Opinion, 283 P.2d 31, vacated.

1. Appeal and Error ⇨131, 162(3)

Generally, voluntary acceptance of the benefit of a judgment or order is a bar to the prosecution of an appeal, since the right to accept the fruits of the judgment and the right to appeal therefrom are wholly inconsistent, and an election to take one is a renunciation of the other, but exception exists where appellant is concededly entitled to the benefits which are accepted and a reversal will not affect the right to those benefits.

2. Appeal and Error ⇨162(1)

In action to recover legal services rendered by a plaintiff's assignor and for investigation costs where after judgment was affirmed by the District Court of Appeal, plaintiff delivered a satisfaction of judgment acknowledging payment thereof, plaintiff's right to appeal was barred, since in case of reversal and retrial judgment could conceivably be smaller.

3. Appeal and Error ⇨162(1)

In action to recover for legal services rendered by plaintiff's assignor and for investigation costs, where after affirmance

of judgment plaintiff executed a satisfaction of the judgment acknowledging payment, satisfaction was not inoperative on the ground that plaintiff's prior recordation of the abstract of the judgment placed it within the power of the defendant to compel a satisfaction, where plaintiff's recordation was voluntary and the tender of money and demand for satisfaction did not involve compulsion. West's Ann.Code Civ.Proc. § 675.

4. Appeal and Error ⇨162(1)

In action to recover for legal services and investigation costs, plaintiff's acts after affirmance of judgment by the District Court of Appeal in accepting payment and executing and authorizing the filing of a complete satisfaction constituted a waiver of the right to appeal, notwithstanding that he may have acted under an erroneous belief that he was compelled to accept the tender. West's Ann.Code Civ.Proc. § 675.

S. V. O. Prichard, Beverly Hills, for appellant.

Algerdas N. Cheleden, Los Angeles, for respondent.

GIBSON, Chief Justice.

Plaintiff, as assignee, sued to recover \$10,000, alleged to be the reasonable value of attorney's services, and \$905.10 assertedly expended as costs in connection with certain litigation. The matter was tried without a jury, and plaintiff was awarded judgment for \$1,500. He then appealed, claiming that the trial court abused its discretion in not awarding a larger amount.

After the judgment was affirmed by the District Court of Appeal, and before a hearing was granted by this court, defendant gave plaintiff a check for \$1,655, and plaintiff executed and delivered a satisfaction of judgment which acknowledged payment of the judgment and authorized the clerk to enter full satisfaction of record. Defendant urges that the appeal is moot and should be dismissed by reason of this satisfaction.

[1] It is the general rule that the voluntary acceptance of the benefit of a judgment or order is a bar to the prosecution of an

appeal, since the right to accept the fruits of the judgment and the right to appeal therefrom are wholly inconsistent, and an election to take one is a renunciation of the other. *Schubert v. Reich*, 36 Cal.2d 298, 299, 223 P.2d 242; *Giometti v. Etienne*, 5 Cal.2d 411, 413 et seq., 55 P.2d 216; *Preluzsky v. Pacific Co-operative Cafeteria Co.*, 195 Cal. 290, 293-294, 232 P. 970; *Union Lithograph Co. v. Bacon*, 179 Cal. 53, 57, 175 P. 464; *In re Estate of Ayers*, 175 Cal. 187, 189-190, 165 P. 528; *County of San Bernardino v. County of Riverside*, 135 Cal. 618, 67 P. 1047. An exception to the general rule exists where the appellant is concededly entitled to the benefits which are accepted and a reversal will not affect the right to those benefits. (See *Gudelj v. Gudelj*, 41 Cal.2d 202, 214, 259 P.2d 656; *In re Estate of Hubbell*, 216 Cal. 574, 15 P.2d 503; *Browning v. Browning*, 208 Cal. 518, 282 P. 503; *Coffman v. Bushard*, 164 Cal. 663, 665, 130 P. 425; *Royat v. Roberts*, 107 Cal.App.2d 447, 449-450, 237 P.2d 25; *Wold v. League of Cross of Archdiocese*, 107 Cal.App. 344, 347, 290 P. 460.)

[2] Plaintiff asserts that he comes within this exception and argues that defendant, by failing to appeal, has agreed that plaintiff is entitled to the amount of \$1,500 awarded by the judgment, and hence the sole question presented by the appeal is whether plaintiff is entitled to a greater recovery. The controversy, however, concerned the value of services and the amount of payments made, and in case of a reversal and retrial the judgment could conceivably be smaller. Cf. *Schubert v. Reich*, 36 Cal.2d 298, 300, 223 P.2d 242; *In re Estate of Ayers*, 175 Cal. 187, 190, 165 P. 528; *County of San Bernardino v. County of Riverside*, 135 Cal. 618, 620-621, 67 P. 1047; *Guho v. City of San Diego*, 124 Cal.App. 680, 683, 13 P.2d 387. As stated in *Preluzsky v.*

Pacific Co-operative Cafeteria Co., 195 Cal. 290, 293, 232 P. 970, 971, "if a party to a judgment accepts payment or satisfaction of a part thereof which is favorable to him, and that part is of such a character that the part adverse to him cannot be reversed without affecting the part which is in his favor and requiring the reversal of that part also, the party so accepting the fruits of a part of the judgment in his favor is estopped from prosecuting an appeal from those parts which are against him."

[3,4] There is no merit in plaintiff's claim that the satisfaction should be held to be inoperative on the theory that plaintiff's prior recordation of an abstract of judgment placed it within the power of defendant to compel a satisfaction. His recordation of the abstract was voluntary, there was no court order directing satisfaction (see Code Civ.Proc., § 675), and the tender of the money and demand for satisfaction did not involve legal or economic compulsion. Compare *Alamitos Land Co. v. Shell Oil Co.*, 217 Cal. 213, 215, 17 P.2d 998; *Greenspot Desert Inns, Inc., v. Roy*, 63 Cal. App.2d 54, 60, 146 P.2d 39. Plaintiff's acts in accepting payment and then executing and authorizing the filing of a complete satisfaction constituted a waiver of the right to appeal. Cf. *Giometti v. Etienne*, 5 Cal.2d 411, 414-415, 55 P.2d 216; *Guho v. City of San Diego*, 124 Cal.App. 680, 683-684, 13 P.2d 387. The fact that he may have acted under the erroneous belief that he was compelled to accept the tender cannot prevent the satisfaction from operating as a bar to prosecution of the appeal.

The appeal is dismissed.

SHENK, CARTER, TRAYNOR,
SCHAUER, SPENCE and McCOMB, JJ.,
concur.

46 Cal.2d 370

Geo. C. W. EGAN, Petitioner,

v.

The STATE BAR OF CALIFORNIA,
Respondent.

S. F. 19367.

Supreme Court of California.

In Bank.

March 27, 1956.

Proceeding to review recommendation of disbarment. The Supreme Court held that evidence warranted findings of culpability and justified disbarment.

Order of disbarment.

1. Attorney and Client ⇄53(2)

In proceeding to review recommendation of disbarment, evidence warranted findings of culpability and justified disbarment. Rules of Professional Conduct, rule 9, West's Ann.Bus. & Prof.Code following section 6076.

2. Attorney and Client ⇄55

In proceeding to review recommendation of disbarment, in view of non-compliance with rule requiring that motion for reopening be accompanied by affidavit stating substance of any new evidence and reasons why such evidence was not presented to local administrative committee, and fact that alleged new matter was in conflict with petitioner's previous testimony, denial of petitioner's oral motion to reopen matter was not prejudicial. Rules of Procedure of State Bar, rule 39.1, West's Ann. Bus. & Prof.Code following section 6087.

3. Attorney and Client ⇄54

That examiner in disbarment proceedings subsequently represented complaining client in collection of claim, did not indicate that examiner was biased or prejudiced against attorney whose disbarment was recommended to Supreme Court.

4. Attorney and Client ⇄58

In proceeding to review recommendation of disbarment, in view of previous

record of public reproof and suspension, and character of petitioner's conduct in instant case, disbarment, as recommended, was appropriate penalty. Rules of Professional Conduct, rule 9, West's Ann.Bus. & Prof.Code following section 6076.

Geo. C. W. Egan, San Francisco, in pro. per., for petitioner.

Garrett H. Elmore, San Francisco, for respondent.

PER CURIAM.

This is a proceeding to review a recommendation of the Board of Governors of The State Bar that petitioner be disbarred from the practice of law.

Petitioner* was employed by Austin Olsen in January 1951 to collect damages for injuries allegedly suffered by Olsen and his wife as the result of an accident. A short time later those from whom the damages were sought agreed to pay \$750 at the rate of \$40 per month (later reduced to \$20) and in the following two years paid petitioner \$485 under the agreement. Petitioner did not promptly advise Mr. Olsen when payments were made and several times, in response to inquiries made by Mrs. Olsen, made incorrect statements concerning receipt of the payments. This was done with intent to deceive and mislead, and Mrs. Olsen was deceived and misled thereby.

Except for two payments aggregating \$45 made to the Olsens in 1952, petitioner retained and converted to his own use the balance of the sum collected, and rendered no accounting to the Olsens until April 1953 after Mrs. Olsen complained to The State Bar.

Questions

First: Did the evidence sustain the findings of culpability on the part of petitioner?

Yes. The record discloses that the transaction in question originated in 1951. Mrs.

* Petitioner is approximately 68 years of age and was admitted to practice law in this state on February 23, 1910.

Rosalie Olsen, wife of Austin Kelly Olsen, sustained neck injuries on January 4, 1951, while riding in an automobile registered in the name of her husband. Mr. Olsen also suffered some injuries in the accident.

The Olsens employed petitioner to represent them in connection with their claim for damages, and on April 1, 1951, petitioner obtained an agreement executed by Agnes Rogers and Chatmon Hamp Adam whereby they agreed to pay at petitioner's office the sum of \$750 in cash at the rate of \$40 per month commencing April 27, 1951, until the whole sum of \$750 should be paid. In the two-year period April 1951 to March 1953 payments on this obligation were made or collected by petitioner or his office with considerable regularity. The payments, with one exception, were \$20 rather than \$40 after February 27, 1952.

As of April 4, 1953, petitioner admittedly had received collections of \$485. On February 28, 1952, he paid \$20 by check to Mr. Olsen; on June 6, 1952, petitioner paid \$25 by check to Mrs. Olsen. No further payments were made until April 1953 when petitioner rendered an accounting dated April 4, 1953, by letter to Mrs. Olsen. Shortly thereafter he offered and later transmitted a cashier's check for \$278.34 in settlement of the account to date. The check payable to Austin K. and Rosalie Olsen, was transmitted under date of April 10, 1953, accompanied by a letter explaining the deduction of one third of \$485 as petitioner's fee, the general status of the matter, and a request for instructions as to whether petitioner should continue with the collection.

The accounting and settlement were accepted by Mrs. Olsen after the death of her husband, which took place April 11, 1953.

Preceding the accounting and settlement, a complaint had been made to The State Bar and, Mrs. Olsen testified, various efforts had been made to reach petitioner without effect. The record discloses ample evidence that all but two or three installments of money which petitioner received for the Olsens were converted to his own personal use and that it was his intention

to substitute his personal obligation for the monies thus collected belonging to his client. The evidence further discloses that he neglected for a long period to report receipt of the funds of his clients and did not make a prompt accounting to them of their funds which were in his possession. It also appears that even though he had received funds belonging to the Olsens he falsely stated that no monies had been in fact received by him.

[1] Clearly the foregoing facts support the findings of fact of the Board of Bar Governors. Such findings disclose that petitioner violated rule 9 of the Rules of Professional Conduct, which reads: "A member of the State Bar shall not commingle the money or other property of a client with his own; and he shall promptly report to the client the receipt by him of all money and other property belonging to such client." 33 Cal.2d 30.

Second: Did the Board of Governors properly deny petitioner's oral motion to reopen the matter before them?

[2] *Yes.* Petitioner did not comply with rule 39.1, Rules of Procedure of The State Bar, which requires that a motion for reopening be accompanied by affidavit stating the substance of "any new evidence * * * and the reasons why such evidence was not presented to the local administrative committee". In addition, the motion was properly denied because petitioner had in fact testified to his version of the arrangement which he had with Mr. Olsen (since deceased). He had testified: "We will let the matter go along. If we are lucky enough to get any money out of these people, then I'll hold a reasonable amount out to cover costs and whatever incidental expenses there might be. That was the way the matter was left." As grounds of the motion to reopen, petitioner stated to the Board of Governors that he had an agreement that he could "reserve" the funds until the full \$750 was collected. This was the only new matter, and it was in conflict with petitioner's previous testimony. Clearly, no prejudice resulted to him from the denial of the motion.

Third: Was the examiner biased and prejudiced against petitioner because after petitioner's services were terminated he represented Mrs. Olsen in making collection of the balance of the obligation due her?

[3] No. The record discloses that the examiner was not employed by Mrs. Olsen and did not represent her until after the hearings before the trial committee had been concluded.

Fourth: Was the degree of discipline appropriate under the circumstances?

Yes. The Board of Governors took into consideration the past record of petitioner. This included (1) public reproof on November 19, 1937; (2) suspension for one year ordered by this court following recommendation of disbarment, *Egan v. State Bar*, 10 Cal.2d 458, 75 P.2d 67 (January 12, 1938); and (3) public reproof on June 23, 1939.

This court in *Narlian v. State Bar*, 21 Cal.2d 876, at page 887, 136 P.2d 553, at page 558, thus correctly states the rule: "It is appropriate to take into consideration this previous record in determining what penalty should be imposed for the misconduct involved in the present proceeding. [Citing numerous cases.]"

[4] The evidence discloses that petitioner over a long period of time had failed to meet the high standards demanded of members of the legal profession and that on a previous occasion he had been disciplined for misappropriating funds of a client. *Egan v. State Bar*, 10 Cal.2d 458, 75 P.2d 67. Clearly, with such a record, his conduct in the instant case was most reprehensible and disbarment as recommended by The State Board of Bar Governors was an appropriate penalty. (See *Kennedy v. State Bar*, 13 Cal.2d 236, 240, 88 P.2d 920; *Hennessy v. State Bar*, 18 Cal.2d 685, 687, 117 P.2d 326 [2].)

It is ordered that Geo. C. W. Egan be disbarred and that his name be stricken from the roll of attorneys of this state, the order to become effective 30 days after the filing of this opinion.

Hugh WRIGHT and Mabel Wright, Plaintiffs, Cross-Defendants and Respondents,

v.

James VAUGHN and Reva Vaughn, Defendants, Cross-Complainants and Appellants.

Civ. 4990.

District Court of Appeal, Fourth District, California.

March 22, 1956.

Action and cross-action for damages resulting from collision of automobiles. The Superior Court, Kern County, Warren Stockton, J., entered judgment for plaintiffs and defendants appealed. The District Court of Appeal, Griffin, J., held that where defendants' automobile at night struck plaintiffs' automobile from the rear, although immediately prior to collision plaintiffs' automobile had been parked on left side of street in violation of law, there was evidence to support trial court's findings that there was no negligence on the part of plaintiffs contributing proximately to collision.

Affirmed.

1. Automobiles ⇨244(58)

In action and cross-action for damages resulting when defendants' automobile at night struck plaintiffs' automobile from the rear, although immediately prior to collision plaintiffs' automobile had been parked on left side of street in violation of law, there was evidence to support trial court's finding that there was no negligence on part of plaintiffs contributing proximately to collision.

2. Appeal and Error ⇨1011(1)

On appeal on a question of fact, where testimony in trial court involves a substantial conflict, action of trial court will not be disturbed.

3. Appeal and Error ⇨1001(1)

Where there is a fair and reasonable amount of evidence to support the finding

of a jury, it will not be disturbed by an appellate court although in its opinion it is against the preponderance of the evidence.

T. R. Clafin, Bakersfield, for appellants.

Deadrich, Bates & Stewart, Bakersfield, for respondents.

GRIFFIN, Justice.

Plaintiffs, husband and wife, brought this action against defendants, husband and wife, for damages as a result of a collision of their cars on a rainy night on December 24, 1952, on Trust Avenue, near Bakersfield. Plaintiffs were driving in a general easterly direction, and at about 5:30 p. m. they drove from the south side of Trust Avenue to the north side thereof and parked their car, in violation of the law, entered the home of their son to take in some Christmas presents, and remained there until 6 p. m., when they lit their car lights, drove away, and crossed over to the south or their right-hand side of Trust Avenue and proceeded onward in an easterly direction for a short distance (estimated at about 60 feet beyond the lot line of the son's home or 80 feet from where the car was first parked). About that time a dog ran in front of plaintiffs' car and the driver, Mr. Wright, stopped rather suddenly to avoid hitting it. He testified his lights were in good condition and when he applied the brakes to stop they automatically so indicated; that soon thereafter his car was struck from the rear by defendants' car; and that it injured Mrs. Wright and damaged their car.

Defendants denied their negligence, claimed negligence on the part of plaintiffs, and filed a cross-complaint claiming damages for injury to their car.

Defendants concede there was sufficient evidence to support a finding of negligence on their part but claim that plaintiffs were guilty of contributory negligence as a matter of law, and that there was no sufficient evidence to support the finding that plaintiffs were not guilty of contributory negligence. This is the only claim made on this appeal. Judgment was rendered in

favor of plaintiffs for \$1,641.64, and defendants were denied relief on their cross-complaint.

[1] Defendant James Vaughn¹ testified generally that he had taken a drink of whiskey in Arvin, was on his way home on Trust Avenue proceeding on the southerly half thereof about 15 to 25 miles per hour; that he stopped for a gutter crossing and did not recall seeing any car ahead of him; that just as he shifted into high gear he ran into the rear end of plaintiffs' car; that he did not see it or any lights on it at all; that the accident happened "just like that"; that just before he struck it he was traveling about 20 miles per hour and that he then noticed the stop lights, tail lights and front lights were lit on plaintiffs' car and he applied his brakes, skidded his car about ten feet, and knocked plaintiffs' car about 60 feet from the point of impact. He admitted telling plaintiffs' son that he had a "couple of drinks" and it would "go hard with him with the officers" if they discovered it. The son stated defendant driver said an ambulance should be called and his mother taken to the hospital, and that he agreed to pay the doctor bill.

While the evidence might well have supported a finding of contributory negligence on the part of plaintiffs, it cannot be said that the evidence shows it as a matter of law. It might justify the conclusion that plaintiffs had returned to the proper side of Trust Avenue and were lawfully proceeding thereon before their car was struck from the rear.

Plaintiffs' son testified they went out of their house to the car; that plaintiffs' car started up after the lights were lit; that it proceeded across the street; and that they then returned to the porch of their home before they heard the screeching of brakes and the impact. The brakes on plaintiffs' car were applied and this fact was indicated by the stop lights. Apparently defendants were not looking, or for some unexplained reason did not see plaintiffs' car in front of them in time to avoid the accident. These facts differentiate the case from *Mazgedian v. Swift & Co.*, 22 Cal.App.2d 570, 71 P.2d 833, relied upon by

defendants. There is some evidence to support the trial court's finding that there was no negligence on the part of plaintiffs contributing proximately to their injuries.

[2,3] It is a cardinal doctrine often enunciated that where, upon a question of fact, the testimony in the court below involves a substantial conflict, the action of the trial court will not be disturbed. Wherever there is a fair and reasonable amount of evidence to support the finding of a jury it will not be disturbed by an appellate court although in its opinion it is against the preponderance of the evidence. (10 Cal.Jur. 1172, sec. 383.)

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J.,
concur.



139 Cal.App.2d 855

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Ray Alvin McDONALD, Defendant and
Appellant.
Cr. 2655.

District Court of Appeal, Third District,
California.

March 16, 1956.

Defendant was convicted of violating statute making it public offense for any motorist involved in accident resulting in any death to fail to make report of it without delay to highway patrol or police. The Superior Court, Tehama County, Albert F. Ross, J., entered judgment accordingly, and defendant appealed. The District Court of Appeal, Van Dyke, P. J., held that uncontradicted testimony that defendant had not asked to use telephone at house to which he had gone immediately after accident showed that he had failed to avail himself of first opportunity to make report

without delay and established corpus delicti so as to render admissible defendant's extrajudicial statements.

Judgment affirmed.

1. Criminal Law Ⓒ517(4)

In prosecution for violating statute requiring any motorist involved in accident causing death "without delay" to report accident to highway patrol or police, uncontradicted testimony that motorist did not ask to use telephone at house to which he went immediately after accident, showed that he failed to avail himself of opportunity to make required report "without delay" and established corpus delicti so as to make his extrajudicial statements admissible. West's Ann.Vehicle Code, §§ 480, 482(a).

2. Automobiles Ⓒ355(8)

Evidence sustained conviction of motorist for violation of statute requiring any motorist involved in accident resulting in any death to report it without delay to highway patrol or police. West's Ann. Vehicle Code, §§ 480, 482.

Alfred E. Frazier and Edward J. Allen,
Red Bluff, for appellant.

Edmund G. Brown, Atty. Gen., by Deputies Atty. Gen., Doris H. Maier and J. M. Sanderson, for the People.

VAN DYKE, Presiding Justice.

Appellant was charged by an amended information with having violated Section 480 of the vehicle code by failing to report a fatal accident and failing to furnish the information required by Section 482(a) of the Vehicle Code, which provides, in part:

"* * * In the event of death of any person resulting from an accident, the driver of any vehicle involved must, after fulfilling the requirements of Section 480 of this code and the foregoing requirements of this subsection, and if there be no traffic or police officer at the scene of the accident to whom to give the information required by this subsection, shall, without delay,

report such accident to the nearest office of the California Highway Patrol or office of a duly authorized police authority and submit with such report the information required by this subsection."

Trial was had before the court sitting without a jury. Pursuant to stipulation, the evidence thereat was limited to the testimony taken at the preliminary examination and two extrajudicial statements admitted over appellant's objection that the corpus delicti had not been proved. The trial court found appellant guilty and after denial of his motion for a new trial imposed a county jail sentence, the execution of which was suspended. Appellant was placed on probation for one year.

This is an appeal from the judgment of conviction and the order denying a motion for a new trial. Appellant contends that the corpus delicti was not proved independently of appellant's extrajudicial statements and that the evidence as a whole is insufficient to sustain a finding that appellant was guilty.

The deceased, Viola Unruh, met almost instantaneous death when she fell or jumped from an automobile which the appellant was driving on a county highway east of Vina in Tehama County. When found decedent's body was dressed in a flowered shirt, blue slacks and low-heeled shoes. The shirt had holes in the back, apparently from the woman having slid on the gravel of the road shoulder. A piece of her skull about three inches across was found lying nineteen feet from her body and pieces of brain matter were lying between. The whole top and right side of her skull were crushed. Her body was found by a Mr. O'Brien who telephoned the sheriff's office. Prosecution witnesses testified that at about six-thirty on the night in question the deceased and appellant left a highway tavern where they had each consumed a bottle of beer. The deceased was then driving appellant's automobile. However, within a half hour thereafter a witness, who knew both the appellant and the deceased, saw the car in which they riding stop and saw the couple get out and exchange seats. This witness

testified that the car, with appellant at the wheel, then proceeded about 300 yards down the highway when the right-hand door flew open. Appellant leaned over and closed it. He then stopped the car, got out, walked down the road about 15 feet, looked at something, put his hand to his head, and walked back to the car. It was approximately at this point on the road where the deceased's body was found a few minutes later by Mr. O'Brien. In the meantime, appellant drove to a nearby residence, where he had a brief conversation about the weather with the lady of the house, but made no mention of an accident and did not ask to use the telephone. He drove off in the direction of town and shortly thereafter appeared at the tavern where he and the deceased had been earlier that evening. He purchased a pint of whisky and immediately left, without using the telephone. Within a few minutes appellant returned to the scene of the accident in company with his wife. However, he did not identify himself as the driver of the vehicle in which the deceased had been riding or give the investigating officers the information required by Section 482(a) of the Vehicle Code.

[1] Appellant offered no proof that he reported the accident and there is uncontradicted testimony that he did not ask to use the telephone at the house to which he went immediately after the accident. He thus failed to avail himself of the first opportunity to make the required report "without delay". We have concluded that the foregoing facts establish the corpus delicti as it may be inferred therefrom that appellant did not promptly and "without delay" report the accident. Therefore, his extrajudicial statements were properly admitted.

[2] When placed under arrest, appellant at first denied that the deceased had been with him, claiming that they parted at the tavern. From such denial it may be inferred that appellant did not report the accident of which he at first disclaimed any knowledge and of which he gave an untruthful account. On the day after the accident, appellant in a second statement admitted that the deceased had been riding

with him, but claimed that she opened the door and stepped from the car. He testified he looked back and did not see her so he assumed that she had walked off the road. Again he inferentially admitted he made no report. There would be no reason for his so doing if he believed the deceased had not been injured. Appellant's denials and contradictory and false accounts of how the accident occurred are strong evidence that he made no report thereof. The evidence as a whole supports the trial court's finding of guilt.

The judgment and the order are affirmed.

SCHOTTKY and PEEK, JJ., concur.



140 Cal.App.2d 218

Ben F. WELLS, Plaintiff and Respondent,
v.

**COCA COLA BOTTLING COMPANY OF
FRESNO, a corporation, Defendant
and Appellant.**
Civ. 4971.

District Court of Appeal, Fourth District,
California.

March 23, 1956.

Hearing Denied May 15, 1956.

Action against bottling company and retailer to recover damages for injuries sustained by plaintiff as a result of drinking bottled beverage containing glass. Upon death of original plaintiff, his wife, as administratrix of his estate, was substituted as plaintiff. The Superior Court, Tulare County, Glenn L. Moran and Robert K. Meyers, JJ., rendered judgment against bottling company, and the bottling company appealed. The District Court of Appeal, Barnard, P. J., held that since action had been fully tried to court without jury and sufficiently submitted when court's decision for plaintiff was indicated and proposed findings had been submitted by plaintiff prior to death, court had the pow-

er and the right after death of plaintiff to enter findings and judgment nunc pro tunc as of date prior to death.

Motion to dismiss appeal denied and judgment affirmed.

1. Trial ⇨368

Where action tried to the court without a jury was ordered submitted on briefs but no briefs were filed over a period of many months, trial court had jurisdiction to take case under submission and decide it without briefs.

2. Appeal and Error ⇨1170(1)

Trial ⇨368

Where action tried to the court without a jury was ordered submitted on briefs, but no briefs were filed over a period of many months, trial court was justified in believing that the parties had waived the privilege of filing briefs, and act of trial court in deciding case without briefs constituted, under such circumstances, a sufficient submission of case, and failure to enter formal order of submission before court indicated its decision and ordered preparation of findings was not reversible error, particularly where conflicts in the evidence were obvious and such that decision of case necessarily depended upon determination as to credibility of witnesses. West's Ann.Const. art. 6, § 4½.

3. Trial ⇨368

Where action tried to the court without a jury was ordered submitted on briefs with understanding that plaintiff was to file the first brief, defendant could file a brief, though no brief had been filed by plaintiff.

4. Judgment ⇨273(1)

The authority to order the nunc pro tunc entry of a judgment is inherent in the court and is to be exercised for the purpose of doing justice between the parties.

5. Trial ⇨368

Where cause has been tried and finally submitted, the rights of the parties are to be determined as they existed at the time of such submission.

6. Judgment ⇨273(2)

Inherent authority of court to order *nunc pro tunc* entry of judgment will always be exercised where it is apparent that delay in entering judgment was that of the court and was not due to any fault of the party seeking *nunc pro tunc* entry.

7. Motions ⇨54

A *nunc pro tunc* order should be granted or refused as justice may require, in view of the circumstances of the particular case.

8. Judgment ⇨273(5)

Nunc pro tunc entry of judgment as of a date prior to death of a party to action may be ordered, if case was in such condition at the date to which judgment is to relate back that a final judgment could then have been entered.

9. Judgment ⇨273(5)

Where action for injuries sustained by plaintiff as a result of drinking bottled beverage containing glass had been fully tried to court without jury and sufficiently submitted when court's decision for plaintiff was indicated, prior to death of plaintiff, proposed findings had been submitted by plaintiff four days before death, and record contained nothing to indicate that finding that there was no unreasonable delay in presenting proposed findings was not supported by the facts, court had the power and right after death of plaintiff to enter findings and judgment *nunc pro tunc* as of date prior to death.

10. Food ⇨25

Evidence was sufficient to support judgment against bottling company for injuries sustained by plaintiff as a result of drinking bottled beverage containing glass.

— — — — —

Ray W. Hays, James N. Hays, Fresno, for appellant.

Wm. M. Thornton, Exeter, for respondent.

BARNARD, Presiding Justice.

This is an action for damages for personal injuries to the original plaintiff al-

leged to have been caused by drinking a bottle of coca cola containing pieces of glass. The Coca Cola Bottling Company of Fresno and the owners of a grocery store where the bottle of Coca Cola was purchased were named as defendants in the action.

The action was tried before Judge Moran sitting without a jury on March 4, 1953. After both sides had rested the judge suggested he would like to have briefs filed. Both sides agreed and the judge said "Very well. It will be ordered that the case be submitted on briefs, 15, 15, 5." The preceding discussion indicates that the parties understood that the plaintiff was to file the first brief. No briefs were ever filed and on December 4, 1953, the court signed a memorandum indicating its decision against the Coca Cola Bottling Company, but in favor of its codefendants, and ordering the plaintiff to prepare findings of fact and conclusions of law.

The plaintiff's counsel presented proposed findings of fact and conclusions of law to the court on February 24, 1954. The plaintiff died on February 28, 1954. The findings of fact and conclusions of law were signed by the court and filed on March 2, 1954. A judgment awarding the plaintiff \$3,000 as against the Coca Cola Company was signed and filed on March 8, 1954. Thereafter, plaintiff's counsel learned that the plaintiff had died in Arizona on February 28. Judge Moran was retired for disability on March 26, 1954.

The Coca Cola Company filed a motion to set aside the judgment, and a notice of intention to move for a new trial; the plaintiff's wife, as administratrix, was substituted as plaintiff in the action; and plaintiff's counsel filed notice of a motion for an order amending the findings and judgment by changing the date thereof to February 26, 1954, and for an order that they be filed *nunc pro tunc* as of February 26. All of these motions were heard by Judge Meyers who entered a minute order on August 26, 1954, denying the motion to set aside the judgment, denying the motion for a new trial, and ordering that the findings of fact, conclusions of law, and judgment be amended by changing the date thereof

to February 26, 1954, and that they all be filed *nunc pro tunc* as of February 26. Later, a formal order to the same effect was signed and filed and the Coca Cola Bottling Company has appealed from the judgment thus entered.

It is first contended that the court had no power or jurisdiction to enter any judgment prior to the death of the original plaintiff because the case had not yet been submitted. It is argued that the case had been ordered submitted on briefs, that no order was later made submitting the case without briefs, and that the plaintiff had not waived his right to file the opening brief. While it is admitted that in a case tried before the court counsel has no absolute right to argument, and that whether argument should be allowed is a matter within the discretion of the court, it is argued that the court had here deferred submission and ordered that the cause be argued in briefs, that prejudice appears since the evidence was conflicting and the appellant had a right to point out the conflicts to the court, and that by rendering its decision without allowing the appellant to exercise that right the court exceeded its jurisdiction and committed prejudicial error.

[1-3] In *Franks v. Cesena*, 192 Cal. 1, 218 P. 437, where a similar order was made submitting the case on briefs, the court held that the submission of the case was not deferred until the filing of the final brief, and that the plaintiff could not dismiss the action because the matter had been submitted. Whether or not the instant case should be deemed to have been submitted at the close of the trial, when time was allowed for briefs, it can hardly be questioned that the court had the power to take it under submission and decide it when no briefs were filed over a period of many months. Assuming that in the exercise of that power the court should have then entered a formal order of submission, before indicating its decision and ordering the preparation of findings, and that the failure to do so was error, any such error should not be held reversible under the facts here appearing. Sec. 41½, Art. VI of the Const. The appellant had an ample

opportunity to comment on the conflicts in the evidence, in the absence of an opening brief if this was thought necessary, and could have filed a brief had it so desired. The conflicts in the evidence were obvious to anyone, including the court, and were such that the decision of the case would necessarily rest upon which of two sets of witnesses were believed. After such a long delay the judge was justified in believing that the parties had waived the privilege of filing briefs, and in considering the case as submitted. Under the circumstances, the act of deciding the case, taken in connection with the original order and the delay, was a sufficient submission of the case and no reversible error appears in this connection.

It is next contended that even if the court had jurisdiction to decide the case prior to the death of the original plaintiff "it had no right or power to enter the *nunc pro tunc* findings and judgment." It is argued that this was done by a judge other than the one who had heard the case; that a *nunc pro tunc* judgment may be entered only when a case is ready for the rendition of final judgment, and when the delay in entering the judgment is the result of some act or delay of the court and is not due to any fault of the party making the application; and that the delay in entering judgment here was due to no fault on the part of the court, but resulted solely from the respondent's failure to file any brief, and the failure to submit findings of fact and conclusions of law promptly after the court's decision on December 4, 1953.

[4-8] In *Fox v. Hale & Norcross S. M. Co.*, 108 Cal. 478, 41 P. 328, 329, it was pointed out that the authority of a court to order the *nunc pro tunc* entry of a judgment is inherent in the court and is to be exercised for the purpose of doing justice between the parties; that if the cause has been tried and finally submitted the rights of the parties are to be determined as they existed at the time of such submission; and that the decision which the parties have invoked the court to make is not necessarily the statutory and technical decision, but is the final determination of the rights of the parties. While it was pointed out that a

court will always exercise this authority when it is apparent that the delay in entering judgment is that of the court and is not owing to any fault of the party making the application, it is further stated that "a *nunc pro tunc* order should be granted or refused as justice may require, in view of the circumstances of the particular case." Similar principles are pointed out in *Norton v. City of Pomona*, 5 Cal.2d 54, 53 P.2d 952. In *Leavitt v. Gibson*, 3 Cal. 2d 90, 43 P.2d 1091, 1999, the court approved the general test, "* * * Was the cause in such condition at the date to which the judgment is to relate back that a final judgment could then have been entered?" In *Re Estate of Pillsbury*, 175 Cal. 454, 166 P. 11, 14, 3 A.L.R. 1396, the court said: "Where the suitor is not at fault the determinative consideration moving the court is whether or not the action at the death of the party was ready for the rendition of final judgment." In *Boyd v. Lancaster*, 32 Cal.App.2d 574, 90 P.2d 317, 319, it is said: "It is the important function of a *nunc pro tunc* order to supply deficiencies in the record of orders or judgments already actually made or rendered so as to make the record conform to the truth. If the cause has been tried and finally submitted to the court for its judgment, the rights of the parties are to be determined as they existed at the time of such submission." The circumstances involved in *Mather v. Mather*, 22 Cal.2d 713, 140 P.2d 808, and in *Corbett v. Corbett*, 113 Cal.App. 595, 298 P. 819, relied on by appellant, were entirely different and nothing said in those cases is inconsistent with the rules above referred to.

[9] This action had been fully tried with ample opportunity for argument given to both sides, and had been sufficiently submitted when the court's decision was fully indicated on December 4, 1953. The original plaintiff had submitted proposed findings four days before he died. While it would seem that this could well have been done at an earlier date, the court found,

in its *nunc pro tunc* order, that there had been no unreasonable delay in presenting proposed findings after the rendering of the decision on December 4, 1953. There is nothing in the record to indicate that the conclusion to this effect was not supported by the facts as then presented to the court. This action had been fully tried, the court had announced its decision, and findings had actually been prepared and submitted before the death of the original plaintiff. The delay in entering judgment was not due to any fault of the plaintiff, within the meaning of the established rules. When the proposed findings were submitted the plaintiff had done all that he could do, and at the time of his death the action was ready for the rendition of final judgment. The delay in signing the findings and entering judgment is the controlling factor in determining whether the *nunc pro tunc* principle should be applied. This delay was that of the court, and was not due to any fault of the plaintiff. We find nothing in the record which would justify a reversal on the ground that the court had no right or power to enter the *nunc pro tunc* findings and judgment.

[10] The appellant further contends that the evidence was not sufficient to sustain the judgment. It is admitted that "the case is replete with conflicting testimony concerning the facts surrounding the alleged injuries", but it is argued that "respondent's only evidence of damage is through his own mouth or that of his family, and by his doctor based entirely on the story told him by respondent without objective findings to sustain his opinion." It would serve no useful purpose to review the evidence here. While it was conflicting in many respects, it is amply sufficient to support the judgment. On a previous motion to dismiss the appeal a ruling was reserved with the matter to be considered with the merits of the case. The motion to dismiss is denied. The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

140 Cal.App.2d 228

Roy A. ROGERS, Plaintiff and Appellant,
v.

**BANK OF AMERICA NATIONAL TRUST
AND SAVINGS ASSOCIATION, as Ad-
ministrator of the Estate of Elizabeth A.
Rodgers, also known as Elizabeth A. Rog-
ers and E. A. Rodgers, alias Lizzie Green,
deceased, et al., Defendants and Respond-
ents.**

Civ. 16687.

District Court of Appeal, First District,
Division 2, California.
March 26, 1956.

Action to recover share of plaintiff's grandmother's estate allegedly held by defendant's decedent for plaintiff's benefit. The Superior Court, City and County of San Francisco, Melvyn I. Cronin, J., entered judgment adverse to plaintiff, after sustaining without leave to amend a demurrer to his fourth amended complaint, and plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that any cause of action the grandmother might have possessed as to alleged fraudulent real estate transactions was barred by statute of limitations, and held that plaintiff was not a proper party to bring action to recover personal property belonging to his grandmother's estate.

Affirmed.

1. Pleading ⇨252(1, 2)

As a general rule, an amended pleading supersedes prior one, which thereafter is disregarded, but if prior verified complaint contains allegations which make it fatally defective, defect cannot be cured by omitting such allegations in later complaint without proper explanation and court may then still consider said omitted allegations.

2. Limitation of Actions ⇨174(1)

Where alleged fraudulent real estate transactions took place prior to 1893, and decedent had knowledge thereof during many years prior to her death in 1906, any action on account thereof was barred by statute of limitations at time of decedent's death; and her heirs or next of kin could

not derive any such cause of action from her. West's Ann.Code Civ.Proc. § 338, subd. 4.

3. Limitation of Actions ⇨146(1)

Alleged acknowledgment that property had been wrongfully taken, and promise to account therefor, could not, when admittedly oral, take case out of operation of statute of limitations. West's Ann.Code Civ.Proc. §§ 338, subd. 4, 360.

4. Descent and Distribution ⇨91(1)

Executors and Administrators ⇨154

Action to recover personal property belonging to decedent's estate must be brought by executor or administrator of estate, and only in exceptional circumstances, when representatives of estate cannot or will not act, or when they obstruct action, may such action be brought by heirs; and fact that estate has not been probated or that there is no representative is not such a circumstance.

5. Descent and Distribution ⇨91(1)

Decedent's daughter's alleged promise to account to decedent's grandson, for property such daughter acknowledged to belong to grandson as his share of decedent's estate and which such daughter allegedly acknowledged wrongfully taking, was nugatory if meant to give to grandson personally right to bring action to recover personal property belonging to decedent's estate.

R. A. Rogers, in pro. per.

Dreher, McCarthy & Dreher, San Francisco, for respondents.

NOURSE, Presiding Justice.

Plaintiff appeals from a judgment entered on the sustaining without leave to amend of a demurrer to his fourth amended complaint against the administrator of the Estate of Elizabeth A. (Green) Rodgers, hereinafter called the decedent. To all four prior drafts demurrers had been sustained with leave to amend. All demurrers contained among other grounds that the complaint did not state facts sufficient to constitute a cause of action and that plaintiff had no legal capacity to maintain the action. We have con-

cluded that the fourth amended complaint also suffers from said and other defects.

The basis of the complaint in all its forms is that decedent allegedly stole or took by fraud from plaintiff's grandmother Elizabeth McConnell real and personal property, and that she commingled the moneys and securities so obtained with her own. Decedent was a daughter of the second marriage of Elizabeth McConnell, whereas plaintiff is the only issue of Maria T. Rogers, a daughter of the first marriage of Elizabeth McConnell. Elizabeth McConnell died in San Francisco on March 27, 1906. Several more descendants of hers are mentioned in the complaint—the children of decedent as defendants—but none of them seem to have been served and they are not parties to the action. It is further alleged that in September 1947 and April 1948 decedent informed plaintiff that she held property which belonged to plaintiff as his share in the estate of Elizabeth McConnell from whom she had wrongfully taken it, which matters she had fraudulently concealed from the heirs and next of kin of Elizabeth McConnell, and that decedent had then promised fully to account therefor to plaintiff, but that she left California on October 17, 1948 taking her possessions with her, and that she died in Georgia on March 8, 1950 without rendering the accounting promised.

Plaintiff timely filed his claim in the estate of decedent, but it was rejected. Plaintiff's prayer is in substance that he recover his share of the Estate of Elizabeth McConnell which decedent held for plaintiff's benefit, that the administrator of the estate of decedent account for the property so held and that a trust be imposed on the assets of the estate of decedent for the value of plaintiff's said interest.

[1] The allegations as to decedent's depredations in the 4th amended complaint are brief. Many details contained in the 2nd and 3rd amended complaints among others as to the time of the alleged acts, are omitted from the last complaint allegedly on the ground that they were "irrelevant, redundant and evidentiary." It is not contended that they were incorrect or that the several complaints do not relate to the same facts. All complaints are verified. To the general

rule that an amended pleading supersedes the prior one, which thereafter is disregarded, there is the well settled exception, that if a prior verified complaint contains allegations which make it fatally defective, the defect cannot be cured by omitting said allegations in the later complaint without proper explanation and the court may then still consider said omitted allegations. *Owens v. Traverso*, 125 Cal.App.2d 803, 808, 271 P.2d 164; *Lee v. Hensley*, 103 Cal. App.2d 697, 709, 230 P.2d 159; *Slavin v. City of Glendale*, 97 Cal.App.2d 407, 411, 217 P.2d 984.

[2, 3] With respect to the taking of real property the third amended complaint alleged in substance that decedent together with her first husband Alexander Montgomery by means of forged deeds transferred said real property to fictitious persons, unlawfully sold said properties and commingled the money received therefrom with their own. Alexander Montgomery died on November 4, 1893. Elizabeth McConnell thereafter engaged in the saloon business in San Francisco and died in Oakland on March 27, 1906. In the second amended complaint it is moreover alleged that "plaintiff's grandmother, by reason of the said Lizzie Green, [decedent], having forged her name to the conveyances of said properties did from and after August 28, 1884 [the date of the marriage of decedent to Montgomery], and up to the time of her death, use the name of Elizabeth A. Inskip, alias Inskeep" [Inskip was the name of her first husband, Green the name of her second husband, the father of decedent]. It is also alleged in the second amended complaint that when Elizabeth McConnell in her saloon business accumulated an estate, she "specifically refrained from acquiring any real property." These allegations show that Elizabeth McConnell during many years prior to her death knew of the fraudulent real estate transactions on which the action of plaintiff is in part based and which took place prior to Montgomery's death in 1893, and that any action of Elizabeth McConnell against her daughter on that ground was barred by the statute of limitations, § 338, subd. 4, Code of Civil Procedure, at the time of Elizabeth McConnell's death so that her heirs or next of kin could not derive any

such cause of action from her. Said bar of the statute was duly stated as a ground of defendant's demurrer to the fourth amended complaint. No circumstance tolling the statute is alleged in the complaints and it is not contended by appellant that such a ground could be introduced by further amendment. The promises made by decedent in 1947-1948 of which it is not alleged that they were made in writing and of which it is alleged in the second amended complaint that they were made orally cannot take the case out of the operation of the statute. § 360 of the Code of Civil Procedure; *Norton v. Bassett*, 154 Cal. 411, 418, 97 P. 894.

[4, 5] With respect to the taking of personal property it is alleged in the fourth amended complaint that decedent broke open a trunk of Elizabeth McConnell at her home in Oakland and took from it moneys and securities in excess of \$26,000, and that she concealed said matter from the heirs at law and next of kin of said Elizabeth McConnell. In the third amended complaint it is stated that said theft took place on the day of Elizabeth McConnell's death (March 27, 1906) and that at the funeral on March 30, 1906 decedent informed plaintiff and his mother that Elizabeth McConnell had died penniless. Her estate was never probated.

It cannot be said that the statute has barred any action for said alleged theft because there are allegations, not fully stated above, as to how the theft was concealed, that it was only revealed to plaintiff in 1947-1948 and that decedent was absent from the state since October 1948 so that the running of the statute was suspended. However, the complaint does not state a cause of action in plaintiff and does not show his capacity to sue. The action for the theft evidently was part of Elizabeth McConnell's estate. It is not alleged whether Elizabeth McConnell died testate or intestate and why in either case plaintiff was entitled to any part of her estate. If she died intestate plaintiff's mother, who was alive at the time of Elizabeth McConnell's death, would succeed to the exclusion of plaintiff. It is not alleged that plaintiff's mother died, testate, intestate or at all. Possibly these defects

could be cured in some way by further amendment but appellant does not complain of the fact that he is not allowed further to amend and tries to uphold his present (fifth) draft to which the sustaining of a demurrer was certainly justified. Moreover, even if appellant could allege that he was directly or indirectly entitled to a share of the estate of Elizabeth McConnell such would not entitle him to bring action for personal property belonging to the estate. It has long been settled that such action must be brought by the executor or administrator of the estate. *Robertson v. Burrell*, 110 Cal. 568, 574 et seq., 42 P. 1086; *Holland v. McCarthy*, 177 Cal. 507, 171 P. 421. Only in exceptional circumstances when the representative of the estate cannot or will not act or obstructs the action, may such action be brought by heirs. 21 Cal.Jur.2d 410. The fact that the estate has not been probated or that there is no representative is not such a circumstance. In *Chard v. O'Connell*, 48 Cal.App.2d 475, 477, 120 P.2d 125, 126, this court said: "Since plaintiff in that count attempts to sue as an heir and expressly alleges that no administrator of her mother's estate had ever been appointed, that count fails to state a cause of action. It was expressly held in *Holland v. McCarthy*, 177 Cal. 507, 171 P. 421, that an action to set aside a transfer of personal property by a decedent on the ground of fraud or undue influence must be brought by an executor or administrator and cannot be maintained by an heir in the absence of allegations of circumstances taking the case out of the general rule." The alleged promise of decedent to account to plaintiff, who was not the person entitled to the accounting under the above rule is nugatory if meant to give the right to him personally. The allegation of said promise cannot be permitted to circumvent the above rule of our law "designed to protect the rights and interests, not only of the estate of the decedent, but of all persons interested therein, whether creditors, claimants, heirs, or legatees." *Holland v. McCarthy*, supra, 177 Cal. at page 509, 171 P. at page 422.

Judgment affirmed.

DOOLING and KAUFMAN, JJ., concur.

140 Cal.App.2d 42

James S. DRESSER, Petitioner and Appellant,

Minnie D. Smith, Special Administratrix of the Estate of Cecil W. Smith, Deceased, Petitioner and Appellant,

v.

CITY OF TORRANCE, a municipal corporation; and the City Council of the City of Torrance; and Nicholas O. Drale, Albert Isen, Mervin M. Schwab, Willys G. Blount and Victor E. Benstead, Jr., as City Councilmen constituting said City Council; and the following as officers of said City, to wit: George W. Stevens, as City Manager, Albert Bartlett, as City Clerk, Walter C. Bradford, as Personnel Clerk, and Harriett V. Leech, as City Treasurer, Defendants and Respondents.

Civ. 21378, 21379.

District Court of Appeal, Second District,
Division 2, California.

March 20, 1956.

As Modified on Denial of Rehearing

April 18, 1956.

Petition for a writ of mandate based upon a nullity of city council's action in removing petitioners permanently from the city's service. From an adverse judgment in the Superior Court, Los Angeles County, Arnold Praeger, J., the petitioners appealed. The District Court of Appeal, Moore, P. J., held that where the Board of Review merely recommended suspension of petitioners from their employment the city council had no authority to remove them, and that the petitions were not barred by laches because the petitioners waited four months and 19 days before filing the petitions.

Judgment in accordance with the opinion.

1. Municipal Corporations ⇨192

Where building inspector and assistant were suspended by the Board of Review

and ordinance provided that the recommendations of the Board should be adopted by the city council or appointive officer and the employees were appointed by the city manager and not by the council, the city council had no authority to remove the employees.

2. Mandamus ⇨172

In a mandamus proceeding to review the conduct of a local administrative tribunal, chief issue is whether the person affected has been accorded a hearing as prescribed by law and whether there is substantial evidence to support the charge.

3. Municipal Corporations ⇨192

Where building inspector and assistant were in the service of the city as civil service employees and had been disciplined by the review board by suspension, action of the city council with respect to the employees was limited to that of approving the action of the board under the terms of the ordinance and it had no power to remove the employees with or without a complaint or a trial.

4. Municipal Corporations ⇨218(8)

While, in case of an officer appointed by the council of the city of Torrance, it has the power to overrule the board's decision under the ordinance, and in case of a department head appointed by the city manager, the council could overrule the trial board by a vote of four members under the charter, the council was empowered to annul or reduce the penalty of suspension imposed on the employees but not to increase it.

5. Equity ⇨72(1)

There is no laches without prejudice suffered by him who pleads it and in such case prejudice is not presumed.

6. Mandamus ⇨143(2)

City employees seeking reinstatement to their positions from which they were wrongfully discharged were not guilty of

laches precluding resort to mandamus for reinstatement though they waited four months and 19 days to file their petition, whether city suffered no prejudice from the delay.

7. Evidence ⚡83(1)

Presumption obtains that a position in the public service vacated by discharge or suspension will be filled.

8. Equity ⚡71(1)

It is not merely the lapse of time that constitutes laches, but rather the consequences of the delay.

9. Constitutional Law ⚡277(2), 278(1)

The deprivation of any person of his possessions or his office may be only according to law.

John E. McCall and James C. R. McCall, Los Angeles, for appellants.

James M. Hall, Redondo Beach, Stanley E. Remelmeyer, Torrance, for respondents.

MOORE, Presiding Justice.

Appellants were employees of the City of Torrance as Building Inspector and Assistant Building Inspector, respectively, for salaries of \$457 and \$388 per month. They had been appointed by the City Manager to such positions in the classified civil service of the city in May 1950 and in July 1949. To qualify for such positions they had successfully taken competitive examinations. Their employment opened up to them all the rights and privileges of civil service employees, including tenure during good behavior. Both were suspended March 10, 1954. Pursuant to their demand, the City Manager filed charges on March 12. Appellants filed answers within ten days and at once requested a review of the accusations. On April 14 both were tried before the Civil Service Board sitting as a Board

of Review pursuant to provisions of Ordinance 326 on the written charges of the City Manager that appellants had failed to enforce Ordinances 462 and 643 adopting certain Uniform Building Code provisions, and had failed to maintain adequate records of inspections. The Smith accusation set forth twelve specifications, while the Dresser charge alleged ten.

The conclusions and decision of the Board (Exhibit A) were signed and filed on April 22. The board were "in agreement" that conditions in the Building Department needed correcting and concluded that appellants had not been given sufficient instruction properly to perform their duties, and that neither accused was thoroughly familiar with the requirements of the Uniform Building Code; that Smith had been negligent and that "there is a real need for an in-service training program for all building inspectors." They recommended the institution of such program. It was the decision of the Board that Dresser be suspended for 75 days without pay, and Smith 60 days without pay from March 10, 1954, to be then "reinstated to their previous positions with all rights restored."

When the City Council convened on April 27, 1954, the clerk read the "communication from the Civil Service Commission" (Exhibit A) and another document, purported "findings of fact and judgment from the Board of Review, Civil Service Commission" which, according to the minutes but not the fact, found Dresser and Smith guilty of having failed to "enforce violations" specified ordinances and provisions of the Uniform Building Code, and having "failed to maintain adequate records on inspections." By motion duly carried, the Council voted to "approve the findings of the Civil Service Board, excluding the recommendations and the decision." By two other motions carried unanimously, Dresser and Smith were "removed from the services of the City of Torrance."

At a meeting of the City Council on May 25, 1954, a petition of each appellant was presented to set aside the orders of removal of April 27. The Council was advised by City Attorney Hall that the Council's action of April 27 was "definitely subject to challenge." Nevertheless, the Council unanimously resolved that the action of April 27 with reference to both appellants be reaffirmed.

Action for Writ of Mandate

Basing their petition upon the nullity of the council's action in removing them permanently from the city's services, but not contesting the authority of the Board of Review to suspend them, appellants separately filed petitions for writs of mandate to compel the Council to reinstate them in the same offices they held prior to their suspension by the City Manager. Dresser computed his damages at \$14.75 per calendar day, and Smith his at \$12.75; both prayed for damages from the dates of reinstatement set by the Board, and according to their respective salaries.

[1] The City Council had no authority to remove either appellant. Ordinance 326 provides for civil service for the City of Torrance, and in section 14, the "findings and conclusions of the Board of Review may contain such recommendations as said Board shall deem warranted, and *shall be adopted by the City Council or appointive officers*, except that where said decision relates to an officer or employee appointed by the City Council, said Council may, by four-fifths vote, modify or overrule such decision. *The decision and recommendations of the Civil Service Commission and any action taken by the City Council shall be final and conclusive.*"

The Council's power to overrule the Board of Review did not come into action under Ordinance 326 as the employees involved were appointed by the City Man-

ager and not by the City Council. The "appointive" officer, Mr. Stevens, should have received the official communication of the Board of Review which was "final and conclusive" for suspension for a certain number of days, and then for reinstatement.

Respondents' contention that as heads of departments, appellants could be removed by the City Council by overruling the Board's decision is without support in fact or law. The Charter of Torrance, Article VII, section 5(e) gives to the City Manager the supervision and control over heads of departments and the power to control the administrative functions of such departments; to appoint, from Civil Service eligibility lists, *heads of departments*; to prefer charges against them "in the manner prescribed by * * * Civil Service Ordinance"; but any decision of the Civil Service Board or Trial Board may be overruled by an affirmative vote of four members of the City Council.

Subsection (e) does not include either Dresser or Smith as they were both in the "Building Department" as inspectors, and not as department heads. This is clear as to Smith who was an assistant inspector. As to Dresser, it appears that his efficiency reports were signed by "Geo. W. Stevens" (the City Manager) as "Dept. Head." If Dresser was not a department head, section 14 of Ordinance 326 above quoted governs the matter of review.

The positions of both suspendees were filled immediately by "temporary" appointments (Ordinance 326, sec. 14). Such appointees received higher salaries than those paid appellants when the Building Department was "reorganized." The new inspectors are not permanent.

Instead of following the course prescribed by the Charter and Ordinance 326, the Council attempted to oust appellants from their civil service status without

their having been convicted of any wrong by the reviewing Board. The action of the City Council was without authority, and unless upset by judicial action would result in the ruthless deprivation of vested rights.

[2-4] In a mandamus proceeding to review the conduct of a local administrative tribunal, the chief issue is whether the person affected has been accorded a hearing as prescribed by law and whether there was substantial evidence to support the charge. *La Prade v. Department of Water & Power*, 27 Cal.2d 47, 53, 162 P.2d 13. Inasmuch as both appellants were in the service of the City and were civil employees, and had been disciplined by the Trial Board, the action of the City Council was *ultra vires*, illegal and void. Its power in this instance was limited to that of approving the action of the Board. It had no power at all to remove appellants, with or without a complaint and a trial. The Council sat in a quasi-judicial capacity, it could go no further than the reviewing Board had gone, after notice. No ordinance or charter provision authorized it to enlarge a penalty fixed by the Board. *Peters v. Hobby*, 349 U.S. 331, 75 S.Ct. 790, 99 L.Ed 1129. In the case of an officer appointed by the Council, it has power to modify or overrule the Board's decision (under the Ordinance); in the case of a department head appointed by the City Manager, the Council may overrule the Trial Board by vote of four members (under Charter). This means to annul or reduce the penalty, but not to increase it. *Peters v. Hobby*, *supra*.

As a result of the City Council's action, appellants' names were stricken from the payroll of the City and from the roll of civil service employees; they were excluded from their employment. Despite the language of the City Charter and of the Ordinance 326 providing for classified service of "all employees who are regularly and continuously employed in the service of the City," the Council reaffirmed its

April 27th order on May 25. No salary has been paid to Dresser since 75 days after March 10, 1954, when his legal suspension expired although he stands in constant readiness with ability to perform the services for which he was employed. No salary was paid to Smith starting sixty days after his suspension, although he stood ready, willing and able until his death on February 8, 1956.

Were Appellants Guilty of Laches?

Four months and nineteen days after the City Council's final action discharging appellants, the latter served petitions for writs of mandate upon respondents, and filed them on October 18, 1954. The trial court made finding that within the period between the final action of the City Council and the serving of the petitions, "the City of Torrance, through its City Council, has completely reorganized its building department and has made all building inspectors subordinates to the head of the building department, and has employed building inspectors to take" the places which were formerly occupied by petitioners; that petitioners were "aware of said reorganization plan as it was accomplished by ordinance, and took no step to inaugurate the present proceeding until the reorganization plan was consummated." Basing its action upon such finding, relief was denied both appellants.

Was City Prejudiced By Delay?

The finding that the City of Torrance was prejudiced by reason of the delay in filing the petitions appears to have been based upon the theory (1) that such a change had resulted from enactment of Ordinance 724 on January 4, 1955, (2) that new employees had in the interim been placed upon the City's payroll and (3) if appellants should be reinstated, the City would be required to pay two salaries for each position filled by such reinstatements. In the first place, the positions vacated by the suspensions of appellants were prompt-

ly filed by "temporary appointments" of Messers West and Walsh by the City Manager within two days after the suspension on March 10, 1954. As to the so-called reorganization of the Building Department, the respondents' answer alleged that each petitioner "was aware of said reorganization plan as it was accomplished by Ordinance." This is denied in petitioners' replication and the transcript shows that no oral evidence was taken and there was no written evidence to overcome that denial. The finding that the City Council "has made all building inspectors subordinates to the head of the building department, and has employed building inspectors to take" the places formerly occupied by appellants is borrowed from the answer. The finding itself discloses that positions substantially identical with those held by appellants are still in being. The fact that all building inspectors now are subordinates of the "head of the building department" does not disqualify either appellant. They were already subordinate to some higher authority. That the salaries of the so-called new positions are greater than those formerly paid appellants could cause no detriment to the City. Its City Charter or City Council fixed the new salaries for such men as might qualify according to law. Appellants were qualified.

When was the "reorganization" accomplished? Ordinance 724 aiming at such purpose was not passed until January 4, 1955. At that time, the Board of Review had failed to find appellants guilty of any wrong and had merely ordered their suspensions. The record discloses that the Board tried appellants on the charges filed against them by the City Manager, adopted findings and made a decision, but nowhere does it appear that they convicted appellants of wrong-doing: the court found they did not do so. The Board determined that the Building Inspectors had not been

given sufficient instructions; that Dresser "was not thoroughly familiar with the requirements of the Uniform Building Code" and that Smith "was not as familiar with the Code as he should have been and that he was negligent in his duties." The appointees to the positions vacated by the suspension of appellants took their places as temporary employees on March 12, 1954. Hence, the City could not be liable for their removal.

[5-7] The trial court did not consider the merits of the controversy. It determined that inasmuch as appellants had waited four months and 19 days to file their petition herein, they were guilty of laches and could not recover without regard to the justice of their cause. Now, there is no laches without prejudice suffered by him who pleads it. *Hayman v. City of Los Angeles*, 17 Cal.App.2d 674, 680, 681, 62 P.2d 1047. Prejudice is not presumed. We have shown above that the City suffered no prejudice. It cannot be maintained that prejudice was suffered by the City's employment of Walsh and West in the positions vacated by the suspension of appellants. It is presumed that a position in the public service vacated by discharge or suspension will be filled. *Hayman v. City of Los Angeles*, supra. But it is not shown that respondents could not reinstate appellants. The lapse of four months and 19 days before they filed their petitions raised no presumption of prejudice from such delay. *Almassy v. Los Angeles County Civil Service Commission*, Cal.App., 200 P.2d 846, 855. It was said in the *Almassy* decision that the mere lapse of four months from the date of the action of the commission has not "been held to give rise to a presumption of prejudice."¹

[8] Neither is there any proof of prejudice. If prejudice cannot be presumed, and

1. A hearing was granted, 34 Cal.2d 387, 210 P.2d 503, and the case was decided upon other grounds. However, the lan-

guage of Mr. Justice Shinn quoted in the text appeals to us as sound.

if it is not proved, there is no laches to support the judgment below. It is not merely the lapse of time that constitutes laches, but rather the consequences of the delay. *Jones v. City of Los Angeles*, 120 Cal.App.2d 858, 861, 262 P.2d 37; *Hayman v. City of Los Angeles*, supra. While many decisions have approved of brief periods as sufficient to constitute laches, *such instances are based* upon the failure of the plaintiff to show reasons for his delay. *United States ex rel. Arant v. Lane*, 249 U.S. 367, 39 S.Ct. 293, 63 L.Ed. 650, 651. The instant cause does not fall in that category. Appellants had been busily engaged in their sessions with the City Manager, the Trial Board and the City Council from March 10 to May 25. To file a petition for mandamus required the painstaking labors of one or more lawyers, their research, preparation of pleading and many conferences. They filed the petition October 18, 1954. The intervening period is not greater than the time frequently consumed by a court in deriving a judgment after all arguments have been made and briefs filed. The counsel retained by appellants were experienced lawyers. In view of their capabilities, it cannot be said that in taking the time to file, they needlessly delayed the commencement of the action. They had to consider not only the restoration of appellants, but the question of the measure and the amount of damages. Reinstatement and damages were both allowed in *Brown v. State Personnel Board*, 43 Cal.App.2d 70, 73, 110 P.2d 497. There relief was granted notwithstanding a delay of over two years in filing action. In view of the issues involved, the pleadings to be prepared, the ordinances, Charter, decisions to be studied and considered, conferences to be held, the delay of appellants in filing their petitions was not unreasonable in view of the groundless action taken by the City Council.

[9] But whatever might be said of the merits of the case or of appellants' delay in filing, it is a basic element of our juri-

dical system that the deprivation of any person of his possessions or his office may be only according to law. That policy was not followed herein. Because the City Council acted contrary to law, its order is of no legal significance. Also, in keeping with the principle of tenure by public employees, Ordinance 326 makes provision in case of "reduction of personnel due to the abolition of a position" that within two years "the discharged employee shall be preferred over any other qualified persons for such position."

It is ordered that both judgments be and they are reversed.

FOX and ASHBURN, JJ., concur,



139 Cal.App.2d 888

Robert I. RETHERS, Plaintiff, Cross-Defendant and Appellant

v.

Harriet Rose RETHERS, Defendant, Cross-Complainant and Respondent.

Civ. 16603.

District Court of Appeal, First District,
Division 2, California.

March 19, 1956.

Rehearing Denied April 18, 1953.

Divorce proceeding. After wife had obtained judgment on cross-complaint, the Superior Court, City and County of San Francisco, Orla St. Clair, J., granted husband new trial, and wife appealed. Before appeal, wife's counsel obtained order allowing certain fee for services on appeal, and husband contested this allowance. The District Court of Appeal, Nourse, P. J., held that award of \$1500 to wife for attorney fees for services on appeal, where attorney filed six page brief discussing only one of several grounds urged for new trial,

was excessive, and order would be reversed with directions to trial court to fix reasonable fee of not more than \$300.

Order reversed.

See also 294 P.2d 968.

Divorce ⇐227(2), 287

Award of \$1,500 to wife for attorney fees for services on appeal by wife from order granting husband new trial in divorce proceeding, where attorney filed six page brief discussing only one of several grounds urged for new trial, was excessive, and order would be reversed with directions to trial court to fix reasonable fee of not more than \$300.

Dean Cunha, San Francisco, for appellant.

B. W. Hirschberg, Jr., Raymond H. Schubert, San Francisco, for respondent.

NOURSE, Presiding Justice.

Proceedings for a divorce were commenced by a complaint filed by Robert Rethers in the City and County of San Francisco. The wife filed a cross-complaint. The original complaint was abandoned and the wife had a favorable judgment on her cross-complaint. The defendant to the cross-complaint filed a notice of motion for a new trial which was granted. Mrs. Rethers appealed from that order in case number 16605 which appeal is now pending.¹ Before that appeal had been perfected Mrs. Rethers' counsel obtained from a trial judge who had not heard the trial an order awarding her attorney fees for services on appeal of \$1,500 together with costs of \$150. Mrs. Rethers had theretofore been awarded the sum of \$300 as attorney fees for the trial of the action.

Appellant's attack upon the order is based upon the single ground that the award is excessive and an abuse of judicial discretion.

Appellant's brief in support of her appeal in case number 16605 consists of six printed pages. She discusses only one of the

grounds urged for a new trial. The respondent, in his brief, argues the validity of the various grounds urged by him in support of his motion for a new trial.¹ Appellant made no reply and has given this court no assistance in support of her appeal from the order and no answer to the several grounds urged on the motion for a new trial.

Counsel's services as confined to the appeal alone were not worth more than \$300.

The order is reversed with directions to the trial court to fix a reasonable fee—not in excess of \$300.

Order reversed.

DOOLING and KAUFMAN, JJ., concur.



140 Cal.App.2d 28

Robert I. RETHERS, Plaintiff, Cross-Defendant and Respondent,

v.

Harriet Rose RETHERS, Defendant, Cross-Complainant and Appellant.

Civ. 16605.

**District Court of Appeal, First District,
Division 2, California.**

March 20, 1956.

Divorce proceeding initiated by husband. After judgment for wife on her cross-complaint, the Superior Court, City and County of San Francisco, Albert C. Wollenberg, J., granted husband new trial, and wife appealed. The District Court of Appeal, Nourse, P. J., held, in part, that in view of evidence of both parties of existence of debts of community, and absence of finding as to extent of such debts, award of all community property to wife, without deducting debts or making provision for their discharge, was against law, and con-

¹. See 294 P.2d 968.

stituted justification for order granting new trial.

Order affirmed.

1. Pleading ⇨147

Except with respect to requirement of one final judgment, an action on a cross-complaint is considered a separate action in which the original defendant is the plaintiff. West's Ann.Civ.Code, § 128.

2. Divorce ⇨109

Though proof of residence of husband, who initiated divorce proceeding, was lacking, such would not defeat jurisdiction of court of wife's cross-action for divorce, upon satisfactory proof of residence of wife. West's Ann.Civ.Code, § 128.

3. Divorce ⇨108

It is sufficient in cross-action for divorce that cross-complainant allege and prove either that original plaintiff or that cross-complainant has been resident of state and county for period required by statute. West's Ann.Civ.Code, § 128.

4. Divorce ⇨184(4)

Where, upon appeal by wife from order granting husband new trial in divorce proceeding, without specification of grounds, husband claimed that new trial was justified by excessiveness of permanent alimony granted wife, in view of nonspecification of insufficiency of evidence in order, it would be conclusively presumed that order was not based on ground that evidence did not support alimony to that extent. West's Ann.Code Civ.Proc. § 657.

5. Divorce ⇨151

Where, upon appeal by wife from order granting husband new trial in divorce proceeding, without specification of grounds, husband claimed that new trial was justified by excessiveness of permanent alimony granted wife, assertion of justification of order could only be based on ground that judgment was against law if evidence were insufficient in law to support such award and without conflict in any material point. West's Ann.Code Civ. Proc. § 657.

6. Divorce ⇨151

In divorce proceeding, upon appeal by wife from order granting husband new trial without specification of grounds, in which husband claimed that order was justified by excessiveness of permanent alimony granted wife, in view of conflict in evidence as to income of wife and husband, award of alimony totalling \$4,500 over five year period was not against law. West's Ann.Code Civ.Proc. § 657.

7. Divorce ⇨254

Where divorce decree awarded wife all community property, and, though evidence of both parties showed that there were community debts, no finding was made on extent of such debts, decree was against law.

8. Divorce ⇨151

In divorce proceeding, upon appeal by wife from order granting husband new trial without specification of grounds, in which husband claimed that it was error for which trial court could grant new trial to award all community property to wife without deducting community debts or making any provision for their discharge, in view of evidence of both parties of existence of debts of community, and absence of finding as to extent of such debts, award of all community property to wife was against law, and constituted justification for order granting new trial.

9. Appeal and Error ⇨854(6)

An order for new trial will be affirmed if it may be sustained on any ground.

B. W. Hirschberg, Jr., San Francisco, for appellant.

Dean Cunha, San Francisco, for respondent.

NOURSE, Presiding Justice.

This is an appeal from an order granting a new trial. Plaintiff, husband, sued for divorce on the ground of cruelty alleging residence for the required period in the City and County of San Francisco. Defendant, wife, cross-complained on the grounds of wilful desertion and extreme

cruelty and also alleged residence for the required period in the City and County of San Francisco. No evidence was presented on the husband's complaint. At the trial of the wife's cross-complaint both she and a son of hers by a former marriage testified to her residence in San Francisco during more than the required period. An interlocutory decree in her favor was duly entered on the cross-complaint. The husband moved for a new trial on five of the statutory grounds, one of which was "insufficiency of the evidence to justify the judgment and that said judgment is against law." The order granting the motion for a new trial, from which the wife appeals, does not contain any designation of the grounds on which it is based.

The husband urged three points in support of his motion in the trial court and he urges the same points on appeal in support of the order. Only with respect to the first one has appellant briefed her position.

[1-3] 1. The contention that the lack of legally corroborated evidence of the residence requirement of the husband justified the granting of the new trial is without merit. It is true that in that respect there was no other corroboration than the admission and testimony by the wife, and that, if the husband had been the plaintiff on whose complaint the judgment was granted, such would have vitiated the judgment as a matter of law. *Eriksen v. Eriksen*, 57 Cal.App.2d 532, 535-536, 134 P.2d 825. However, the judgment was granted on the cross-complaint of the wife and her testimony as to her residence was duly corroborated. Except with respect to the requirement of one final judgment, an action on a cross-complaint is considered a separate action in which the original defendant is the plaintiff. "These cross-actions * * * are * * * distinct and independent causes of action, so that when properly interposed and stated the defendant becomes in respect to the matters pleaded by him, an actor, and there are two simultaneous actions pending between the same parties wherein each is at the same time both a plaintiff and a defendant." *Pacific Finance Corp. v. Superior Court*,

219 Cal. 179, 182, 25 P.2d 983, 984, 90 A.L.R. 384; *Case v. Kadota Fig Ass'n*, 35 Cal.2d 596, 603, 220 P.2d 912. In *Coggins v. Superior Court*, 127 Cal.App. 412, 16 P.2d 148, this court held that the fact that a court had no jurisdiction over the subject matter of the original complaint did not prevent it from deciding the action on the cross-complaint if that action was within its jurisdiction. In *Pacific Finance Corp. v. Superior Court*, supra, it was held that the involuntary dismissal of the original action does not require dismissal of the cross-action. In the present case the lack of proof of a jurisdictional requirement of the original action cannot destroy the court's jurisdiction of the cross-action when the jurisdictional requirements of the cross-action are independently proved. The provision of section 128 of the Civil Code which exempts the cross-complainant from the residence requirement (if the original complainant is a resident as required by that section) does not imply that with respect to the cross-action the residence requirement cannot be fulfilled by the residence for the required period of the cross-complainant, the actual plaintiff in the cross-action. No case in this state has been cited or is known to us which holds that such is insufficient. In *Bullard v. Bullard*, 189 Cal. 502, 504, 209 P. 361, 362, it was said: "There is much reason for concluding that in construing this section [§ 128 Civ.Code], as applied to a case wherein the action is for separate maintenance with a cross-action for divorce, the word 'plaintiff' should be construed to mean 'cross-complainant.'" However, it was there held unnecessary to decide the point. In *Coleman v. Coleman*, 23 Cal.App. 423, at page 425, 138 P. 362, at page 363, it was held that a cross-complainant who is not a resident of the state or the county in which the action is brought is not entitled to affirmative relief unless proof is offered that the plaintiff has resided in the jurisdiction for the requisite period. The court then continued: "Without proof at the trial that one of the parties to the action had resided in the state and county for the necessary period, the court can never acquire jurisdiction to grant a di-

vorice to one or other of the parties." Accordingly it is said in 16 Cal.Jur.2d 355: "A cross complainant * * * need not be a resident to entitle him to a divorce, unless the plaintiff has not resided in the state for the statutory period. Without proof that at least one of the parties has resided in the state and county for the necessary periods, the court cannot acquire jurisdiction to grant a divorce to either." We hold that in a cross-action for divorce it is sufficient that the cross-complainant alleges and proves either that the original plaintiff or that the cross-complainant has been a resident of the state and county for the period required by section 128, *supra*.

[4-6] 2. Respondent contends that the granting of the new trial is justified by the excessiveness of the permanent alimony granted the wife (\$75 a month for 5 years), relying on *Hall v. Hall*, 42 Cal.2d 435, 440, 442, 267 P.2d 249, for the court's discretion to grant a new trial on that ground. It must be noted that insufficiency of the evidence is not specified in the order so that it is conclusively presumed that the order was not based on the ground that the evidence did not support alimony to that extent. Code Civ.Proc. § 657. At most could the granting of a new trial be considered justified on the ground that the judgment was against law if the evidence would be insufficient in law to support such award and without conflict in any material point. *Verzola v. Russi*, 135 Cal.App.2d 330, 287 P.2d 166, and cases there cited. Such is not the case. The evidence is not without conflict as to the income of the wife, she testifying that it was only \$150 a month in the last and best year, the husband that he evaluated it at \$300 a month. There was further evidence favorable to the award to the effect that at the time of the trial the wife was 59 years old, that her income as partner in a bridge studio was uncertain, that she was under medical care, that for a reasonable standard of life she needed \$250 a month in total, that the husband in the last year had earned \$2,800 before deductions as a post office employee and owned separate property found by the

court to amount to \$50,000, based on his testimony that he had inherited \$14,000 from an aunt and that he was entitled to a share in the estate of his deceased mother of which he testified that he did not know the size but that the estate totaled more than \$50,000. Under this evidence it cannot be said that a total alimony award of \$4,500 over 5 years is against law.

[7,8] 3. Respondent contends that it was error for which the trial court could grant a new trial to award all community property to the wife without deducting community debts or making any provision for their discharge. There was evidence of both parties showing that there were debts and appellant neither on the motion for a new trial nor on appeal denied that there were community debts. No finding is made as to the extent of said debts. The interlocutory decree awarded to the wife all the community property which had been found to exist. In *McKannay v. McKannay*, 68 Cal.App. 701, 707-708, 230 P. 214, 217, it is said: "It is doubtless true that the community property which shall be distributed upon a dissolution of the community by divorce is the residue which remains after the discharge of the community obligations. [Citations.] It does not appear clearly, however, * * * whether or not the debts in question, * * * were incurred for the benefit of the community. * * * Before a division of the community property can be made legally, the nature of those debts must be definitely ascertained. If it be determined as a fact that they are community debts, then they should be deducted from the gross value of the community property, before a division thereof is made." See also 16 Cal. Jur.2d 593; *Johnston v. Johnston*, 33 Cal. App.2d 90, 91 P.2d 142. As in our case there was no finding with respect to the material question of community debts the court could consider re-examination of the facts necessary in order to determine this point and a lesser award of community property to the wife could require re-examination and increase of the alimony. The granting of a new trial is thus justified on the ground that the judgment is against

law. *Karp v. Jacobs*, 135 Cal.App.2d 388, 287 P.2d 400; compare *Renfer v. Skaggs*, 96 Cal.App.2d 380, 383, 215 P.2d 487.

[9] An order for a new trial will be affirmed if it may be sustained on any ground. *Mazzotta v. Los Angeles Ry. Corp.*, 25 Cal.2d 165, 169, 153 P.2d 338.

Order affirmed.

DOOLING and KAUFMAN, JJ., concur.



140 Cal.App.2d 1

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Thomas Michael KING, Defendant and
Appellant.

Crim. 5526.

District Court of Appeal, Second District,
Division 1, California.

March 19, 1956.

Hearing Denied April 18, 1956.

Prosecution for bookmaking and pool-selling. The Superior Court of Los Angeles County, Joseph M. Maltby, J., entered judgment accordingly and entered order denying new trial, and defendant appealed. The District Court of Appeal, Fourth, J., held that where officer had been told by confidential informant that defendant was using certain telephone numbers for bookmaking purposes, officer watched informant dial one of such numbers and apparently place a bet and officer was told by second officer that second officer had dialed one of the numbers and had obtained race results, officer had reasonable grounds to make arrest of defendant at premises where such telephone numbers were assigned, and arrest and search of premises and seizure made without warrant were proper.

Order and judgment are affirmed.

1. Criminal Law ⇨419(3)

Gaming ⇨60

Testimony of officer that confidential informant had told him that defendant was using certain telephone numbers for bookmaking purposes, that officer had observed informant dial one of the numbers and place bet and that another officer had informed him that he had called one of the numbers and obtained race results was sufficient to establish probable cause for officer's searching premises where telephones assigned such numbers were located and making seizures, and testimony was not inadmissible as hearsay, as truth of information was not in issue. *West's Ann.Pen.Code*, §§ 337a, subs. 1, 2, 4, 836, 844.

2. Arrest ⇨63(4)

Reasonable cause to justify arrest may consist of information obtained from others and is not limited to evidence that would be necessarily admissible at trial on issue of guilt. *West's Ann.Pen.Code*, §§ 836, subd. 3, 844.

3. Arrest ⇨63(4), 71

Where arrest, search, and seizure, were made by officer pursuant to information given by confidential informant, fact that informant had time to secure search warrant could not vitiate the arrest, search and seizure. *West's Ann.Pen.Code*, §§ 836, subd. 3, 844.

4. Arrest ⇨63(4)

Where officer had been told by confidential informant that defendant was using certain telephone numbers for bookmaking purposes, officer watched informant dial one of such numbers and apparently place a bet and officer was told by second officer that second officer had dialed one of the numbers and had obtained race results, officer had reasonable grounds to make arrest of defendant at premises where such telephone numbers were assigned, and arrest made without warrant was proper. *West's Ann.Pen.Code*, §§ 836, subd. 3, 844.

5. Arrest ⇨68, 71

Under statute providing that to make arrest, officer may break open door after

having demanded admittance and explaining purpose for which admittance was desired, where officer who had reasonable grounds to believe that defendant was conducting bookmaking enterprise on premises knocked on door and identified himself, waited about two minutes, and receiving no response, forced entry into premises, his entry was lawful, even if he had not demanded admittance and explained his purpose and arrest, and search contemporaneous with and incident to it were lawful. West's Ann.Pen.Code, §§ 337a, subs. 1, 2, 4, 836, subd. 3, 844.

6. Criminal Law ⚖️386

In bookmaking prosecution, evidence of telephone conversations between arresting officer who had answered telephones at scene of arrest and persons who called with reference to placing horse bets was admissible.

A. H. McConnell, Long Beach, for appellant.

Edmund G. Brown, Atty. Gen., Robert S. Rose, Deputy Atty. Gen., for respondent.

FOURT, Justice.

In an information filed by the District Attorney of the County of Los Angeles the appellant, Thomas Michael King, was charged in Count I with a violation of section 337a, subdivision 1, Penal Code, a felony, in that he "did willfully, unlawfully and feloniously engage in poolselling and bookmaking * * *." In Count II the appellant was charged with the violation of section 337a, subdivision 2, Penal Code, a felony, in that he "did willfully, unlawfully and feloniously, for gain, hire, reward, gratuitously and otherwise, keep and occupy a house, located at 161 Claremont Avenue, Long Beach, with a book and books, paper and papers, apparatus, device and paraphernalia, for the purpose of recording and registering a bet and bets, and purported bet and bets, and wager and wagers, and purported wager and wagers, and of selling pools, and purported pools, upon the result and purported result, of a trial, and purported trial, and contest, and

purported contest, of skill, speed and power of endurance between beasts, to wit, horses." In Count III appellant was charged with a violation of section 337a, subdivision 4, Penal Code, a felony, in that he "did willfully, unlawfully and feloniously, for gain, hire, reward, gratuitously and otherwise, record and register a bet and bets, and a wager and wagers, upon the result and purported result of a trial and purported trial and contest and purported contest of speed and power of endurance between beasts, to wit, horses."

Appellant was arraigned in the superior court, made a motion to dismiss the information under section 995 of the Penal Code, which was denied, and thereafter he entered his plea of not guilty to each of the counts.

When the cause came on for trial on June 30, 1955, the appellant and all counsel waived trial by jury and stipulated that the People's case would be submitted on the transcript of the testimony taken at the preliminary hearing, with all parties reserving the right to put on such additional testimony as desired.

The transcript of the testimony taken at the preliminary hearing was admitted into evidence. The prosecution put on additional testimony and rested. The appellant rested and the court found him guilty of counts I, II and III, as charged in the information.

Appellant made a motion for a new trial which was denied; he was then sentenced to imprisonment in the county jail for the term of two months on each count, the sentences to run concurrently. He filed his notice of appeal from the order denying his motion for a new trial and from the judgment.

Appellant did not testify in his own behalf. The following is a fair statement of the facts of the case, based largely on the testimony of Officer R. M. Gardner, a deputy sheriff of Los Angeles county, and Donald Ashton, a representative of the telephone company.

On April 9, 1955, Gardner received information from a confidential informant that Thomas King was using Long Beach

telephone numbers 98383 and 81436 for bookmaking purposes. The confidential informant had on previous occasions given competent and correct information to Officer Gardner. Subsequently, Officer Gardner observed the informant dial Long Beach number 98383 on a telephone. Long Beach number 98383 is a number assigned to the telephone located at 161 Claremont Avenue, Belmont Shore, Long Beach, California, a two-story residence. While Officer Gardner listened in the telephone, the confidential informant stated his name, identified himself, and said, "Give me ten dollars to win on Rover Bill in the sixth race at Golden Gate." A male voice answered, "O.K., I got your bet."

Officer Gardner was then told by Deputy Sheriff Greenlees that he had called Long Beach number 98383 and had obtained race results. Officer Gardner instructed Deputy Greenlees to go down to the corner and again call the location. Deputy Greenlees went to the corner and subsequently returned, and informed Officer Gardner that he had again dialed that number and had for the second time obtained race results.

At approximately 4:15 p.m. Officer Gardner, Sergeant Jacobson of the Long Beach Department and several other sheriff's deputies proceeded to the 161 Claremont Avenue residence. Officer Gardner then knocked on the door and identified himself. After waiting for approximately two minutes and after receiving no response to his knock, Officer Gardner forced open the door, by kicking it in. After their entry the officers found the appellant, Thomas King, seated at a table in the dining room portion of the lower floor. In front of appellant were numerous pieces of paper, two telephones, pencils and several documents which Officer Gardner, a qualified expert in the ways, means, devices, paraphernalia commonly used in Los Angeles county for bookmaking, identified as betting markers and scratch sheets. In the officer's opinion, "this location is what is commonly called a phone spot, which is a location where bets are received over the telephone and reported on pieces of paper."

At about 4:30 p.m. the telephone rang. Officer Gardner answered the phone. A man's voice replied, "This is Andy * * * in the eighth race at Golden Gate Field I want 10, 5 and 10 on Fabulous Vega." At about 4:35 p.m. the phone rang again and a man's voice stated, "This is 527, give me \$4.00 to win on Mr. Sullivan in the eighth race at Golden Gate."

Subsequently, appellant informed Officer Gardner that he did not live on the premises at 161 Claremont Avenue; that he had recorded all the bets; that the betting markers were all in his handwriting; that "he took in approximately \$2,000 a day in bets over the telephone, for which he was paid \$15.00 a day in wages * * *."

[1] Appellant contends, in substance, that the information received by the arresting officer, from the confidential informant, which was offered in evidence to establish probable cause was inadmissible hearsay.

In each of the instances objected to by the appellant the extra-judicial statements were offered in evidence not to prove the truth of the matter asserted, but to establish probable cause to effect the search and seizure. The truth of the information given to Officer Gardner was not in issue, nor was it offered in evidence to prove any element of the offense against the appellant. The evidence in question was offered solely to establish that the officer had reasonable or probable cause to effect the search and seizure. We believe the testimony was admissible, and as such was properly received in evidence.

It is set forth in 6 Wigmore on Evidence, 3d ed, § 1766, pp. 177-178, among other things, the following:

"The theory of the Hearsay rule is that, when a human utterance is offered as evidence of the truth of the fact asserted in it, the credit of the assertor becomes the basis of our inference, and therefore the assertion can be received only when made upon the stand, subject to the test of cross-examination. If, therefore, an extra-judicial utterance is offered, not as an assertion to evidence the matter asserted, but

without reference to the truth of the matter asserted, the Hearsay rule does not apply. The utterance is then merely not obnoxious to that rule. It may or may not be received, according as it has any relevancy in the case; but if it is not received, this is in no way due to the Hearsay rule.

* * * * *

"The prohibition of the Hearsay rule, then, does not apply to all words or utterances merely as such. If this fundamental principle is clearly realized, its application is a comparatively simple matter. The Hearsay rule excludes extrajudicial utterances only when offered for a special purpose, namely, as *assertions to evidence the truth of the matter asserted.*"

Also in section 1789 of Wigmore (supra), where it is stated, at page 235:

"Wherever an utterance is offered to evidence the *state of mind* which ensued in another person in consequence of the utterance, it is obvious that no assertive or testimonial use is sought to be made of it, and the utterance is therefore admissible, so far as the Hearsay rule is concerned."

[2] It is settled that reasonable cause to justify an arrest may consist of information obtained from others and is not limited to evidence that would necessarily be admissible at the trial on the issue of guilt. *People v. Boyles*, 45 Cal.2d 652, 290 P.2d 535; see, also, *Brinegar v. United States*, 338 U.S. 160, 171-176, 69 S.Ct. 1302, 93 L.Ed. 1879; *United States v. Li Fat Tong*, 2 Cir., 152 F.2d 650, 652; *Aitken v. White*, 93 Cal.App.2d 134, 145, 208 P.2d 788; *Cook v. Singer Sewing Machine Co.*, 138 Cal.App. 418, 422-423, 32 P.2d 430; *Willson v. Superior Court*, 46 Cal.2d 291, 294 P.2d 36.

"The term, reasonable or probable cause, has been defined: 'By "reasonable or probable cause" is meant such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion, that the person accused is guilty.' In re McCarty, 140 Cal.App. 473, 474, 35 P.2d 568.

"The term, 'probable,' has been defined as meaning 'having more evidence for than against; supported by evidence which

inclines the mind to believe, but leaves some room for doubt.' Ex parte Heacock, 8 Cal.App. 420, 421, 97 P. 77." *People v. Novell*, 54 Cal.App.2d 621, 623-624, 129 P.2d 453, 454.

It was stated in *People v. Brite*, 9 Cal.2d 666, at page 687, 72 P.2d 122, at page 133: "Probable cause is a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true." [Citing cases.] Reasonable or probable cause is a question of law, where there is no conflict to be decided by the court. [Citing cases.]"

[3-5] Appellant also contends that the confidential informant had ample time to secure a search warrant and that such course should have been followed. It is immaterial whether the informant had time to secure a warrant. The arrest, search and seizure were effected by the officers and not by the informant. The question is whether the officers had probable cause to arrest the appellant and incidentally search the immediate premises.

Penal Code section 836 provides as follows:

"A peace officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person:

* * * * *

"3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it. * * *

It is at once apparent, from the facts and circumstances, that the officer had reasonable grounds to warrant the arrest of the appellant.

Having had probable cause to arrest the appellant,—query, was the entry into the premises lawful? We believe that the entry was lawful.

The officer knocked on the door and identified himself. He waited about two minutes, and receiving no response, forced entry into the premises.

Penal Code section 844 provides as follows:

"To make an arrest, a private person, if the offense be a felony, and in all cases a

peace officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired."

The record does not disclose whether the officer demanded admittance and explained the purpose for which he desired admittance.

In the case of *People v. Maddox*, 46 Cal.2d 301, 294 P.2d 6, the officers had information, some of which had been very recently acquired, that the defendant was selling narcotics from a certain house. The officers went to the door of the house and knocked. The officers then heard a voice say 'wait a minute', and also heard the sound of retreating footsteps. One of the officers kicked the door open and rushed in and in one of the rooms saw the defendant with a spoon in his hand headed toward the bedroom. The defendant was caught and the spoon taken. There were traces of heroin on the spoon. The defendant, in the *Maddox* case, contended, as does the appellant here, that the arrest was illegal because the officers did not comply with section 844 of the Penal Code.

The court said, among other things, 46 Cal.2d at pages 304, 305, 294 P.2d at page 8:

"The question is thus presented whether or not evidence obtained by search incident to an arrest must be excluded when the officer has reasonable cause to make the arrest and search but fails to comply with the requirements of section 844. * *

"The answer to this question must be sought in the basic reasons for the exclusionary rule. We considered those reasons again in *People v. Martin*, supra, 45 Cal.2d 755, 290 P.2d 855, and expressly rejected the theory that evidence is excluded to redress or punish a past wrong. The evidence is excluded 'on the ground that the government must not be allowed to profit by its own wrong and thus encouraged in the lawless enforcement of the law.' 45 Cal.2d at page 761, 290 P.2d at page 857. Accordingly, we held in the

Martin case and in *People v. Boyles*, supra, 45 Cal.2d 652, 290 P.2d 535, that illegal conduct that was entirely unrelated and collateral to the securing of the evidence objected to does not render that evidence inadmissible. See also, *Rogers v. Superior Court*, 46 Cal.2d 3, 291 P. 929.

* * *

"The demand and explanation requirements of section 844 present a more difficult problem. The officer's compliance with them will delay his entry, and cases might arise in which the delay would permit destruction or secretion of evidence so that what the search turns up would depend on the officer's compliance with the section. In other cases, however, the evidence may not be readily disposed of, and in still others it may be impossible to determine whether or not the evidence would still have been available had there been the delay incident to complying with the section.

"It must be borne in mind that the primary purpose of the constitutional guarantees is to prevent unreasonable invasions of the security of the people in their persons, houses, papers, and effects, and when an officer has reasonable cause to enter a dwelling to make an arrest and as an incident to that arrest is authorized to make a reasonable search, his entry and his search are not unreasonable. Suspects have no constitutional right to destroy or dispose of evidence, and no basic constitutional guarantees are violated because an officer succeeds in getting to a place where he is entitled to be more quickly than he would, had he complied with section 844. Moreover, since the demand and explanation requirements of section 844 are a codification of the common law, they may reasonably be interpreted as limited by the common law rules that compliance is not required if the officer's peril would have been increased or the arrest frustrated had he demanded entrance and stated his purpose. *Read v. Case*, 4 Conn. 166, 170; see, *Restatement, Torts*, § 206, comment d. Without the benefit of hindsight and ordinarily on the spur of the moment, the officer must decide these questions in the first

instance. When as in this case, he has reasonable grounds to believe a felony is being committed and hears retreating footsteps, the conclusion that his peril would be increased or that the felon would escape if he demanded entrance and explained his purpose, is not unreasonable. In this proceeding we are not concerned with whether or not the officer's failure to do so would have justified defendant in using force to protect his person or property, or whether or not a jury in a trespass action might conclude that reasonable cause for the officer's failure to comply with the demand and explanation requirements did not exist. Moreover, since the officer's right to invade defendant's privacy clearly appears, there is no compelling need for strict compliance with the requirements of section 844 to protect basic constitutional guarantees. Cf., *People v. Boyles*, supra, 45 Cal.2d 652, 290 P.2d 535; *People v. Cahan*, supra, 44 Cal.2d 434, 442, footnote, 282 P.2d 905. We conclude therefore that when there is reasonable cause to make an arrest and search and the facts known to him before his entry are not inconsistent with a good faith belief on the part of the officer that compliance with section 844 is excused, his failure to comply with the formal requirements of that section does not justify the exclusion of the evidence he obtains."

[6] Appellant further contends that it was error for the court to receive evidence of the conversations on the telephone between the officer and those who called the house with reference to certain bets. The court, in *People v. Radley*, 68 Cal. App.2d 607, in a similar situation, stated at page 609, 157 P.2d 426, at page 427: "It is the established rule that the court may properly receive the evidence of such conversations, not for the purpose of establishing the truth of what was said over the telephone, but for the purpose of establishing that the room was being occupied for placing bets on horse races. *People v. Joffe*, 45 Cal.App.2d 233, 235, 113 P.2d 901; *People v. Reifenstuhl*, 37 Cal.App.2d 402, 405, 99 P.2d 564."

We believe the evidence was properly admitted.

In our opinion the arrest was lawful; the search was contemporaneous with and incident to the lawful arrest, and the seizure was lawful; and further, that all of the evidence was properly admitted.

The order denying the appellant's motion for a new trial and the judgment are, and each of them is, affirmed.

DORAN, Acting P. J., concurs.



Dorothy A. ANDERSON, Plaintiff and Respondent,

v.

Maudie O. MART, as Administratrix of the Estate of William E. Anderson, also known as William Everett Anderson, deceased, Defendant and Appellant. *

Civ. 16638.

District Court of Appeal, First District, Division 1, California.

March 23, 1956.

Rehearing Denied April 20, 1956.

Hearing Granted May 15, 1956.

Action by divorced wife against divorced husband's estate for present value, based upon her life expectancy, of support provision of property settlement agreement entered into prior to divorce. The Superior Court, Contra Costa County, Homer W. Patterson, J., entered judgment for divorced wife, and husband's administratrix appealed. The District Court of Appeal, Bray, J., held that, where agreement released each party from all liabilities for future acts and claims of other, provided that each party accepted provisions of agreement in full satisfaction of his or her right to the community property and in full satisfaction of his or her right, if any, to alimony or support and maintenance, allowed wife \$60 per month as support and maintenance of wife and parties' minor child, and provided that agreement was a complete settlement of parties' property rights and claims against each other, sup-

port provision was integrated into and inseverable from the property settlement agreement.

Affirmed.

1. Judgment ⚖️92, 117

An uncontested action may be considered as a default proceeding, but, in a default action, relief granted cannot exceed the prayer.

2. Divorce ⚖️245(3)

Where property settlement agreement between husband and wife prior to divorce contemplated that it was to be submitted to court for approval, husband, who did not appeal from the divorce decrees, which approved and ratified the property settlement agreement, and who thereafter entered into stipulation modifying the decrees, necessarily admitted regularity of the decrees, and husband's administratrix would be precluded from claiming that husband had not acquiesced in court's action of approving the property settlement.

3. Husband and Wife ⚖️278(1)

In drafting property settlement agreement, husband and wife may provide for division of all community property and, in a separate and severable clause, indicate their intentions as to amount of alimony which should be given wife, or they may agree upon a property settlement and include a provision that husband periodically pay "support and maintenance", or they may integrate the provisions for division of property with the support settlement.

4. Divorce ⚖️245(1)

Where, in making property settlement agreement, husband and wife provide for division of all community property and, in separate and severable clause, indicate their intentions as to amount of alimony which should be given to wife, divorce decree giving such payments of alimony will be subject to being modified. West's Ann.Civ.Code, § 139.

5. Husband and Wife ⚖️279(1)

Where, in property settlement agreement, husband and wife agree upon a property division and include a provision that

husband will periodically pay "support and maintenance", question whether the payments were meant to be in nature of a property division or simply true alimony is for the court to decide.

6. Husband and Wife ⚖️279(1)

Where, in property settlement agreement, husband and wife integrate the provisions for division of property with the support settlement, support payments become part of and inseverable from the property settlement.

7. Divorce ⚖️243

Where court approves property settlement agreement in divorce action, it may properly order support payments provided therein to be paid so there could be no question of its power to enforce such payment by contempt proceedings, but such order in the decree would not make the provision severable from the agreement.

8. Husband and Wife ⚖️279(1)

Where property settlement agreement between husband and wife prior to divorce released each party from all liabilities for future acts and claims of other, provided that each party accepted provisions of agreement in full satisfaction of his or her right to the community property and in full satisfaction of his or her right, if any, to alimony or support and maintenance, allowed wife \$60 per month as support and maintenance of wife and parties' minor child, and provided that agreement was a complete settlement of parties' property rights and claims against each other, support provision was integrated into and inseverable from the property settlement agreement.

9. Husband and Wife ⚖️279(1)

Absence of provision, in property settlement agreement between husband and wife prior to divorce, that wife's support would terminate upon her remarriage indicates that alimony was not intended.

Johnson & Harmon, San Francisco, for appellant.

Timothy A. O'Connor, San Jose, for respondent.

BRAY, Justice.

This action was brought by a former wife against the estate of her deceased former husband upon a claim filed against the estate for the present value, based upon her life expectancy, of the support provision of a property settlement agreement. The court gave plaintiff judgment for \$14,190.¹ Defendant appeals.

Questions Presented.

1. Was the incorporation of the agreement in the interlocutory decree valid?
2. Was the support provision an integral and inseverable part of the property settlement agreement?

Record.

March 12, 1948, plaintiff and decedent entered into the property settlement agreement. June 22nd, plaintiff sued for divorce. Decedent, in propria persona, filed an answer. The case was tried as an uncontested matter. July 23rd, an interlocutory decree of divorce was entered granting plaintiff a divorce, awarding custody of the minor child to plaintiff, and ordering decedent to pay plaintiff "\$60.00 per month as and for the support and maintenance of said plaintiff and the minor child * *." It further decreed that the property settlement agreement "be, and the same is hereby approved and ratified, and the terms thereof are incorporated herein with the same force and effect as if set forth in full herein." A copy of the agreement was annexed to the decree. October 10, 1949, a final decree of divorce was entered, incorporating all of the orders and provisions in the interlocutory decree. September 24, 1951, the parties entered into a "Stipulation In Re Modification of Interlocutory and Final Judgments and Decrees of Divorce." It was entitled in the court and cause and provided that the interlocutory and final decrees "may be modified so as to provide that the defendant pay to plaintiff the sum of Fifty Dollars (\$50.00) a month as and for the support and maintenance of plaintiff and the minor child of the parties hereto, and that the above-

entitled court may cause to be made and entered herein its order so modifying said decrees." Although the stipulation was not filed, nor the decrees modified, decedent thereafter paid plaintiff \$50 per month only. April 5, 1952, plaintiff's former husband died. On the rejection of plaintiff's claim by the administratrix of his estate, plaintiff brought this action.

1. Incorporation of Agreement in Interlocutory Decree.

Defendant contends that the court had no power to approve or incorporate said agreement. In the divorce action complaint plaintiff alleged that she did not have sufficient money or means with which to support herself and the minor child, and that the sum of \$60 per month was a reasonable sum therefor, and in the prayer asked that decedent be required to pay such sum. The only reference to the agreement was "That there is no community property the result of said marriage of the parties hereto, a property settlement agreement having been entered into by and between the parties." There was no specific request for approval of the agreement. There was a request "for other and further relief."

Contending that the approval of, and incorporation of, the agreement went beyond the pleading, defendant cites cases such as *Baar v. Smith*, 201 Cal. 87, 255 P. 827; *Morrow v. Morrow*, 40 Cal.App.2d 474, 105 P.2d 129; *Burnett v. King*, 33 Cal.2d 805, 205 P.2d 657, 12 A.L.R.2d 333; *Smith v. Smith*, 40 Cal.2d 461, 254 P.2d 1. None of these cases is in point. In the *Baar* case no cause of action was alleged or attempted to be alleged against certain defendants. Therefore, the court held a judgment for costs against them was improper. In the *Morrow* case a judgment was entered establishing a Nevada judgment which was not set forth in the complaint nor did the prayer ask that it be established. The court held that the failure to plead it and to ask for that relief made the judgment void. The *Burnett* case was a default one holding that the failure to ask in the complaint for a division of the community property made its disposition by the trial court void.

1. This judgment exceeds the appraised value of the estate by \$4920.57.

Interestingly, the court stated and cited cases in support, that where support money or alimony is involved, "this issue is so germane to the issue of divorce that a defendant must anticipate an award therefor although there is no prayer to that effect." 33 Cal.2d at page 810, 205 P.2d at page 659. It would appear that in our case, where the property settlement agreement is mentioned in the complaint and that agreement has a clause "Subject to approval by any Court," the issue of approval is so germane that the decedent should have anticipated that approval would be considered by the court. (The Smith case is discussed later.)

[1,2] Although an uncontested action may be considered as a default proceeding,² and in a default action the relief granted cannot exceed the prayer (see cases cited above), the circumstances here preclude defendant from claiming that decedent did not acquiesce in the action of the court in approving the agreement. Here, the agreement expressly contemplated that it was to be submitted to the court for approval. (The support provision states "Subject to approval by any Court of competent jurisdiction.") The complaint referred to the fact of there being a property settlement agreement. Decedent appealed from neither decree. He entered into a stipulation modifying the decrees, thereby necessarily admitting their regularity.

2. The Agreement.

Was the support provision integrated into and inseverable from the property settlement agreement?

In *Pearman v. Pearman*, 104 Cal.App.2d 250, 253, 231 P.2d 101, 103, the court states: "No single factor can be relied upon in any given case to determine whether monthly payments are in the nature of property or alimony. The agreement must be taken as a whole and consideration given as to the circumstances under which it was made and the nature and value of the property being divided and its relation to the amount of

the periodic payments. *Puckett v. Puckett*, 21 Cal.2d 833, 841-842, 136 P.2d 1."

The agreement states: "Whereas, the parties hereto desire to avoid expense, delay, inconvenience and litigation with respect to the settlement of their property rights and obligations * * *." In paragraph "First" besides releasing each party "from any and all obligations and liabilities for the future acts of the other party," "each party is hereby released and absolved from any and all claims and demands of the other, including all claims of either party upon the other party for support and maintenance as husband and wife, or otherwise, it being understood that this instrument is intended to settle the rights of the parties hereto in all respects, except as hereinafter provided." "Fifth: That each party does hereby accept the provisions herein made for him or for her in full satisfaction of his or her right to the community property of the parties, or other property acquired after marriage by either party, and in full satisfaction of his or her right, if any, to alimony or support and maintenance." The agreement divided money and bonds equally between the parties. Of two automobiles the husband received the better. The wife received the home (later sold for \$6000) and furnishings, the husband a lot, later appraised in his estate at \$600. "To take from such periodic payments the character of modifiable alimony it is not essential that the wife has received more or less than her share of the community property and that that fact has influenced the amount of the periodic payments allowed her. * * * at the time a property settlement is made, the parties may be uncertain as to which of their property is community rather than separate, and they will ordinarily not know how the court in the divorce action will find the facts or how it would, in the absence of an acceptable agreement, exercise its discretion in dividing the property and awarding alimony. The amicable adjustment of these doubtful questions with respect to the property and support and maintenance rights

2. See *Blackwell v. Blackwell*, 86 Cal.App. 2d 513, 516, 194 P.2d 796, which action

under the circumstances there was so considered.

of the parties may alone supply sufficient consideration to support their entire agreement.'” Lane v. Bradley, 124 Cal.App.2d 661, 665, 268 P.2d 1092, 1094.

Paragraph “Fifteenth” provided: “It is understood and recognized by the parties hereto that they can control the custody of the minor child of the parties hereto only to the extent that their agreement coincides with the order which any Court of competent jurisdiction may make for the best interest of said child.” Paragraph “Sixteenth,” which gives rise to the present controversy, provides: “Subject to approval by any Court of competent jurisdiction, Husband agrees to pay to Wife the sum of Sixty (\$60.00) Dollars per month as and for the support and maintenance of Wife and the minor child of the parties hereto, commencing forthwith and continuing in a like sum each and every month thereafter.” Paragraph “Eighteenth” provides: “* * * this agreement is intended to be, and is, a full, final and complete settlement of the property rights of the parties hereto and of all claims which either party has or might claim to have had against the other, were it not for this agreement.”

[3-6] In drafting a property settlement agreement, a husband and wife can choose one of three forms with respect to providing the wife and perhaps children, if any, with support. First, they may draft the agreement to provide a division of all the community property and in a separate and severable clause indicate their intentions as to the amount of alimony which should be given to the wife. The divorce decree giving such payments of alimony will be subject to being modified under Civil Code, § 139. Secondly, the parties may agree upon a property division and include a provision that the husband periodically pay “support and maintenance.” The problem then is one for the courts to decide whether the payments so provided were meant to be in the nature of a property division or simply true alimony. Finally, the parties may

integrate the provisions for division of the property with the support settlement, in which case the support payments become a part of and inseverable from the property settlement. In reality what we have then are two extreme situations, one where the support is alimony and the other where the support is in the nature of a property division.

Defendant contends in spite of the fact that the agreement specifically provides that each party releases the other from all claims for support and maintenance and “in full satisfaction of his or her right, if any, to alimony or support and maintenance,”³ and is intended to be in full settlement “of all claims which either party has or might claim to have had against the other,” that nevertheless, the support agreement is not an integrated part of the property settlement clause, because of the words in paragraph sixteenth “Subject to approval” of a court. Paragraph sixteenth follows the statement in paragraph fifteenth to the effect that the parties recognize that the control of custody of the minor parties must coincide with the order which a court may make. As the support provision is for both mother and child it necessarily must be subject to court approval. Hence that reservation in paragraph sixteenth is in no wise contrary to the other definite provisions.

Defendant points out that paragraphs first to fifth contain general provisions; paragraphs sixth to tenth, provisions giving property to the wife; paragraphs eleventh to fourteenth, provisions giving property to the husband; paragraphs fifteenth and sixteenth concern custody of the child and support of both child and mother. While the omission of the wife’s support provision from the area of paragraphs sixth to tenth may be of some significance, it is not controlling in any degree. Nor does the inclusion of child support with that of the wife in paragraph sixteenth determine that the provision is by way of alimony and maintenance and not

3. See Dexter v. Dexter, 42 Cal.2d 36, 265 P.2d 873; Finnegan v. Finnegan, 42 Cal. 2d 762, 269 P.2d 873; Taliaferro v.

Taliaferro, 125 Cal.App.2d 419, 270 P.2d 1036, for the effect of such a provision.

by way of settlement of community rights. See *Taliaferro v. Taliaferro*, supra, 125 Cal. App.2d 419, 426, 270 P.2d 1036.

Defendant contends that the allegation in the divorce complaint of plaintiff's financial need, the order of payment in the interlocutory decree, and the stipulation modifying the decree, all point to an understanding by plaintiff and the divorce court that paragraph sixteenth in the agreement was merely a promise to pay alimony, severable from the whole agreement. We see in the complaint nothing more than an allegation to bring to the attention of the court when it would consider whether to approve the agreement, and particularly the support provision, the fact of plaintiff's financial need of such payment.

[7] When a court approves of a property settlement agreement it may properly order the support payment provided therein to be paid so there could be no question of its power to enforce such payment by contempt proceedings. Thus the order in the decree does not make the provision severable from the agreement. It was not necessary in order to prevent an interpretation that the support payment is severable from the agreement for the stipulation modifying the decrees to state that the decrees and the agreement be modified. The stipulation necessarily modifies the agreement as well because the stipulation states that the decrees are modified "so as to provide" that the decedent thereafter pay the reduced sum.

[8] It is to be noted that in the *Dexter*, *Finnegan* and *Taliaferro* cases, supra, the courts in finding that the support provided in the settlement agreement was a division of property, pointed to language in the agreements to the effect that "they intended finally to settle both the division of their property and their rights and duties with respect to support and maintenance, and each party waived 'any and all right to support, care and maintenance' other 'than as expressly provided for herein.'" *Dexter* case, supra, 42 Cal.2d at page 41, 265 P.2d at page 876. Such similar language exists in the present agreement in paragraphs first, fifth and eighteenth. It would be con-

trary to the very expression of the parties to hold that the support was simply alimony and thus would not be a final settlement as to the rights of the parties each against the other.

However, in *Puckett v. Puckett*, 21 Cal. 2d 833, at page 842, 136 P.2d 1, at page 6, it states: "The presence of the provision that the monthly payments are for the support and maintenance of plaintiff and the child do not necessarily indicate alimony rather than a property settlement. The agreement must be taken as a whole."

The facts in this case are entirely different from those in *Smith v. Smith*, supra, 40 Cal.2d 461, 254 P.2d 1. There the parties entered into a property settlement agreement in which the wife expressly waived all alimony. In her divorce complaint she asked for approval of the agreement excepting "any provision therein respecting payment of alimony." 40 Cal. 2d at page 463, 254 P.2d at page 2. She then asked for "at least token alimony". The court approved the agreement and ordered the defendant to pay \$1 per month for her support. Later the wife applied to the trial court to increase the support to \$100 per month. That court refused to so do on the ground that the decree had approved the agreement waiving alimony. The Supreme Court, however, held that in the complaint, the wife had asked the trial court to withhold approval of the provision by which she waived alimony and to grant her nominal alimony, and that although the decree stated that the agreement was approved, in the light of the complaint and the award of alimony the court had actually refused to approve the waiver of alimony and hence was entitled to award alimony. There the award of alimony was inconsistent with an approval of the entire agreement. Here the order in the interlocutory decree for payment of support was completely consistent with the support provision of the agreement.

[9] The absence of a provision that the wife's support would terminate upon her remarriage is an indication that alimony was not intended. See *Lane v. Bradley*, supra, 124 Cal.App.2d 661, 665, 268 P.2d

1092. The following language from *Dexter v. Dexter*, supra, 42 Cal.2d 36, at page 41, 265 P.2d at page 876, is applicable; "When, as in this case, however, the parties have made the provision for support and maintenance an integral part of their property settlement agreement, the monthly payments will ordinarily have a dual character. To the extent that they are designed to discharge the obligation of support and maintenance they will ordinarily reflect the characteristics of that obligation and thus have the indicia of alimony. [Citations.] On the other hand, to the extent that they represent a division of the community property itself, or constitute an inseparable part of the consideration for the property settlement, they are not alimony * * *."

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



140 Cal.App.2d 260

Oscar RUDNICK, Individually and as a copartner of Imperial Land and Cattle Company, a copartnership, Plaintiff and Respondent,

v.

James DELFINO, Frank Delfino, Tony Delfino and Willie Delfino, copartners, doing business as Delfino Brothers, a copartnership, and Imperial Land and Cattle Company, a copartnership comprised of Oscar Rudnick and James Delfino, as copartners, Defendants and Respondents,

Harold V. Smith, Defendant and Appellant.
Civ. 4991.

District Court of Appeal, Fourth District,
California.

March 26, 1956.

rrior Court, Kern County, R. B. Lambert, J., denying his motion for change of venue a defendant whose motion was denied appealed. The District Court of Appeal, Conley, J. pro tem., held, inter alia, that in such action defendant whose residence was in county where action was brought was not entitled to change of venue on theory that partnership, one of whose members was a resident of county where action was brought, was to be considered a plaintiff, so that movant remained the only defendant.

Judgment affirmed.

1. Partnership ⇨344

Where there has in fact been a partnership, court of equity in single action may grant prayers for dissolution of partnership and for accounting, and also for decree for payment over of any balances which may be due.

2. Venue ⇨4

A suit to dissolve a partnership is a transitory action based on partnership agreement and controlled as to venue by section 395 of the Code of Civil Procedure. West's Ann.Code Civ.Proc. § 395.

3. Partnership ⇨322

In suit to dissolve and wind up affairs of copartnership, normally all of partners are not only necessary, but indispensable parties to litigation.

4. Partnership ⇨322

Partner suing for accounting may make all other partners parties defendant, although controversy exists only between himself and one of such partners, and although he made no request on any of them to join him in suit as parties plaintiff.

5. Venue ⇨68

On motion for change of venue, burden is on moving party to show that action was not brought in proper county and that another place of trial should be ordered. West's Ann.Code Civ.Proc. § 395.

6. Venue ⇨22(3)

When a defendant who resides in county in which action is brought is a necessary and proper party defendant, it is immaterial that another defendant, even the principal

Action for dissolution of limited partnership, for accounting and for decree directing division and distribution of partnership assets. From an order of the Super-

defendant, resides in another county. West's Ann.Code Civ.Proc. § 395.

7. Venue ⇨22(1)

A defendant is not entitled to have a suit removed to county of his residence unless it appears that none of other defendants who are proper parties is a resident of county in which action was filed. West's Ann.Code Civ.Proc. § 395.

8. Venue ⇨67

If any of defendants had been joined fraudulently or in bad faith merely to establish venue in county where action was brought, issue could have been tendered and proof to that effect made by affidavits on behalf of party moving for change of venue. West's Ann.Code Civ.Proc. § 395.

9. Venue ⇨46

No person can sue himself, and hence if plaintiff, a resident of K. county, should purport to bring an action against himself and another of S. county, the latter, in absence of other factors would be entitled to change of venue. West's Ann.Code Civ. Proc. § 395.

10. Partnership ⇨63, 200

A partnership in the eyes of the law is not a legal entity even though it may be sued under firm name, by reason of statute, and when a firm's name is used it is only a convenient method for denoting those persons who compose firm at time when that name is used and a plaintiff who sues partners in name of their firm in truth sues them individually just as much as if he had set out all their names. West's Ann.Code Civ.Proc. § 388.

11. Partnership ⇨322

A partner suing for dissolution of copartnership and for accounting was not required to make preliminary demand on all or any of his partners to join with him before commencing suit, and, acting in good faith, he could join all parties having an interest in partnership as defendants.

12. Venue ⇨46

In action by partner for dissolution of limited partnership and for accounting, a defendant who was not a resident of county where action was brought, was not entitled

to change of venue on theory that partnership, one of whose members was also a resident of county where action was brought, was required to be considered a plaintiff, and since no person could sue himself movant was sole defendant. West's Ann.Code Civ.Proc. §§ 388, 395.

Vizzard, Baker & Sullivan and James Vizzard, Bakersfield, for appellant.

Borton, Petrini, Conron & Brown, Bakersfield, for respondent Oscar Rudnick.

Deadrich, Bates & Stewart and Kenneth H. Bates, Bakersfield, for respondents James Delfino, Frank Delfino, Tony Delfino, and Willie Delfino.

CONLEY, Justice pro tem.

This is an appeal by one of the defendants, Harold V. Smith, from an order denying his motion for a change of venue from Kern County to San Bernardino County.

Plaintiff "Oscar Rudnick, individually and as a copartner of Imperial Land and Cattle Company, a copartnership" sues for a dissolution of Silver River Ranch, a limited partnership, for an accounting and a decree directing the division and distribution of the partnership assets. The verified complaint alleges that the members of the copartnership originally consisted of Oscar Rudnick, Harold V. Smith, Delfino Brothers, a copartnership comprising James Delfino, Frank Delfino, Tony Delfino and Willie Delfino, Maxwell H. Weinberg and Dale E. Weinberg; that at a later date the Weinbergs transferred their interests to Imperial Land and Cattle Company, a copartnership, comprised of Oscar Rudnick and James Delfino and that the latter company succeeded them as copartners. All of the alleged present copartners are made parties to the suit.

In his affidavit of merits for change of venue, the defendant and appellant Harold V. Smith alleges that at all times mentioned in the complaint and on the date of the filing of the action he was and now is a resident of San Bernardino county. The affidavit does not refer to the residence of any other party defendant and it does not contain any allegation as to the place where

the contract of copartnership was entered into, or where it was to be performed. It does not charge any fraud, or lack of good faith on the part of the plaintiff in joining other persons as parties defendant. The complaint states that the defendant Frank Delfino at all times mentioned therein was and now is a resident of Kern county and that the partnership contract was made and entered into in Kern county. By affidavit, the defendant Frank Delfino establishes his residence at all of the times involved in the litigation as being in Kern county.

The complaint for the dissolution of the limited partnership, Silver River Ranch, alleges that Delfino Brothers is a general copartnership comprised of James Delfino, Frank Delfino, Tony Delfino and Willie Delfino, with its principal place of business in Kern county, where Frank Delfino at all times has been and now is a resident; that Imperial Land and Cattle Company is a general partnership comprised of Oscar Rudnick and James Delfino as copartners; that on or about November 1, 1951, the plaintiff Oscar Rudnick, individually, and Harold V. Smith, Delfino Brothers, Maxwell H. Weinberg and Dale E. Weinberg, in the county of Kern, made and executed written articles of limited copartnership which are set forth as exhibit one, attached to the pleading.

The complaint further asserts the filing of a certificate of limited partnership in San Bernardino county (Exhibit Two), the sale and assignment by the Weinbergs of their interest to Imperial Land and Cattle Company and the execution and recordation of an amended certificate of limited partnership in San Bernardino county (Exhibit Three). The pleading avers the prompt commencement and carrying on of the business of the partnership involving the expenditure of large sums of money in the acquisition and improvement of its properties, the lending to it of funds exceeding \$300,000 for its use and benefit by Imperial Land and Cattle Company, and of \$150,000 by the Weinbergs, for which they are entitled to reimbursement; that the defendants, other than Smith, have performed their agreements as set forth in the articles

but that Harold V. Smith has not carried out his contractual duties in that he has failed to convey to the Silver River Ranch the real property referred to in the articles, free of encumbrances other than those permitted by the agreement, has refused to transfer title to some of the farming machinery, equipment and personal property called for, and has not removed the encumbrances from some of it. Continuing, the complaint alleges the right of the Weinbergs to accelerate the maturity date for the repayment to them of the \$150,000 loaned to the partnership in the event the trust deed given as security was not placed in the position of a first trust deed prior to December 9, 1952, and that the Weinbergs have elected to accelerate the maturity of the obligation and are presently demanding full payment thereof, together with interest; that the Silver River Ranch was prevented from securing a loan of \$250,000 from The Travelers Insurance Company by reason of the failure of Smith to remove the encumbrances from the above mentioned land; that his failure of contractual duty has substantially impaired the credit of the partnership so that it is no longer reasonably practicable to carry on its business; that plaintiff has requested Smith to consent to a voluntary dissolution, but he has refused so to do.

In the prayer of the complaint, a decree of dissolution is asked in which the general partners will be directed to sell the partnership property, an accounting is demanded, and distribution requested to the several partners after the payment of debts.

The articles of limited copartnership and agreement (Exhibit One), attached to the complaint, is a lengthy and comprehensive contract, conforming generally to its description contained in the complaint. Detailed analysis in this opinion is unnecessary but we do call attention to the fact that the purpose of the partnership, as shown by the articles, was to acquire and use for agricultural purposes and stock raising lands in San Bernardino county, and that the principal place of business is fixed at Helendale, San Bernardino county; that Oscar Rudnick and Delfino Brothers were

named as general partners and Oscar Rudnick, Delfino Brothers, Harold V. Smith, Dale E. Weinberg and Maxwell H. Weinberg as limited partners, and that the parties expressly refer to the certificate of limited copartnership of even date and agree that "the two documents are intended to supplement each other."

[1,2] This, then, is a suit to dissolve and wind up the affairs of a copartnership in a form frequently employed in courts of equity. "Where there has in fact been a partnership, a court of equity in a single action may grant prayers for a dissolution of the partnership and for an accounting, and also for a decree for the payment over of any balances which may be due." 40 Am. Jur., p. 362. Such a suit is a transitory action based on the partnership agreement and controlled as to venue by the provisions of section 395 of the Code of Civil Procedure. *Gilman v. Nordin*, 112 Cal.App.2d 788, 790, 247 P.2d 394; *Hays v. Cowles*, 60 Cal.App.2d 514, 518, 141 P.2d 26; *Averill v. Lincoln*, 52 Cal.App.2d 398, 126 P.2d 398.

Section 395 of the Code of Civil Procedure provides that:

"* * * the county in which the defendants, or some of them, reside at the commencement of the action, shall be a proper county for the trial of the action. When a defendant has contracted to perform an obligation in a particular county, either the county where such obligation is to be performed, or in which the contract in fact was entered into, or the county in which the defendant, or any such defendant, resides at the commencement of the action, shall be a proper county for the trial of an action founded on such obligation, and the county in which such obligation is incurred shall be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary. * * *

If Kern county is a proper place of trial under any of the three alternatives set forth in the section, the order denying a change of venue must be affirmed.

[3,4] In a suit of this kind, normally all of the partners are not only necessary, but indispensable parties to the litigation. *Young v. Hoglan*, 52 Cal. 466; *Wright v. Ward*, 65 Cal. 525, 4 P. 534; *Harrison v. McCormick*, 69 Cal. 616, 621, 11 P. 456; *Cuyamaca Granite Co. v. Pacific Paving Co.*, 95 Cal. 252, 30 P. 525. As is said in 68 C. J.S., Partnership, § 415, pages 936-937:

"Ordinarily, all the partners are not only proper, but are also necessary, parties to an action for dissolution * * * unless all are brought into the litigation, a decree cannot be made which will finally dispose of all questions involved * * *. The partner suing for an accounting may make all the other partners parties defendant, although a controversy exists only between himself and one of such partners, and although he made no request on any of them to join him in the suit as parties plaintiff."

And 40 American Jurisprudence, at page 362, enunciates the same principle:

"The general rule in equity that all persons interested in the object of a suit where rights will be directly affected by the decree must be made parties to the suit applies to proceedings for the settlement of the affairs of a partnership, unless their non-joinder is excused."

[5] It is elementary that on a motion such as this for a change of venue, the burden is on the moving party to show that the action was not brought in the proper county and that another place of trial should be ordered. *Hearne v. De Young*, 111 Cal. 373, 376, 43 P. 1108; *Quint v. Dimond*, 135 Cal. 572, 67 P. 1034; *Donohoe v. Wooster*, 163 Cal. 114, 124 P. 730; *Greenleaf v. Jacks*, 133 Cal. 506, 65 P. 1039; *Briscoe v. Guarantee Mtg. Co.*, 57 Cal.App. 492, 207 P. 487.

[6] When a defendant who resides in the county in which the action is brought is a necessary and proper party defendant, it is immaterial that another defendant, even the principal defendant, resides in another county. *White v. Anderson*, 50 Cal.App.2d 634, 123 P.2d 543; *Walker v. Wells Fargo*

Bank & Union Trust Co., 24 Cal.App.2d 220, 74 P.2d 849; Ferguson v. Koerber, 69 Cal.App. 47, 230 P. 476; Winterburn v. Sheriff, 61 Cal.App. 531, 215 P. 406.

[7] A defendant is not entitled to have a suit removed to the county of his residence unless it appears that none of the other defendants who are proper parties is a resident of the county in which the action was filed. Independent Iron Works v. American President Lines, 35 Cal.2d 858, 221 P.2d 939; Yellow Mfg. Acceptance Corp. v. Stoddard, 93 Cal.App.2d 301, 208 P.2d 1040; Goossen v. Clifton, 75 Cal.App. 2d 44, 170 P.2d 104.

As Frank Delfino's residence in Kern county is established by uncontradicted proof, the trial court's ruling denying a change of venue was correct, unless Frank Delfino, for some special reason, was not a proper party defendant.

[8] If any of the defendants had been joined fraudulently or in bad faith merely to establish venue in Kern county, the issue could have been tendered and proof to that effect made by affidavits on behalf of the moving party. McDonald v. California Timber Co., 151 Cal. 159, 90 P. 548; Sourbis v. Rhoads, 50 Cal.App. 98, 194 P. 521. But the appellant does not charge fraud. His affidavit in support of the motion did not allege improper joinder or even refer to the residences of any defendant other than the moving party.

[9] Appellant, however, argues that as no party can sue himself, Imperial Land and Cattle Company, the partnership consisting of Oscar Rudnick and James Delfino must be considered to be a plaintiff; and that if James Delfino is thus considered a plaintiff, the Delfino Brothers partnership and all of its members must also be considered plaintiffs. This would leave the appellant as sole defendant and venue would be regulated accordingly. It must be conceded that no person can sue himself. Byrne v. Byrne, 94 Cal. 576, 29 P. 1115, 30 P. 196, 39 Am.Jur. 857. If John Doe, a resident of Kern county, should purport to bring an action against himself and Peter Poe of San Bernardino county, the latter,

in the absence of other factors, would be entitled to a change of venue.

[10] A partnership in the eyes of the law is not a legal entity even though it may be sued under the firm name, by reason of the provisions of section 388 of the Code of Civil Procedure. Reed v. Industrial Accident Comm., 10 Cal.2d 191, 73 P.2d 1212, 114 A.L.R. 720; First Nat. Trust & Savings Bank v. Industrial Accident Comm., 213 Cal. 322, 331, 2 P.2d 347, 78 A. L.R. 1324; Heinfelt v. Arth, 135 Cal.App. 445, 447, 448, 27 P.2d 420; People v. Maljan, 34 Cal.App. 384, 387, 167 P. 547. As is said in Western National Bank v. Perez (1891) 1 Q.B. 304, 314:

"When a firm's name is used, it is only a convenient method for denoting those persons who compose the firm at the time when that name is used and a plaintiff who sues partners in the name of their firm in truth sue them individually, just as much as if he had set out all their names." See also Francis v. McNeal, 228 U.S. 695-699, 33 S.Ct. 701, 702, 57 L.Ed. 1029, 1030.

[11] James Delfino and each of the Delfino brothers has a right to his day in court. Substantial property interests are to be adjudicated in the litigation and it by no means follows that the Delfinos, collectively or separately, agree with the allegations of the complaint or share the plaintiff's view of the necessity of dissolution and accounting. Each is a necessary and indispensable party and in the final analysis is entitled to urge his individual claims and rights against all others who have an interest in the partnership. As the ultimate disposition of the partnership property will be a division of assets or perhaps of liabilities among the several parties, the plaintiff is in no sense acting for all but one of them. He is not required to make a preliminary demand on all or any of his partners to join with him before commencing suit, and, acting in good faith, he may join all parties having an interest in the partnership as defendants. 68 C.J.S., Partnership, § 415, page 937; Ditmore v. Nicholson, Tex.Civ.App., 188 S.W. 2d 414.

[12] The trial court was justified in denying the motion for a change of venue because Frank Delfino is a resident of Kern county. *Monogram Co. of California v. Kingsley*, 38 Cal. 28, 237 P.2d 265.

The judgment is affirmed.

BARNARD, P. J., and MUSSELL, J.,
concur.



140 Cal.App.2d 91

Gerald VEST, Plaintiff and Petitioner,
v.

The SUPERIOR COURT of the State of California IN AND FOR the CITY AND COUNTY OF SAN FRANCISCO, and Honorable Theresa Meikle, Judge thereof, Sally Astikian and Charles Astikian, Real Parties In Interest.

Civ. 17118.

District Court of Appeal, First District,
Division 2, California.

March 21, 1956.

Petition for writ of mandate to set aside order of Superior Court quashing writ of execution and directing Superior Court to appoint appraisers. The District Court of Appeal, Kaufman, J., held that value of realty, constituting community property of judgment debtor and former wife, in excess of homestead exemption, though property had been awarded to wife by interlocutory decree of divorce, was liable for satisfaction of judgment entered against husband prior to entry of divorce decree on cause of action for conversion of personalty, which accrued during marriage, and that remedy by appeal from order quashing execution was not speedy and adequate so as to preclude issuance of writ of mandate.

Peremptory writ of mandate issued.

1. Execution ⇐160

Generally, none but the parties to action who are liable to be injured may move for

recall of writ of execution, unless the writ or the judgment upon which it issued is void on its face, in which case, subsequent purchasers, lienholders and execution and judgment creditors may so move.

2. Execution ⇐161

Where judgment is valid upon its face and execution issued thereon is regular in form, court has no power to vacate execution for omissions or acts of sheriff after writ has duly come into his hands.

3. Execution ⇐161

A levy upon property exempt from execution is not ground for recalling the writ.

4. Execution ⇐161

Means are provided by law for protection of rights of strangers to action and a levy cannot be quashed on ground that judgment debtor has no interest in the property levied upon.

5. Husband and Wife ⇐268(9)

Realty constituting community property of husband and wife was liable for satisfaction of judgment against husband on cause of action for conversion of personalty which accrued during marriage, and fact that such realty was awarded to wife by interlocutory decree of divorce after entry of judgment against husband did not relieve it from such liability.

6. Husband and Wife ⇐270(11)

Execution on judgment against husband on cause of action for conversion of personalty, which accrued during marriage, could be levied on realty constituting community property of husband and wife without first bringing a creditors' bill in equity to set aside interlocutory decree of divorce awarding such realty to wife entered after entry of judgment against husband. *West's Ann.Civ.Code*, § 3439.09.

7. Homestead ⇐66, 200

Where realty, constituting community property of husband and wife, except for declaration of a homestead thereon, was liable for satisfaction of judgment against husband, judgment creditor was entitled to levy on the value of such realty in excess of the homestead exemption and have appraisers appointed to determine such excess. *West's Ann.Civ.Code*, §§ 1245, 1246.

8. Appeal and Error ⇨115

Order quashing writ of execution was appealable.

movant would be required to renew his motion and present the same question to the same court that had previously decided it.

9. Execution ⇨116, 221

The lien created by levy of a writ of execution obtains for only one year and where property levied upon is sold more than one year after issuance of writ, such sale is void. West's Ann.Code Civ.Proc. § 688.

Ralph Leon Isaacs, Albert J. McGuire, San Francisco, for petitioner.

John K. Hagopian, San Francisco, for respondents real parties in interest.

KAUFMAN, Justice.

10. Mandamus ⇨4(3)

Remedy by appeal from order quashing writ of execution under which levy had been made on realty, constituting community property of judgment debtor and former wife, which except for homestead exemption was liable for satisfaction of judgment, without passing on judgment creditor's application for appointment of appraisers to determine whether there was any interest in the realty in excess of homestead exemption available for satisfaction of judgment was not speedy and adequate so as to preclude issuance of writ of mandate setting aside order quashing execution and directing superior court to appoint appraisers. West's Ann.Code Civ.Proc. § 688; West's Ann.Civ.Code, §§ 1245, 1246.

Petitioner filed herein a petition for an alternative writ of mandate and thereafter this court issued an alternative writ. A return was thereafter filed and the matter was then duly argued before the court.

On July 22, 1955 petitioner recovered a money judgment against Charles Astikian (Civil, No. 441686) for conversion of personal property. On November 9th following, petitioner caused an execution to be issued on the judgment directed to the Sheriff of the City and County of San Francisco, who, pursuant to this writ, levied upon Astikian's interest in certain real property, which at that time stood in the name of his wife, Sally.

11. Mandamus ⇨53, 55

Where superior court at instance of judgment debtor's former wife erroneously quashed writ of execution under which levy had been made on realty, constituting community property of judgment debtor and former wife, which except for homestead exemption was liable for satisfaction of judgment, in order to prevent irreparable damage to judgment creditor by reason of expiration of lien created by levy of execution, peremptory writ of mandate should issue setting aside order quashing execution and directing superior court to appoint appraisers to determine whether there was any interest in the realty in excess of homestead exemption available for satisfaction of judgment. West's Ann.Code Civ.Proc. § 688; West's Ann.Civ.Code, §§ 1245, 1246.

Prior to this transaction, on October 2, 1952, Astikian and his wife had jointly declared a homestead upon this property. On July 8, 1955, Sally Astikian filed a divorce action in the Superior Court of San Francisco and on July 25, the court entered an interlocutory judgment of divorce whereby it found that the real property in question was community property and awarded it entirely to the wife.

On the 18th of November, 1955, petitioner filed an application in the Superior Court for the appointment of appraisers to appraise the homestead, alleging upon information and belief that the property in question was worth \$25,000 and that the maximum amount under the homestead declaration was \$12,500.

12. Mandamus ⇨4(3)

The remedy by appeal is neither speedy nor adequate so as to preclude issuance of writ of mandate, if upon reversal of order,

On November 28, Sally Astikian served the petitioner with a notice of motion to set aside and quash the said execution on the grounds that Charles Astikian did not have any right, title or interest in the real property at the time the sheriff levied the execution. Sally Astikian was not a party to

the action instituted by petitioner against Charles Astikian.

On December 1, petitioner's application for the appointment of appraiser to appraise the homestead and respondent's motion to quash and recall the writ of execution were heard together. No one appeared to oppose the application for the appointment of appraisers, but the petitioner offered opposition to the respondent's motion to quash and recall the writ by introducing the file in the divorce action including the interlocutory decree of divorce wherein the court determined that the property in question was community. The motions were submitted and on January 26, 1956 the court made its order granting the motion to set aside and quash the execution but made no formal decree regarding the petitioner's application for appointment of appraisers.

Petitioner contends that this order was made in excess of the jurisdiction of the court and that he does not have a plain, speedy and adequate remedy in the ordinary course of law for although the order is appealable, an appeal will not adequately safeguard his interests.

[1-4] Petitioner contends that the trial court abused its discretion in quashing the writ of execution. It is the general rule that none but the parties to the action who are liable to be injured can move for recall of the writ, 23 C.J., Executions, sec. 426, p. 541, 33 C.J.S., Executions, § 144, unless the judgment upon which it issued or the writ is void on its face. In such cases it has been held that subsequent purchasers, lienholders and execution and judgment creditors may so move, 23 C.J., Executions, sec. 426, p. 542, 33 C.J.S., Executions, § 144, and cases cited; *Dorland v. Smith*, 93 Cal. 120, 28 P. 812; *Montgomery v. Meyerstein*, 195 Cal. 37, 231 P. 730. In the present case, however, the judgment is valid upon its face, and the execution issued thereon was regular in form. Under such circumstances it is well settled that the court has no power to vacate an execution for the omissions or acts of the sheriff after the writ has duly come into his hands, 23 C.J., Executions, sec. 424, p. 540, 33 C.J.S., Executions, § 143. Hence it has been held that a levy upon

property exempt from execution is not a reason for recalling the writ, *Roth v. Insley*, 86 Cal. 134, 24 P. 853; nor can the levy be quashed on the ground that the judgment debtor has no interest in the property levied upon, as strangers to the action have means provided by law for protecting their rights, 23 C.J., Executions, sec. 285, p. 470, 33 C.J.S., Executions, § 109; *Bancroft Code Practice and Remedies*, sec. 1999, p. 2630. *Associated Oil Co. v. Mullin*, 110 Cal.App. 385, 392, 294 P. 421; *Roth v. Insley*, 86 Cal. 134, 24 P. 853, 11 Cal.Juris. §§ 58, 64.

Petitioner further contends that the real property which is held under the execution, being the community property of Charles and Sally Astikian, is liable for the debts of the husband.

Under the interlocutory decree of divorce entered on July 25, 1955 the court awarded all the community property of the spouses to the wife (the grounds for divorce being the extreme mental cruelty of the husband) and found that the real property in question was community. Petitioner maintains that since the cause of action accrued during marriage and judgment was entered in his conversion action prior to the interlocutory decree, it was a debt chargeable to community property and the wife took such property subject to all burdens for community debts.

In *Bank of America Nat. Trust & Savings Ass'n v. Mantz*, 4 Cal.2d 322, 49 P.2d 279, a husband and wife entered into a property settlement agreement prior to divorce whereby each spouse acknowledged ownership by the other of a one-half interest in certain real property title to which had been taken by the spouses in a deed describing them as joint tenants. In the divorce action which ensued the court affirmed the property settlement. Slightly more than a year later, the wife brought a supplemental action to impeach the settlement and to have the divorce amended. The court determined that the property in question was community property as regards the half which the husband had been awarded and accordingly awarded the wife that half interest. The husband thereafter deeded this interest to his wife and the divorce was made final on January 7, 1931. Meanwhile

the husband had been falling into financial difficulties and a creditor secured judgment against him upon a defaulted guaranty, and then brought an action in equity to have the court declare that the one-half interest in the realty which had been awarded the wife as her share of community property should be available for the payment of the husband's debt. The court said in 4 Cal.2d at page 326, 49 P.2d at page 281:

"The basis of this plea is that by the judgment and decree in said supplementary action and by the final decree of divorce, the half interest in the property became and is community property of the Gormans; that as against the debtor or his judgment creditor, she must take the property *cum onere*.

"We see no escape from the binding efficacy of this contention. Upon no other hypothesis could respondent wife have received it under said decree. Separate property cannot be awarded in a divorce action. Section 157, Civ.Code; Allen v. Allen, 159 Cal. 197, 113 P. 160. This is true in spite of the findings and judgment of the trial court that said property was separate property of Gorman and is now the separate property of respondent. In other words, it is quite true that but for said adjudication, invited by respondent, the evidence would amply support the conclusion of the trial court that originally it was the husband's separate property. But if it were his separate property, appellant would have the right to subject it to payment of its judgment unless the property, prior to lien of the judgment, had been conveyed to another, and even in that event, appellant could still follow it until it reached the hands of a *bona fide* purchaser or encumbrancer for value."

Although petitioner in this case seeks to satisfy a judgment which arose out of a tort action, this will not change the rule enunciated above for in Grolemond v. Cafferata, 17 Cal.2d 679, 111 P.2d 641, the court held that community property was liable for the torts of the husband.

[5] It thus becomes clear from the authorities cited that since this was a judgment arising out of a debt of a husband

incurred during marriage, the community property is liable by way of satisfaction and the fact that the court may have awarded it to the wife in a divorce action so that legal title now stands in her name, will not relieve it from the burdens with which it was encumbered at the time of the award.

[6] It is clear that under Civil Code, sec. 3439.09 the creditor petitioner here had the right to levy execution on the real property set aside to the wife without first bringing a creditors' bill in equity to set aside the decree awarding the real property to the wife. Strong v. Strong, 22 Cal.2d 540, 140 P.2d 386.

[7] Petitioner contends that notwithstanding the exemption from creditors which has been accomplished by homesteading the realty involved in this case, that creditors are entitled to levy upon the value of the property over the homestead exemption and to have appraisers appointed for the purpose of determining this excess if there be any. The authorities sustain him. Brandon v. Faria, 99 Cal.App. 594, 598, 279 P. 192; Civ Code, Sections 1245-1246.

[8-12] Although the order quashing the writ of execution is appealable, petitioner may be irreparably damaged unless he is given relief by mandate. Under Code of Civil Procedure, section 688 the lien created by the levy of a writ of execution obtains for only a single year and where a sale is had after the expiration of a year's time from the issuance of a writ, the sale is void. Ruddell v. Warne, 73 Cal.App.2d 907, 909, 167 P.2d 811. There now remains little more than nine months in which to dispose of the appeal and in which to have appraisers appointed to determine what portion of the property is not exempt from execution and petitioner's rights might be lost if this matter is not disposed of timely. Further, it has been held the remedy by appeal is neither speedy nor adequate if the petitioner be required to renew his motion and to present the same question to the same court that had previously decided it. La Mar v. Superior Court, 87 Cal.App.2d 126, 196 P.2d 98.

In view of the foregoing, it is our opinion that a peremptory writ of mandate

should issue annulling and setting aside the order quashing the execution and directing the trial court to make an order appointing appraisers as provided for by law to determine whether there is any interest in the homestead property available for the satisfaction of petitioner's claim.

Let a peremptory writ of mandate issue.

NOURSE, P. J., and DOOLING, J.,
concur.



140 Cal.App.2d 106

Kenneth L. BURKETT and Patricia M. Burkett, his wife, doing business as Yakima Dental Laboratory, Plaintiffs and Respondents,

v.

DENTAL PERFECTION COMPANY, a California corporation, and Stanley E. Noyes, Defendants and Appellants.

Civ. 21345.

District Court of Appeal, Second District,
Division 2, California.

March 21, 1956.

Action by buyer against seller-corporation and officer thereof for damages allegedly suffered as result of fraud, breach of warranty and negligence. The Superior Court, Los Angeles County, Jerold E. Weil, J., entered judgment for plaintiffs on verdict entered in their favor and defendants appealed. The District Court of Appeal, Ashburn, J., held that there was no error in instructions given at trial.

Judgment affirmed.

1. Trial $\S$ 296(2)

In action by buyer against seller-corporation and officer thereof for damages allegedly suffered as result of fraud, breach of warranty and negligence, error in instruction for failure to make distinction between damages for fraud and for breach

of warranty was rendered innocuous and was not prejudicial by reason of instruction that there could be no recovery for breach of warranty against officer of corporation and in view of fact verdict ran against both defendants, thus showing jurors based verdict upon fraud or negligence and not breach of warranty.

2. Sales $\S$ 434

Failure of complaint for breach of warranty to allege notice by buyer to seller of breach of promise or warranty within reasonable time, is fatal to an action for breach of warranty. West's Ann.Civ. Code, $\S$ 1768.

3. Appeal and Error $\S$ 193(9)

Defect in complaint for breach of warranty because of failure to allege notice by buyer to seller of breach of promise or warranty is cognizable on appeal and may be raised there for first time. West's Ann.Civ.Code, $\S$ 1769.

4. Sales $\S$ 288(2)

The purpose of statutes relating to breach of warranty is to ameliorate the harshness of common-law rule in some states that mere acceptance by or passage of title to buyer of goods constituted waiver of any and all remedies for breach of warranty, and at same time to give seller some protection against stale claims. West's Ann.Civ.Code, $\S\S$ 1768, 1769.

5. Sales $\S$ 446(4, 5)

In action for damages by buyer against seller-corporation and officer thereof for damages allegedly suffered as result of fraud, breach of warranty and negligence, refusal of trial court to give instructions which in effect told jury there would be no warranty either implied or expressed if plaintiff acquired knowledge of serviceability of machine and product purchased, was not error in view of fact such instruction was opposed to applicable statutes. West's Ann.Civ.Code, $\S\S$ 1768, 1769.

6. Sales $\S$ 445(1)

Question of what should have been done by buyers to mitigate damages upon discovery of breach of warranty was one of fact for jury.

7. Sales ⇨446(9)

It is error to instruct that a specific line of conduct is required of injured party in order to minimize his damages for breach of warranty.

8. Sales ⇨446(9)

In action by buyer against seller-corporation and officer thereof for damages allegedly suffered as result of fraud, breach of warranty and negligence, refusal of trial court to give instruction relating to diminution of damages which instruction failed to recognize provisions of statute providing that acceptance of bid by buyer shall not discharge seller from liability, and which instruction also undertook to assert as matter of law that upon discovery of breach of warranty, plaintiffs must immediately cease use of article purchased as means of mitigating their damages, was not error. West's Ann.Civ.Code, § 1769.

9. Trial ⇨256(4)

In action by buyer against seller-corporation and officer thereof for damages allegedly suffered as result of fraud, breach of warranty, and negligence, instructions upon burden of proof were proper as far as they went, and defendants could not complain of failure of trial court to make more specific statement to effect that plaintiffs had burden of proving amount of damage, where they failed to make request for more specific instructions.

Louis Ballenger and Donovan W. Ballenger, Glendale, Lawrence William Steinberg, Beverly Hills, of counsel, for appellants.

Hasbrouck & Melby, Glendale, for respondents.

ASHBURN, Justice.

Plaintiffs conduct a commercial laboratory designing and constructing dental appliances, their only customers being dentists. In March, 1950, they purchased from defendant Dental Perfection Company a certain new material (a compound) for use in fabricating dentures (known as D-P resin), and leased from it a machine (known as D-P Injecto Press), both to be

used for the manufacture of dentures by an injection process. Defendant Stanley E. Noyes was president of defendant corporation and made the deal with plaintiffs. In doing so he made certain representations as to the compound and the press which proved to be unfounded. Plaintiffs sued him and the corporation for damages. The complaint is in seven counts; four sound in fraud, two in breach of warranty and one in negligence. Pursuant to jury verdict for plaintiffs judgment for \$10,670 was entered and defendants appeal therefrom.

Counsel for appellants, recognizing substantial conflicts in the evidence, confine themselves to claims of error in giving and refusing certain instructions.

It is contended that the measure of damages for breach of warranty is more restricted than that applicable to fraud and negligence actions, and that the court erred in giving instructions which failed to explain that difference to the jurors. Counsel rely upon *Rutherford v. Standard Engineering Corp.*, 88 Cal.App.2d 554, 568, 199 P.2d 354, wherein it was held that there is a substantial difference between the measure of damages for fraud and that applying to breach of warranty; that the jury should be instructed upon the distinction between the two.

[1] The instruction which is specifically attacked at bar is number 171, reading as follows: "If, adhering to the court's instructions, you should find that plaintiffs are entitled to a verdict against a defendant, it then will be your duty to award plaintiffs such amount of damages as will compensate them reasonably for all detriment suffered by them and of which defendant's fraudulent misrepresentations, breach of warranty or negligence, as found by you, was a proximate cause—whether such detriment could have been anticipated or not, but in this connection you are reminded that there can be no recovery against defendant Stanley E. Noyes by reason of any breach of warranty. Should your decision be to award damages to the plaintiffs, in arriving at the amount of the award, you shall determine each of the

items of claimed detriment which I now am about to mention, provided that you find it to have been suffered by them and as a proximate result of defendant's fraudulent misrepresentation, breach of warranty or negligence." It is unnecessary to inquire whether error lurks in this instruction for, as respondents point out, it contains a caution which renders the error innocuous, if one there be. Reference is made to this phrase: "but in this connection you are reminded that there can be no recovery against defendant Stanley E. Noyes by reason of any breach of warranty." The same proposition is stated twice in another instruction: "A buyer can recover for breach of warranty from the seller but not from the seller's agent even if the warranty is given by the agent. * * * Any recovery in this action for breach of warranty may be had from defendant Dental Perfection Company only—not from defendant Stanley E. Noyes. Any recovery for any fraudulent misrepresentations made by defendant Stanley E. Noyes or for any negligence of defendant Stanley E. Noyes must be against both defendants, but any recovery for any fraudulent misrepresentation or negligence, respectively, chargeable to defendant Dental Perfection Company may be had only against that defendant if the defendant Stanley E. Noyes did not make fraudulent misrepresentations or was not guilty of any negligence, as the case may be." Because the verdict ran against both defendants the respondents argue correctly that this shows the jurors to have based their verdict upon fraud or negligence, not breach of warranty, and hence that no error in the instruction under attack could be prejudicial.

Appellants rely upon *Hume v. Fresno Irr. Dist.*, 21 Cal.App.2d 348, 356, 69 P.2d 483, 488, wherein it is said: "The rule is settled in this state that, where several issues in a cause are tried and submitted to a jury for its determination, a general verdict may not be disturbed for uncertainty, if one issue is sustained by the evidence and is unaffected by error. [Citing cases.] When a situation of this character is presented it is a matter of no importance that the evidence may have been insufficient to

sustain a verdict in favor of the successful party on the other issues or that reversible errors were committed with regard to such issues. *Big Three Min. & Mill. Co. v. Hamilton*, 157 Cal. 130, 141, 107 P. 301, 137 Am.St.Rep. 118."

Nunneley v. Edgar Hotel, 36 Cal.2d 493, 225 P.2d 497 is in point. This was a personal injury action in two counts, one based on general negligence and the other upon violation of a safety statute. Plaintiff sued Gladys P. Brickel, the owner of the hotel, and her husband Charles F. Brickel, who was its manager. Both were charged with general negligence. In a second count both defendants were charged with negligence growing out of violation of a safety statute. The jury found against both defendants and made no reference to the different causes of action. The court held that the statute on which plaintiff relied was not applicable and that the court erred in instructing that a violation of the statute would render the owner Gladys P. Brickel guilty of negligence; but that the error was not prejudicial because the evidence of general negligence was sufficient to establish the liability of both defendants. At pages 500-501 of 36 Cal.2d, at page 501 of 225 P.2d, the court said:

"The instructions make no distinction between the two counts of the complaint. * * * For this reason, the Brickels contend that, although the jury found against both the owner and the manager of the hotel, there is no way of determining whether responsibility was laid upon each of them because of general negligence, or violation of the statute.

"However, the instructions relating to the provisions of the Health and Safety Code referred only to the conduct of Gladys Peterson Brickel. It must be assumed that the jury understood the instructions and correctly applied them to the evidence. [Citing cases.] It follows that the verdict against Charles F. Brickel, the manager of the hotel, was based upon the evidence relating to general negligence. There is no contention that

the evidence in that regard is insufficient to support a verdict against either of the Brickels. * * *

"The evidence of general negligence is also sufficient to establish the liability of Gladys Peterson Brickel, as the owner of the property. Otherwise stated, the jury could have found Mrs. Brickel liable for the injuries sustained by Miss Nunneley upon the cause of action for general negligence, the evidence as to that charge being applicable to her conduct as well as to that of her husband. Under these circumstances, the giving of Instructions 15 and 30 did not result in a miscarriage of justice. Cal.Const., Art. VI, sec. 4½."

[2, 3] For another reason the verdict herein is sustainable only upon grounds other than breach of warranty. Civil Code, § 1769, provides: "In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor." The complaint contains no allegation, and the transcript discloses no proof concerning a notice such as that specified in the second sentence of the section. This is fatal to an action for breach of warranty. *Vogel v. Thrifty Drug Co.*, 43 Cal.2d 184, 187, 272 P.2d 1. The defect is such that it is cognizable on appeal though raised there for the first time. *Van Buskirk v. Kuhns*, 164 Cal. 472, 476, 129 P. 587, 44 L.R.A., N.S., 710; *Jakobsen v. Peratis*, 213 Cal. 671, 672, 3 P.2d 305; 21 Cal.Jur. § 186, p. 268. There being no possibility of a recovery in this action for breach of warranty, any errors in instructions on that subject could be prejudicial only if they have a tendency to increase the award beyond that permissible under the other causes of action. Appellants' argument is that fraud and neg-

ligence carry more liberal admeasurements and this in turn argues no prejudice from the warranty instructions.

[4, 5] Aside from the foregoing considerations, the refusal of the instructions which appellants discuss could not be error. One of them is as follows: "You are instructed that if you find as a matter of fact that the plaintiff Mr. Burkett gained complete knowledge of the quality and serviceability of the Dental Perfection Company products, that then Mr. Burkett could rely on his own knowledge and there would be no warranty, either implied or expressed." No reference is made to time of discovery, but, as there is no evidence suggesting that it occurred before the lease of the press and purchase of the compound, the jurors must have understood it as referring to knowledge gained after delivery of same. The argument in appellants' brief shows that this was the intent of the instruction. Their counsel discuss the request as one calling for minimizing of damages on plaintiffs' part. It makes no reference to that subject whatever. Intrinsically it is erroneous because it states that knowledge of breach of warranty precludes reliance upon the warranty. The first sentence of § 1769, Civil Code, is again quoted: "In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale." Acceptance is defined in § 1768, Civil Code: "The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them." The instruction is opposed to the statute, whose purpose is disclosed by the discussion in *Franck v. J. J. Sugarman-Rudolph Co.*, 40 Cal.2d 81, 87, 251 P.2d 949, 953. It is there said: "The first sentence of section 1769 of the Civil Code, supra, states that in

the absence of agreement the acceptance of the goods does not discharge the seller for breach of promise or warranty, but the second sentence requires notice by the buyer of a claimed breach in a reasonable time to preserve his rights. The purpose of the two sentences was to 'ameliorate the harshness of the common law rule in some states that the mere acceptance by or passage of title to the buyer of the goods constituted a waiver of any and all remedies for breach of warranty, and at the same time to give the seller some protection against stale claims by requiring notice. (See, discussion Williston on Contracts [Rev.Ed.], sec. 714.)' *Whitfield v. Jessup*, 31 Cal.2d 826, 828, 193 P.2d 1, 2. Apparently the rule was, before the uniform act, as to the sale of personal property generally that an acceptance of the goods by the buyer, knowing of the breach of warranty, constituted a waiver by him of a claim for damages for the breach, at least unless he gave notice of his complaint within a reasonable time." There was no error in refusing this instruction, which harks back to the rule antedating the adoption of the uniform act.

[6-8] Complaint is made of refusal of the following instruction which does relate to diminution of damages: "You are instructed that if you find that the plaintiff, at any time during the time he was using Dental Perfection materials or machine found out and had knowledge that the dentures did not or were not working out satisfactorily, that he no longer could rely on any warranties made by the defendant company and that he was under a duty to cease the use of the material and machine as soon as he had knowledge that they were not performing properly and that he was being injured, and that any use he made of said materials or machine after this knowledge is not chargeable to the defendant, even if you find there is a warranty for the period before this knowledge was acquired." It was properly rejected. In the first place, its last phrase reflects the same mistaken failure to recognize the provisions of § 1769, Civil Code, as is found in the instruction just discussed. But this request also is erroneous in its

statement that "he was under a duty to cease the use of the material and machine as soon as he had knowledge that they were not performing properly and that he was being injured." Also, "that any use he made of said materials or machine after this knowledge is not chargeable to the defendant." In both of these respects the requested instruction undertakes to assert as matter of law that upon discovery of breach of warranty plaintiffs must immediately cease use of the press and the compound as a means of mitigating their own damages. The question of what should be done to accomplish that end is one of fact for the jury. *Dodds v. Stellar*, 77 Cal.App.2d 411, 421-423, 175 P.2d 607; *Danelian v. McLoney*, 124 Cal.App.2d 435, 443, 268 P.2d 775; *Christiansen v. Hollings*, 44 Cal.App.2d 332, 346, 112 P.2d 723. It is error to instruct that a specific line of conduct is required of the injured party in order to minimize his damages. 17 C.J. § 379, p. 1074; 25 C.J.S., Damages, § 184, p. 878; *O'Donnell v. Rhode Island Co.*, 28 R.I. 245, 66 A. 578; *Southern Ry. Co. v. Cunningham*, 123 Ga. 90, 50 S.E. 979, 982; *Louisville & N. R. Co. v. Baker*, 158 Ky. 224, 164 S.W. 799, 801; *Blate v. Third Ave. R. Co.*, 44 App.Div. 163, 60 N.Y.S. 732, 734. This is true unless there is but one permissible procedure recognized by the law in the given circumstances. That is not the situation at bar. Respondents argue with plausibility, and with support in the record, that defendants encouraged continued use of their machine and materials. Plaintiffs received their first complaints from customers in October or November, 1950. Defendants' manager testified that he received a complaint from plaintiffs on October 24, 1950; he thereupon advised them on November 3, 1950, to raise the temperature in the machine from 470 to 485 degrees; on January 25, 1951, he suggested to plaintiffs "that the dentures be normalized in water before they were delivered to the doctor." Plaintiffs discontinued the use of the machine and material in March, 1951. Appellants' opening brief says: "Throughout the testimony of Mr. Lockridge [said manager] we find corrections and suggestions had

been given by him to attempt to keep Mr. Burkett from incorrectly using the machine." This situation presents a question of fact and not one of law as to when, if at all, plaintiffs should have ceased the use of defendants' material and press. There was no error in refusing the instruction last quoted.

[9] It is further argued that the jurors were not instructed that the burden of proof of the amount of damages rested upon plaintiffs. Specific reference is made to an instruction which, so far as fraud and negligence are concerned, told the jury: "As to the phase of this case relating to fraudulent misrepresentation, the burden is upon the plaintiff to prove by a preponderance of the evidence that a defendant made fraudulent misrepresentations or a fraudulent misrepresentation, that plaintiffs relied thereon and were damaged as a proximate result thereof.

* * * As to the phase of this case relating to negligence, the burden is upon the plaintiffs to prove by a preponderance of the evidence that a defendant was negligent and that such negligence was a proximate cause of injury to the plaintiffs, and under that phase of this case to establish the defense of contributory negligence, the burden is upon the defendants to prove by a preponderance of evidence that a plaintiff was negligent and that such negligence contributed in some degree as a proximate cause of the injury." In three other instructions the jurors were told that damage is an element of a cause of action for fraud and deceit. Instruction 21-A says: "Whenever in these instructions I state that the burden, or the burden of proof, rests upon a certain party to prove a certain allegation made by him, or the affirmative of an issue asserted by him, the meaning of such an instruction is this: that unless the truth of that allegation or the affirmative of that issue is proved by a preponderance of the evidence, you shall find the same allegation to be not true and find against the party on that issue. * *"

And instruction 21: "Should the conflicting evidence be evenly balanced in your minds, so that you are unable to say that the evidence on either side of the issue

preponderates, then your finding on that issue must be against the party carrying the burden of proof, namely, the one who asserts the affirmative of the issue." Unquestionably the instructions upon the burden of proof were proper as far as they went. If defendants wanted a more specific statement to the effect that plaintiffs had the burden of proving the amount of damage, they had only to request one and it undoubtedly would have been given; this they did not do. Having failed to make such a request for more specific instructions, they cannot be heard to complain of the generality of those which they now attack. 24 Cal.Jur. § 74, p. 796; Townsend v. Butterfield, 168 Cal. 564, 569, 143 P. 760; Tabata v. Murane, 24 Cal.2d 221, 228, 148 P.2d 605.

The judgment is affirmed

MOORE, P. J., and FOX, J., concur.



140 Cal.App.2d 97

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Lee SPENCER, Defendant and Appellant.
Cr. 3150.

District Court of Appeal, First District,
Division 2, California.

March 21, 1956.

Rehearing Denied April 5, 1956.

Hearing Denied April 18, 1956.

Defendant was convicted of selling heroin. The Superior Court, County of Alameda, Charles Wade Snook, J., rendered judgment on the jury's verdict, and defendant appealed. The District Court of Appeal, Dooling, J., held that trial court's statements in instructions to jury that defendant's testimony on cross-examination that he previously pleaded guilty of misdemeanor violation of State Narcotics Act was admissible as tending to establish defendant's knowledge of nature of drug al-

leged to have been possessed by him and was admitted solely for whatever bearing it might have on question of such knowledge were prejudicial errors, though court sustained defendant's objection to prosecuting attorney's question whether defendant had pleaded guilty of such violation and instructed jury that such testimony must not be considered for purpose of impeachment.

Judgment reversed for a new trial.

1. Criminal Law ⚖️878(4)

A jury's verdicts, finding defendant not guilty of possessing heroin in cigarette package found by arresting officer in automobile beside which defendant was standing when arrested and guilty of selling different quantity of heroin which a woman in automobile testified that defendant sold and delivered to her, were not inconsistent.

2. Criminal Law ⚖️178

The Penal Code sections providing that when two or more defendants are included in same accusatory pleading, court may direct any defendant's discharge, so that he may be witness for People, and that court must order discharge of a defendant as to whom evidence is insufficient to put him to defense, so that he may be a witness for his codefendant, do not apply to preliminary hearing before a magistrate, whose discharge of a defendant does not operate as acquittal of such defendant and bar his further prosecution for same offense. West's Ann.Pen.Code, §§ 1099-1101.

3. Poisons ⚖️4

Knowledge of narcotic character of substance is essential element of violation of narcotics code by possession or sale of such substance.

4. Criminal Law ⚖️337, 673(2)

Evidence which is generally inadmissible is admissible to prove a particular fact in issue and risk of misuse of such evidence by jury must be controlled by instruction limiting its use to particular issue.

5. Criminal Law ⚖️673(2), 1169(1)

Generally, admission of evidence proper for limited purpose only is not prejudicial

to defendant, where jury is properly instructed as to such purpose, but admission of evidence not admissible for any purpose should be held prejudicial error, if its misuse by jury seems at all probable.

6. Criminal Law

⚖️656(3), 783(1), 1166½(12), 1172(2)

In prosecution for possession and sale of heroin, trial court's statements and instructions to jury that defendant's testimony on cross-examination that he previously pleaded guilty of misdemeanor violation of State Narcotics Act was admissible as tending to establish his knowledge of nature of drug possessed by him, and was admitted solely for its bearing on question whether he knew that substance in his possession was a narcotic were errors prejudicial to defendant, so as to require reversal of his conviction for selling heroin, though court previously sustained defendant's counsel's objection to prosecuting attorney's question to defendant as to such plea and instructed jury that such testimony was not admissible for purpose of impeachment. West's Ann. Health & Safety Code, § 11500.

Kretzmer & Landisman, by Joseph Landisman, Richmond, for appellant.

Edmund G. Brown, Atty. Gen., of California, Clarence A. Linn, Asst. Atty. Gen., John S. McInerny, Deputy Atty. Gen., J. Frank Coakley, Dist. Atty., of Alameda County, Dale I. Stoops, Deputy Dist. Atty., Oakland, for respondent.

DOOLING, Justice.

Appellant was charged in an information containing two counts with possession and sale of heroin. The jury found appellant not guilty on the possession count and guilty on the count charging a sale. This appeal is from the judgment of conviction of sale.

The evidence is in sharp conflict. On October 1, 1954, around midnight Officer Hilliard observed appellant and one Jewell Chambers in appellant's automobile. These two got out of appellant's automobile and went to another parked car in which Lloyd

Broadnax and Katherine Jones were seated in the front seat. Jewell Chambers got into the rear seat and appellant stood by the driver's side of the automobile talking to the occupants. They were all eating some baked spareribs which Broadnax had in his automobile. Officer Hilliard approached and seized appellant. The two women fled and were not apprehended until some time later.

A search of appellant's person disclosed no narcotics but inside the front door against which appellant had been leaning a crumpled, damp Chesterfield cigarette package was found containing a quantity of heroin.

Appellant, Broadnax and the two women were jointly charged with possession of heroin and appellant was further charged with a sale of heroin. At the preliminary hearing the committing magistrate dismissed the charge against Broadnax and the two women on the motion of the district attorney on the stated ground that the dismissal was for the purpose of permitting them to be witnesses for the people. The three then testified for the people and appellant was held to answer.

At the trial Jewell Chambers was not called as a witness because she could not be located and the trial judge refused to allow her testimony at the preliminary hearing to be read on the ground that the district attorney had not shown due diligence in attempting to find her. Katherine Jones, an admitted narcotics user, testified that on the evening of his arrest appellant had sold her some heroin which he handed to her while he was standing by Broadnax' automobile. She testified that before her arrest she had used this heroin. Broadnax testified that while he was standing by the automobile appellant had leaned across him and handed something to Katherine Jones. Appellant denied selling or delivering any heroin to Katherine Jones.

[1] Appellant's claim that the verdicts are inconsistent is untenable. The charge of possession related to the heroin in the cigarette package found in the automobile and the charge of sale related to a different

quantity of heroin, that which Katherine Jones testified that appellant had sold and delivered to her.

[2] At least two other assignments of error, however, are substantial and under the circumstances of this case the errors were prejudicial. The jury found appellant not guilty of the charge of possession of the heroin found in the cigarette package, as to which the evidence was wholly circumstantial. They found him guilty of the charge of sale as to which the only direct evidence came from Katherine Jones, who was corroborated by Broadnax to the extent that he testified that he saw appellant hand Miss Jones something (which he did not further identify). Appellant's attorney argued to the jury that these two witnesses were testifying under the possible duress of themselves being prosecuted for the same offenses. The court instructed the jury:

"When two or more persons are included in the same charge, the Court may at any time before the defendants have gone into their defense, on the application of the District Attorney, direct any defendant to be discharged so that he may be a witness for the People.

"The order mentioned in the Penal Code section quoted above is an acquittal for the defendants discharged and is a bar to another prosecution for the same offense."

The section referred to is Penal Code section 1099 which reads:

"When two or more defendants are included in the same accusatory pleading, the court may, at any time before the defendants have gone into their defense, on the application of the prosecuting attorney, direct any defendant to be discharged, that he may be a witness for the people."

Section 1101 Penal Code provides that this order "is an acquittal of the defendant discharged, and is a bar to another prosecution for the same offense."

These sections are found in Chapter II, Part II, Title VII of the Penal Code which

is headed "The Trial" and Title VII of which this chapter is a part is headed "Proceedings After the Commencement of the Trial and Before Judgment." The proceedings before a committing magistrate are in Chapter VII, Part II, Title III Penal Code and are headed: "Examination of the Case, and Discharge of the Defendant, or Holding Him to Answer." From an examination of the code itself it seems perfectly clear that section 1099 has no reference to a preliminary hearing before a magistrate and gives no power to a magistrate holding a preliminary hearing to discharge a defendant so as to give his order of discharge the effect provided in section 1101 of an acquittal and bar to further prosecution for the same offense. In felony cases that power is limited to the court before which the defendant is brought for trial after an information or indictment has been returned.

There is little authority on the subject but such as there is is consistent with this conclusion. The leading case is *People v. Indian Peter*, 48 Cal. 250. At the preliminary hearing in that case the defendant had been informed by the committing magistrate "that if he would become a witness for the people against two persons charged with the same offense * * * the defendant would thereby be acquitted of any crime therein" and the district attorney with knowledge of this fact used him as a witness. The defendant was afterwards tried and convicted for the same offense and urged the proceedings before the committing magistrate as a bar. The court pointed out that the proceeding is regulated by statute (citing Pen.Code, §§ 1099 and 1101) and concluded at page 253: "The statute having thus designated the cases in which, and the proceedings by which, an indictment may be dismissed and a discharge awarded the accused without actual trial, must be taken to exclude all other cases, or cases not provided for by its terms." This case was decided in 1874 and in all the subsequent amendments to the Penal Code including the extensive amendments in 1951, Stats.1951, p. 3829, section 1099 has continuously remained in

the chapter dealing with trials. Prior to 1951 section 1099 read: "When two or more persons are included in the same charge, the court may, at any time before the defendants have gone into their defense, on the application of the district attorney, direct any defendant to be discharged, that he may be a witness for the people."

The 1951 amendment, in accordance with a general, over-all substitution of terms which covered many sections of the Penal Code, in section 1099 substituted the words "accusatory pleading" for the word "charge," and the words "prosecuting attorney" for the words "district attorney." However the Legislature left the amended section in the same chapter dealing with the subject of "The Trial" and gave no indication that they intended to enlarge its scope to cover the action of magistrates at preliminary hearings. It is true that in *Bates v. Superior Court*, 107 Cal.App.2d 656, at page 658, 237 P. 544, 545, the court said: "Whether or not a dismissal may be authorized by a committing magistrate under sec. 1099 of the Penal Code, as it then read, may be an open question. *People v. Indian Peter*, 48 Cal. 250 * * * see amendment 1951 to sec. 1099, Penal Code." If there is any suggestion in this language that the court in that case believed that the 1951 amendment to section 1099 gave the power to a committing magistrate to discharge a defendant under that section it is purely dictum. The court's actual holding was limited to the decision that having discharged the defendant the committing magistrate thereby lost "jurisdiction to further act" in that particular proceeding.

The court in that case did not consider the position of section 1099 in the chapter dealing exclusively with "The Trial," a factor which we consider decisive of its meaning and scope. Nor did it consider the further implication of such a construction in view of section 1100, which provides: "When two or more defendants are included in the same accusatory pleading, and the court is of opinion that in regard to a particular defendant there is not sufficient evidence to put him to his defense, it must

order him to be discharged before the evidence is closed, that he may be a witness for his codefendant."

If section 1099 gives the power of discharge to a committing magistrate section 1100 gives a like power. This would mean that even over objection of the district attorney the committing magistrate could discharge any defendant at a preliminary hearing when two or more defendants were jointly charged and such discharge under section 1101 would operate as an acquittal. It would take strong reasons, which do not here exist, to impute to the Legislature the intention to give such a drastic power to a committing magistrate. We are satisfied that neither section 1099 nor section 1100 applies to a preliminary hearing before a magistrate.

[3-6] Appellant also assigns as prejudicial error the conduct of the prosecuting attorney and the court as shown by the record in the following portions of the transcript:

"Q. (by the prosecuting attorney, cross-examining the defendant): Is it not true that on or about the 4th day of May, 1951 you pleaded guilty to a violation of Section 11500 of the Health and Safety Code * * *

"Mr. Mintz. Just a moment, just a moment, if the Court please, the Section 11500 is a misdemeanor and I charge Mr. Stoops with asking this question deliberately for the purpose of inflaming the jury * * * it is an improper question. I am going to ask the Court to admonish the jury to disregard it.

* * * * *

"Mr. Stoops. In fairness to all, your Honor, the sentence in the case was one year in the County Jail.

"The Court. Then it is a misdemeanor * * * The objection is sustained and the jury is instructed and directed to disregard the asking of the question."

Thereupon outside the presence of the jury defense counsel made a motion for mistrial on the ground that "the prosecution

has indicated to the jury a previous conviction of a narcotics offense which was not a felony." This motion was denied.

Immediately thereafter the court made the following statement to the jury:

"* * * (L)adies and gentlemen of the jury, after considering the last few questions and answers with reference to a misdemeanor, alleged to have been committed in May, 1951, that testimony is not admitted for the purpose of impeachment as is the testimony with respect to another conviction of a felony, but this having been a misdemeanor, it is not admissible as impeachment of the witness. However, it is, in my opinion, admissible for the purpose of establishing, tending to establish I should say one of the elements of the offense * * * namely knowledge of the nature of the drug alleged to have been possessed by the defendant."

In the instructions to the jury on submission of the case the court again advised the jury:

"Evidence of previous conviction of a misdemeanor violation of the State Narcotics Act was admitted solely for whatever bearing it may have on the question of whether or not the defendant knew that the substance he is alleged to have possessed in the second count of the information, was a narcotic as I have before instructed you, and not for the purpose of impeachment, and must not be considered by you for the purpose of impeachment."

It will be observed that after first sustaining the objection to the question, which was for that reason never answered by the witness, the court thereafter twice mistakenly assumed in instructions to the jury that the question had in fact been answered and answered affirmatively. The serious question, however, is whether by these repeated comments the trial court so emphasized the fact of a previous narcotics conviction that the jury may have been unduly impressed by that factor in what

was admittedly a close case depending almost wholly on the testimony of Katherine Jones as weighed against the testimony of the defendant, in spite of the fact that the court instructed them of the limited purpose for which they might consider this testimony.

Knowledge of the narcotic character of the substance is an essential element of the violation of the narcotics code. *People v. Winston*, 46 Cal.2d 151, 293 P.2d 40. However a reading of this transcript satisfies us that the defendant in this case was not advancing the defense that he was not acquainted with the narcotic drug heroin. Immediately before the question about defendant's conviction of violating section 11500, Health and Safety Code the following questions were asked of the defendant to which he gave the following answers:

"Q. Do you know what the expression 'paper of heroin' is?

* * * * *

"A. Sure, I do.

"Q. Now I will show you People's Exhibit 2 in Evidence. What is that?

A. That is a bundle of heroin."

It may be conceded that if appellant's knowledge of the narcotic heroin had been a real issue in the case evidence of his prior conviction of possession of heroin, although not admissible generally, would be admissible for the limited purpose of proving such knowledge, under the instructions given to the jury that it was to be considered by the jury for that limited purpose only. The rule is that evidence generally inadmissible is admissible to prove a particular fact, when that fact is an issue in the case, and the risk of its misuse by the jury is then to be controlled by an instruction to the jury limiting its use to the particular issue. The courts have held that the risk of its misuse by the jury in such a case is overbalanced by its value as evidence on the particular issue, and the party against whom it is introduced is then sufficiently protected by the court's instruction to the jury that they may only consider it in resolving the particular issue. We said on this question in *People v. Malicoat*, 89

Cal.App.2d 742, 745-746, 201 P.2d 850, 853:

"Where evidence is properly admissible for a limited purpose only the courts recognize the danger that it may be improperly considered by the jury for other purposes (*Adkins v. Brett*, 184 Cal. 252, 256-259, 193 P. 251) but that is a risk which must ordinarily be taken if the evidence is admissible for some purpose, and a cautionary instruction limiting its use to the proper purpose is all the protection that the party can be given under the circumstances. For this reason it is generally held that there is no prejudice from the admission of such evidence where the jury is properly instructed as to its limited purpose, 10 Cal.Jur. § 105, p. 815. But where the evidence is not admissible for any purpose the reason for the rule ceases. There is no justification for the risk of its misuse by the jury and if the fact of its misuse seems at all probable the courts should not hesitate to find prejudice in the error."

The rule is one of necessity and the risk of misuse should not be incurred if the evidence is not directed to a disputed issue in the case. Here the record was clear, before the question of appellant's prior conviction of the misdemeanor conviction of possession of heroin was first asked by the prosecutor, from appellant's own testimony above quoted that appellant knew what heroin was. His defense, already developed, was not that he did not know what heroin was but that he was not guilty of the possession and sale of the particular heroin as charged in the information. Since it was already clear that knowledge of the narcotic character of heroin was not in issue there was no reason, and no justification, for the admission of this evidence with the attendant danger of its misuse by the jury despite the cautionary instruction of the court.

The conviction depended basically on weighing the evidence of the witness Jones against the evidence of the appellant. The fact that the jury refused to convict the

appellant of possession of the narcotic found in the car further emphasizes the closeness of the case in the eyes of the jury. We are satisfied that in such a close case the errors discussed may well have swung the balance and that these errors were in fact prejudicial.

Judgment reversed for a new trial.

NOURSE, P. J., and KAUFMAN, J., concur.

Hearing denied; SHENK, J., dissenting.



140 Cal.App.2d 33

**Rodolfo ENDARA, The Mica Corporation,
and Culver Hydro-Press, Inc., Plaintiffs
and Respondents,**

v.

**CITY OF CULVER CITY, Curtis Davis, Ed-
ward Julline, Harold Shields, Joseph Sul-
livan, Duke Watson, and William E. Lor-
etta, Defendants and Appellants.**

Civ. 21381.

**District Court of Appeal, Second District,
Division 1, California.**

March 20, 1956.

Rehearing Denied April 18, 1956.

Hearing Denied May 15, 1956.

Action for an injunction to prevent the defendants from arresting the plaintiff tenants on the ground the business carried on by the corporate plaintiffs at the property involved was in violation of a city zoning ordinance. Judgment for plaintiffs in the Superior Court of Los Angeles County, Burton Noble, J., and the defendant appealed. The District Court of Appeal, Fourn, J., held that the evidence justified the injunction.

Judgment affirmed.

1. Municipal Corporations ⇨601(25)

The adoption of more modern instrumentalities suitable in carrying on a business did not work a change of use within a zoning ordinance permitting a nonconforming use under certain conditions.

2. Appeal and Error ⇨931(1)

Where no error was specified in the findings of the trial court, they were presumed to be true on appeal.

3. Municipal Corporations ⇨601(17), 628

A zoning ordinance cannot unfairly discriminate against a particular parcel of land, and if the general scheme of zoning is valid, the courts may properly inquire whether the scheme of classification and districting has been applied fairly and impartially in each instance.

4. Constitutional Law ⇨42

It is always open to interested parties to contend that a legislative body has gone beyond its constitutional power.

5. Municipal Corporations ⇨625

Where property of plaintiffs on which industrial operations were carried on as permitted as a nonconforming use to a zoning ordinance, was immediately adjacent to an industrial zone and in the immediate future, there would be a large industrial establishment in the zone adjoining the property, zoning ordinance if construed to deny plaintiffs, a right to continue the present industrial use of their property, would be arbitrary and unreasonable.

6. Appeal and Error ⇨931(1)

Trial ⇨375

Where a trial judge views the premises during a trial, what he sees is not a part of the transcript of the record, but is independent evidence, which may be considered by him in arriving at his decision which the Appellate Court would assume supports his findings.

7. Injunction ⇨128

In action for injunctive relief to prevent defendants from arresting plaintiff tenants on the ground that business carried on by corporate plaintiffs at the property was in violation of a zoning ordinance, where the trial court viewed the premises and the surrounding area, and found that there had been no abandonment of the nonconforming use and that the present use was substantially the same as before the adoption of the ordinance, evidence justified the grant of an injunction.

M. Tellefson, Culver City, for appellants.

Robertson, Harney, Drummond & Dorsey, and William M. Poindexter, Los Angeles, for respondents.

FOURT, Justice.

Plaintiffs brought an action for injunctive relief. The amended complaint set forth generally that the plaintiff Endara was the owner of certain property in the defendant city; that the two plaintiff corporations were lessees of the property in question; that the defendants threatened to arrest and annoy the plaintiff tenants; that the defendants directed to the plaintiffs a notice to the effect that the business carried on by the corporate plaintiffs at the property in question was in violation of Culver City Zoning Ordinance No. CS-147, and plaintiffs would be subject to the penalties of such ordinance. Plaintiffs further set forth that the building in question was constructed in 1928, as an industrial building, and has never been used for other than general manufacturing, industrial or storage purposes, and that the use has never been discontinued or abandoned.

Defendants answered by denying generally and setting forth that the use made by the plaintiffs was in violation of the zoning ordinances.

Evidence was taken and the court, pursuant to stipulation, viewed the premises and the area surrounding the property in question, watched and listened to the operations of plaintiffs and observed the traffic and other matters of concern in reference to the various contentions of the parties.

After trial the court made findings of fact and conclusions of law generally sustaining the plaintiffs' contentions, and made a judgment enjoining and restraining the defendants from interfering with the present use of the premises in question.

Defendants appealed from the judgment.

A brief résumé of the facts is as follows. The property in question, located at 4037 Elenda Street, Culver City (hereafter referred to as "4037"), is owned by plaintiff Endara and leased to the remaining plaintiffs, who have occupied the same since January, 1954. The property immediately

adjoining 4037 to the north, known as 4031 Elenda Street (hereinafter referred to as "4031"), also is owned by plaintiff Endara, and used for light manufacturing and storage purposes by the corporate plaintiffs.

On 4031 there are stucco buildings with cement floors, built in 1928, which have been leased to the corporate plaintiffs for several years, and used primarily for laminating resin sheets. Prior to such use by the corporate plaintiffs, the buildings were used, excepting for short vacancies, for industrial and storage purposes.

In 1928, after the construction of the buildings on 4037, the premises were occupied by California Spanish Tile Company and used to manufacture tile, ceramics and like items with the usual equipment required for such operations. A written stipulation was entered into wherein the parties set forth a description of the operations performed in making tile, including the use of dump trucks, hauling of sand and crushed rock and cement and the storage of such items at 4037, also a description of the process of mixing in large vats, the use of press molds, and the use of electrical saws and cutting machines, welding outfits, boilers and other matters.

Since 1937, with few exceptions, the property at 4037 had been used in conjunction with the premises at 4031, largely for storage purposes. From the latter part of 1933 to December, 1937, the property was owned by Security First National Bank. The bank leased the premises to Valencia Spanish Tile Company. Plaintiff Endara acquired the property in 1945. During the period prior to plaintiffs acquiring the premises, the plant was continued in use in manufacturing and storage of raw materials, work in process and finished products. During the war the operations were restricted, but the plant remained open and shipments were made. Since Endara acquired the property it was been occupied by Valencia Floor Tile Company, Colored Cement Tile Company and Lacy & Fox, Inc., and during all of the time to January, 1954, was used for the purpose of manufacturing tile ceramics and for the storage of raw materials and finished products.

On February 8, 1937, there was adopted by the city a zoning ordinance, No. 458, which included a zoning map and divided the city into various zones. On March 24, 1952, there was adopted by the city a zoning ordinance, No. CS-147, which repealed Ordinance No. 458, and which is now in effect, and, with certain amendments, is now the zoning ordinance of the city, governing the use of land and structures thereon.

At the insistence of the city, Endara filed an application for variance on November 3, 1948, wherein he requested an exception permitting the premises to be used for manufacturing tiles and ceramics products. On November 8, 1948, the city council granted a variance to use the premises at 4037 to manufacture tile and ceramics, together with a permit to Lacy & Fox, Inc., as lessees, to carry on the business.

On January 19, 1954, plaintiff Culver Hydro-Press, Inc., filed a petition for variance with the Planning Commission of the city, covering 4037, requesting permission for storage and light manufacturing and expansion of existing operations. Petitioner had no operations previously in 4037, and when referring to expansion, meant its operations at 4031, which place was not involved in this proceeding. The operations at 4031 were under a variance previously granted by the defendant city. The prior tenant of 4037 vacated in December of 1953, and petitioner became the tenant in January, 1954. The petitioner's variance application, in question, came on to be heard before the Planning Commission and that body recommended the denial of the petition. Thereafter, the applicant filed its notice of appeal to the city council, a hearing was held at which Endara and counsel were all present and presented arguments in support of the appeal, and thereafter the petition was denied and the notice to plaintiffs to discontinue the use of the premises at 4037 for storage and manufacturing purposes was served.

The corporate plaintiffs are using the buildings presently, substantially as follows: about 75% of the floor space is for storage of raw materials, supplies and finished products; about 12% of the floor space is partitioned off and given over to actual produc-

tion of laminated sheets, in this latter space there is located and used a hydraulic press. After the sheets are accumulated they are put through a trimming operation. Shipments do not involve any dump trucks or trucks and trailers, but plaintiffs use small stake trucks. Masonite, which is the largest volume item, is trucked in by common carrier truck once or twice a month. An area about the size used for actual productive operations is given over to a laboratory operated by one man, a chemist. The total work force is no greater than that throughout the years. The equipment is hooked up to pre-existing gas, water and power lines. Since February 8, 1937, when Ordinance 458 was adopted, there has been no enlargement of the area used for industrial and storage purposes. The plant has not at any time been used for non-industrial purposes, excepting for temporary vacancies. No physical change, other than necessary maintenance and repair, has been made in the building since 1937, except as permitted by the city. The present depreciated value of the building on 4037 is \$15,000, aside from the value of the land. The land, for industrial purposes, is reasonably worth from \$1 to \$2 per square foot, and there are about 16,500 square feet of land involved. If Endara is required to convert to multiple or single dwelling units he would suffer a substantial loss.

The applicable city ordinance provides in Sections 14.05(A & B), 2.35, 2.36 and 2.48 as follows:

"Section	14.05	Non-Conforming
Buildings and Uses		
* * *	* * *	

"A. Any such non-conforming building or structure may be continued and maintained provided there is no physical change other than necessary maintenance and repair in such building or structure except as permitted in other Sections of this Ordinance.

"B. Any such non-conforming use may be maintained and continued, provided there is no increase or enlargement of the area, space or volume occupied or devoted to such non-conforming use."

"Section 2.35 'Non-Conforming Building'

"A building or structure or portion thereof conflicting with the provisions of this Ordinance applicable to the zone in which it is situated."

"Section 2.36 'Non-Conforming Use'

"The use of a structure or premises conflicting with the provisions of this Ordinance."

"Section 2.48 'Use'

"The purpose for which land or building is designed, arranged or intended, or for which either is or may be occupied or maintained."

[1, 2] A non-conforming use is not restricted to the identical particular use which was in existence at the time of the enactment of the zoning ordinance but embraces any use substantially the same or similar. The adoption of more modern instrumentalities, suitable in carrying on a business should not, in legal contemplation, work a change of use. The trial court heard the testimony and observed the property and the plant in operation and found that the building was designed and intended for manufacturing and storage purposes; that the premises had been substantially continuously used for such purposes; that there had not been any increase or enlargement of the space devoted to industrial and storage use; that there had been no abandonment of the non-conforming use and that the present use is substantially the same as before the adoption of the ordinances. No error has been specified in such findings and they are presumed to be true.

Appellants contend, among other things, that the plaintiffs had no recourse to the courts when the defendants threatened to prevent plaintiffs from using the building for industrial and storage purposes. There is no provision in the ordinance for administrative hearings to determine if a non-conforming use exists. It only provides a procedure for relief when it is assumed that there is a non-conforming use which is excepted from the provisions of the ordinance. Here the plaintiffs exhausted whatever administrative remedy they had. The question is not whether the variance should

or should not have been granted, rather, it is the construction of the ordinance and the constitutionality of its application.

Appellants point out that Endara has no standing in court since he personally failed to exhaust his administrative remedies. The court found that the interest of all the plaintiffs was substantially the same and a separate application by Endara would have been futile. No error is assigned to this finding and we presume it to be supported by the evidence.

[3] A zoning ordinance cannot unfairly discriminate against a particular parcel of land. If the general scheme of the zoning is sound and valid, nevertheless the courts may properly inquire as to whether the scheme of classification and districting has been applied fairly and impartially in each instance. *Reynolds v. Barrett*, 12 Cal.2d 244, 251, 83 P.2d 29.

[4] The court said in *Bernstein v. Smutz*, 83 Cal.App.2d 108, 117-118, 188 P. 2d 48, 53, the following:

"* * * It is always open to interested parties to contend that the legislative body has gone beyond its constitutional power. The question is whether the police power can be stretched as far as was done in this case. In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 160, 67 L.Ed. 322, 28 A.L.R. 1321, 1324, at page 1325, Justice Holmes said: 'The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. *Hairston v. Danville & W. R. Co.*, 208 U.S. 598, 605, 28 S.Ct. 331, 52 L.Ed. 637, (639), 13 Ann.Cas. 1008. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.'

"In *Matter of Application of Throop*, 169 Cal. 93, at page 99, 145 P. 1029, 1031, it was said: 'As stated by the Supreme Court of

the United States in *Dobbins v. [City of] Los Angeles*, 195 U.S. 223, 25 S.Ct. 18, 49 L.Ed. 169, “* * * it is now thoroughly well settled by decisions by this court that municipal by-laws and ordinances, and even legislative enactments undertaking to regulate useful business enterprises are subject to investigation in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power, or whether, under the guise of enforcing police regulations, there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property.” To the same effect, *People v. Hawley*, 207 Cal. 395, 410, 411, 279 P. 136; *Del Fanta v. Sherman*, 107 Cal.App. 746, 749, 290 P. 1087; *Bank of America [Nat. Trust & Sav. Ass'n] v. Town of Atherton*, 60 Cal.App.2d 268, 273, 140 P.2d 678; *American Paint Co. v. McCune*, 67 Cal.App.2d 583, 585, 155 P.2d 123. The court in *Miller v. Board of Public Works*, 195 Cal. 477, 489, 234 P. 381, 385, 38 A.L.R. 1479, made these pertinent observations: ‘It cannot be gainsaid, however, that many municipalities, evidently upon the theory that zoning is a panacea for civil ills, have, under the guise of zoning, sought to enact and enforce unreasonable and discriminatory ordinances. Some of these attempted regulations have been palpably for the exclusive and preferential benefit of particular localities. The duty, therefore, devolves upon the courts to determine in each instance whether or not the ordinance, either in whole or in part, is invalid.’”

In the case of *Skalko v. City of Sunnyvale*, 14 Cal.2d 213, 216, 93 P.2d 93, 94, the court said:

“Also, the police power must be applied to existing conditions. *Miller v. Board of Public Works*, supra. ‘The principle that a police regulation, valid when adopted, may become invalid because in its operation it has proved to be confiscatory, carries with it the recognition of the fact that earlier compliance with the regulation does not

forfeit the right of protest when the regulation becomes intolerable’. *Abie State Bank v. Bryan*, 282 U.S. 765, 51 S.Ct. 252, 257, 75 L.Ed. 690. Where conditions have changed since the legislative action was taken, ‘statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall’. *Euclid v. Ambler Realty Co.*, supra (272 U.S. 365, 47 S.Ct. [114] 118, 71 L.Ed. 303). The question, therefore, is whether under the facts shown by the appellant his rights are now being invaded by the existence and maintenance of the ordinance.”

[5] In the case here plaintiffs’ property is immediately adjacent to an industrial zone. In the immediate future there will be a large industrial establishment in the zone all along the west and rear adjoining the property. If the ordinance were construed to deny the plaintiffs the right to continue the present use of their property it would, in our opinion, be arbitrary and unreasonable.

[6] The judge, in this case, went to the premises, saw the workings at the plant, heard the noise, smelled whatever odors there were, saw the traffic and all of the other facts and circumstances involved. From what he gathered he came to the conclusions heretofore set forth as to the facts. It was said in *Estate of Sullivan*, 86 Cal. App.2d 890, at page 895, 195 P.2d 894, at page 896: “When the trial judge views the premises in question during a trial what he sees is not a part of the transcript of the record but is independent evidence which may be considered by him in arriving at his decision and which this court will assume supports the findings. [Citing cases.]”

[7] We believe that in this particular case, injunctive relief was proper. The ordinance makes no provision for revocation of non-conforming uses or for any hearings or findings in connection therewith.

Judgment affirmed.

DORAN, Acting P. J., concurs.

140 Cal.App.2d 158

**Laura A. HAWKE, Plaintiff and
Respondent,
v.**

**T. M. BURNS, Individually, and as a co-
partner doing business as Burns Furniture
Company, a copartnership, and as execu-
tor of the estate of Charles Edwards
Burns, deceased, Defendant and Appellant.**
Civ. 4976.

District Court of Appeal, Fourth District,
California.

March 22, 1956.

Rehearing Denied April 18, 1956.

Action for injuries to a woman falling on a ramp between two sales rooms in defendant's furniture store. From a judgment of the Superior Court of Kern County, Gordon L. Howden, J., for plaintiff, defendant appealed. The District Court of Appeal, Griffin, J., held that trial court erred in denying defendant's motion to strike architect's testimony, in answer to hypothetical question, that handrails in center and at each end of ramp were indicated by building code as best practice, and that admission of testimony as to plaintiff's attempt to obtain photographs of ramp during trial and eviction of her witnesses from store by defendant and police department and plaintiff's counsel's argument to jury, based on such testimony, were improper, but not prejudicial to defendant, in view of instruction that if jury found that a party had power to produce stronger and more satisfactory evidence than that offered on material point, jury should view with distrust any weaker or less satisfactory evidence actually offered on point.

Judgment affirmed.

1. Evidence ⇨555

In action for injuries to woman falling on ramp between two sales rooms in defendant's furniture store, trial court erred in denying defendant's motion to strike architect's testimony, in answer to hypothetical question, that where doorway and passageway of ramp is 16 feet wide, handrails in center and at each end thereof are indicated by building code as best prac-

tice, in view of evidence that most of ramp's width was occupied by show cases and other fixtures and that only about eight feet thereof was used as passageway.

2. Appeal and Error ⇨999(3)

Negligence ⇨136(25)

In action for injuries to woman falling on ramp in defendant's furniture store, whether variance of one inch from building code requirements respecting width of ramp was so slight in reference to ramp's slope that it could not reasonably be held proximate cause of accident was factual question for jury, whose contrary finding, implied from verdict for plaintiff, cannot be disturbed on defendant's appeal from judgment thereon.

3. Appeal and Error ⇨999(1)

In action for injuries to woman falling on ramp in defendant's furniture store, jury's finding, implied from verdict for plaintiff, that she was not guilty of contributory negligence, cannot be disturbed on defendant's appeal from judgment on verdict.

4. Appeal and Error ⇨1053(3), 1030(1)

Evidence ⇨78

Trial ⇨120(3)

In action for injuries to woman falling on ramp in defendant's furniture store, admission of testimony as to plaintiff's attempt to obtain photographs of ramp during trial and eviction of her witnesses from store by defendant and police department and plaintiff's counsel's argument to jury, based on such testimony, were improper, in absence of showing that photographs would be any better evidence than witnesses' testimony as to conditions seen by them, but not prejudicial to defendant, in view of instruction that if jury found that a party had power to produce stronger and more satisfactory evidence than that offered on material point, they should view with distrust any weaker and less satisfactory evidence offered on point.

5. Trial ⇨127

Generally it is error to inform jury in action for damages that defendant carries insurance.

6. Evidence ⇨263(2)

Generally, where defendant in action for damages makes statement which may fairly be construed as admission or acknowledgment of responsibility, but contains incidental reference to fact that he carries insurance, entire statement is admissible in evidence, not to prove fact of insurance, but solely because such reference is part of admission.

7. Trial ⇨133(2)

In personal injury suit, admission of plaintiff's testimony that defendant stated that he carried insurance against such an accident as that involved and would back up plaintiff in claim against insurer was not error prejudicial to defendant, in view of instruction to jury that only purpose of admitting such testimony was for jury to determine whether such statements constituted admission against interest, that no insurance company was party to action, and that jury could not speculate on or consider such fact, and trial court's reconsideration of claimed prejudicial effect of statements on defendant's motion for new trial, which was denied.

8. Negligence ⇨124(1)

In action for injuries to woman falling on ramp in defendant's furniture store, trial court properly refused to allow defendant to testify that when ramp was constructed 15 years before accident his contractor secured permit for such construction, as such fact was not necessarily determinative of question before jury as to whether defendant maintained store premises in proper manner at time of fall. West's Ann.Code Civ.Proc. § 1963, subd. 33.

9. Negligence ⇨125

In action for injuries to woman falling on ramp in defendant's furniture store, trial court did not err in refusing to allow defendant to testify that no person had previously fallen in area of ramp, where plaintiff produced no evidence to contrary.

10. Evidence ⇨509

In personal injury suit, admission in evidence of portions of physician's testimony in reference to his prognosis as to plaintiff's lack of chances for complete recovery was not error.

11. Appeal and Error ⇨683

The District Court of Appeal cannot determine whether trial court erred in admitting in evidence a deposition not made part of record on appeal. West's Ann. Rules on Appeal, rules 5, 52.

Deadrich, Bates & Stewart, and Kenneth H. Bates, Bakersfield, for appellant.

Borton, Petrini, Conron & Brown, Bakersfield, for respondent.

GRIFFIN, Judge.

This is an action against defendant T. M. Burns, individually, and as a copartner doing business as Burns Furniture Company, and as executor of the estate of Charles Edwards Burns, deceased, for damages for injuries due to a fall on a ramp between two sales rooms. Prior to trial defendant Charles Edwards Burns, one-half owner of the furniture company with his son T. M. Burns, died and the son was substituted as executor of his estate. Plaintiff, 62 years of age, went to a fixture-furniture store operated by defendant in the early afternoon of October 10, 1953, to make a purchase. The store premises consisted of four separate stores facing North Street, in Taft. These stores were on different ground levels separated by partitions. There were open doorways or archways leading from one room to another. The main entrance to the store was into the first sales room. The office was at the rear of this room, which room was about 17 feet wide. The entrance from this room to the second sales room to the east was an open double doorway or archway. The floor of the second sales room was between five and six inches lower than the floor of the main sales room. A ramp existed at that passageway to take care of the difference. It was covered with linoleum and a loose black rubber mat three feet wide. The second sales room to the east was about 17 feet wide, and between the floor of it and the third sales room there was a variation in the floor level of 2½ to 3½ inches over a distance of 16 inches. (The evidence is in dispute in this respect.) The archway at this point is about 16 feet wide, but

showcases and other fixtures occupied over one-half of this space. Another declining ramp is located there to adjust the two levels. It was at this point where plaintiff fell. The floor was there covered with linoleum, tan in color, with asphalt tile of different colors set in the linoleum where the ramp declined. This was partially covered by a three-foot black corrugated rubber mat. This ramp was installed in 1938. The next sales room to the east (the Maple Shoppe) did not have any variation in the elevation of the adjoining floors.

Plaintiff testified that as she entered the main storeroom door, she first inquired at the office as to the whereabouts of a certain clerk; that it was indicated to her that she was in the "Maple Shoppe"; that she then turned in an easterly direction, proceeded through the first archway and down that ramp without difficulty; that a man preceded her and that she followed about 10 feet behind him; that apparently he turned in another direction and she proceeded "just as you would on a floor with no slope", and "all of a sudden I didn't see the ramp or anything * * * I just spun * * * it just felt like I was out in space * * * There was nothing there. My hands flew up and my purse hit a showcase." An "X" mark was indicated by her at a point about the middle of the passageway and about half way down the 16-inch ramp as the place where she fell on the floor and severely injured her knee. The clerk in the Maple Shoppe noticed her and offered to assist her but she asked not to be moved. Later, with some difficulty, she walked out to her car, drove away, and secured a doctor, and a part of the patella was removed. It was indicated there would be some permanent and stationary crippling condition in the right knee. She testified she had never been in this portion of the store before, and that she would not consider the lighting on that afternoon very good. The counters and cases in the store were covered with various wares and there were a number of advertising signs posted about.

The evidence as to the height of the ramp at the point involved is in conflict and confusing. Defendant Burns, called under

section 2055 of the Code of Civil Procedure, placed the variance in the level of the two floors at $2\frac{1}{8}$ inches at one point and $2\frac{1}{2}$ inches "where the walking is done" because he measured it, but he "guessed it was four to six inches before measuring because it looked that depth"; that the length of the ramp was 16 inches, and it was constructed in 1938.

A duly qualified architect testified he was familiar with the requirements of the Uniform Building Code of 1952 in that county and the photographs of the store in evidence. He was then propounded a hypothetical question by counsel for plaintiff, i. e., assuming he owned a store with a doorway 16 feet in width without a handrail or warning signs and with a drop between the top level and the bottom level of somewhere between $2\frac{1}{8}$ inches and $3\frac{1}{2}$ inches over a distance of sixteen inches would that construction be in accord with approved engineering and architectural practice in Kern County? Objection was made to the question on the ground that the evidence did not show the facts stated. Counsel for plaintiff then said he would later supply those facts. The objection was overruled and the answer was that the slope of a ramp considered to be in accordance with the best practice and adopted by the Uniform Building Code must not exceed "one in eight", i. e., one inch in eight inches, and two inches maximum in height for 16 inches, and that two inches maximum height would only allow a 16-inch ramp; that at $2\frac{1}{8}$ inches the minimum standard would be 17 inches; that where the doorway ramp was 16 feet in length, good architectural and customary practice required a handrail to be placed in the center and one at either side of the extremities of the ramp; that any slope in excess of one inch in eight inches, regardless of width, requires a handrail, and for a passageway in excess of 88 inches in width would require a handrail. The witness stated that he had the Uniform Code with him and quoted the section from which he said he was reading. He stated he did not know the provisions of the Uniform Building Code in this respect in 1938, but he understood they were the same as he had stated, and the only

way he could prove it would be to find an old issue. It was shown that none of the parties could find such issue.

During the trial plaintiff's investigator went to defendant's store and took measurements of the ramp and its elevation. Plaintiff's witness testified that it was "just a hair under 3½ inches on one side and 3½ inches on the other, and the ramp extended out 16 inches. He testified he called a photographer to take a picture with a ruler so indicating and that defendant stopped him; that defendant called the officers and kept him from taking pictures until he had obtained the consent of his lawyer or a court order. A draftsman testified for defendant that he prepared charts indicating the variations in the height of the ramp at different levels and stated the lighting condition in the store, when the photographs were taken, was, as reflected by a light meter, average in light, and was "at least as good or well lighted" as the average building with artificial illumination.

The clerk in the Maple Shoppe testified she saw plaintiff approach the ramp and she was looking back and talking to some woman when she was about four feet from the incline; that she turned to wait on a customer and shortly thereafter saw plaintiff in the process of falling in the middle of the ramp.

[1] The theory upon which the jury found defendants to be negligent, of course, is not disclosed. There is evidence produced from a hypothetical question propounded to the architect to the effect that where the doorway and passageway of the ramp is 16 feet in width, a handrail in the center and at each end is indicated by the Uniform Building Code as the best practice. Although the doorway and ramp itself may be 16 feet in width at this point, the majority of the space was occupied by showcases and other fixtures and only about 8 feet or one-half of that space was used as a passageway. From the evidence there would be no requirement of three such handrails as indicated by the witness, and the answer of the witness in this respect was not based on the true factual situation.

Accordingly, no negligence could be predicated upon this testimony and it was error not to grant the motion to strike this portion of the answer since it was one of the acts of negligence which plaintiff's counsel claimed they had established at the trial in his argument to the jury. *Natural Soda Products Co. v. City of Los Angeles*, 109 Cal.App.2d 440, 443, 240 P.2d 993; *Preston v. Hubbell*, 87 Cal.App.2d 53, 61, 196 P.2d 113.

Defendant contends that when specific acts of negligence are alleged, without alleging negligence in general terms, it is error to accept, over objections, evidence of other specific acts of negligence not pleaded, citing such authority as *Marovich v. Central California Traction Co.*, 191 Cal. 295, 216 P. 595. The complaint does not directly allege that the failure to install and maintain three handrails at this particular ramp was one of the acts of negligence relied upon by plaintiffs. It pleaded, in general terms, that in respect to the specific claims of negligence, "among other things, the said defendants and each of them were negligent in the manner in which they maintained, operated and conducted said store and premises". Had the facts been as reported in the hypothetical question and answer, defendants could not be heard to complain in this respect. There is, however, the additional evidence that the ramp did exceed, by a small margin, the allowable slope of 1 inch in 8 inches, and that this would extend the requirements of the ramp to 17 or more inches in order to comply with the Uniform Code section as it existed in 1952, which provision the witness believed was the same in 1938; that the ramp, from the elevation indicated, required a slope in excess of 16 inches; that the passageway exceeded 88 inches in width and a handrail was required. The jury might have been justified in believing that defendants were negligent in maintaining the premises in this condition. *Nunneley v. Edgar Hotel*, 36 Cal.2d 493, 225 P.2d 497.

[2,3] It is argued in this respect that the variance of 1 inch in respect to the width of the ramp would be so slight in reference to its slope that it could not be

reasonably said that this variance could be held to be the proximate cause of the accident. This was a factual question for the jury to determine and its implied finding may not be disturbed on this appeal although there may be considerable merit to the claim. *Crawford v. Southern Pacific Co.*, 3 Cal.2d 427, 429, 45 P.2d 183. The same may be said as to the implied finding that plaintiff was not guilty of contributory negligence. *Tuttle v. Crawford*, 8 Cal.2d 126, 130, 63 P.2d 1128.

[4] Since plaintiff's counsel bore heavily upon this testimony in his argument to the jury, complaint is made as to the admissibility of the testimony relating to the attempt of plaintiff to obtain photographs of the ramp and premises during the trial of the action and the claimed eviction of plaintiff's witnesses by defendant and the police department in this endeavor. Based upon this evidence plaintiff offered and the court gave the general instruction that "If and when you should find that it was within the power of a party to produce stronger and more satisfactory evidence than that which was offered on a material point you should view with distrust any weaker or less satisfactory evidence actually offered by him or her on that point." There is some merit to this contention. It is not contended that the instruction as given is not the law. The argument is that there was no proper evidence to support it, and that although legal in form, it was error to give it under such circumstances. It appears from the evidence that defendants, several months prior to trial, did allow plaintiff to take all the pictures they desired of the premises, including one of the ramp being measured in the same manner discussed on the latter occasion, but which pictures plaintiff failed, for certain reasons, to produce. The latter entrance was made without notice to defendant's counsel or to defendant and upon a guise that plaintiff had an order so to do from Judge Howden's court, through Mr. Brown, attorney for plaintiff.

Defendant testified that he asked the photographer to produce the court's order and he "hemmed and hawed" and finally

said that he was taking the pictures "for Mr. Brown of Judge Howden's court"; that he refused to allow it without a court order or permission of defendant's counsel, since his counsel had told him not to allow any pictures to be taken in there without his consent; that he called the police and, after consultation, the police told the photographer that the consent of defendant or a court order was required, otherwise he must leave the premises. It appears that an investigator for plaintiff appeared at defendant's premises a day or two before trial when defendant was out to lunch, and upon explaining to the employees that Mr. Brown had requested him to take some measurements, over their objections he took measurements of the store at the place indicated and defendant was informed of that fact after returning from lunch.

It appears to us that under the circumstances related the admission of this testimony and the argument of counsel based thereon was inadmissible and may well have tended to inflame the jury and prejudice defendant's case. The jury had the advantage of the testimony of plaintiff's witness in respect to the conditions which they saw there on that particular day, and the only possible objection would be to the taking of a photograph of these same conditions by placing a ruler in position which would so indicate. There is no showing that the production of the photograph would be any better evidence, as a matter of law, than the testimony of the witnesses themselves. *People v. Wilkes*, 44 Cal.2d 679, 284 P.2d 481; *Stewart v. St. Paul City Ry. Co.*, 78 Minn. 110, 80 N.W. 855. The method pursued by plaintiffs in attempting to secure this picture and these measurements was upon the implied representation that it was under a court order. It was without the consent of counsel for the defendant and the testimony in reference to alleged concealment should not have been admitted. However, the court did instruct the jury that "if and when" it should find that it was within the power of a party to produce stronger and more satisfactory evidence the jury should view with distrust any weaker and less satis-

factory evidence offered. We will assume that the jury followed the instruction. Prejudicial error does not affirmatively appear.

[5-7] The next complaint pertains to the admission of certain testimony, received over objections, as to defendant being insured against such an accident. It appears that defendant was absent from the store on the day of the accident and had no direct knowledge of its cause. When he learned of it he went to the hospital and took plaintiff a box of candy and expressed his regret about the accident and her injury. Plaintiff claimed in her testimony that as he was about to leave he said: "Well, we carry insurance * * *." At that point counsel for defendant interrupted the witness and the court excused the jury and a discussion was had between counsel about the testimony. A mistrial was requested and denied. The court, after being informed of the complete answer expected, overruled the objection and allowed the witness to complete it. She then testified he said: "Mrs. Hawke, I am sorry this happened * * *. We are insured for such as this * * *. You go after them and we will back you up". The defendant most emphatically denied any such conversation. Immediately after the introduction of this testimony the court instructed the jury that the only purpose for its admission was for the jury to determine whether these statements attributed to defendant constituted an admission against interest; that no insurance company was a party to the action, and the jury was not allowed to speculate upon it or allow that fact to concern it during the course of deliberations. The jury returned a verdict for plaintiff in the sum of \$7,202.36. Plaintiffs made the novel claim, on the motion for new trial, that since the jurors were so questioned on voir dire in reference to whether they owned stock in or were otherwise connected with any insurance company (which was allowable) the jury was fairly well apprised that defendant was insured, and that any additional mention of that fact was not prejudicial. It is here argued that the answer of the witness contained an admission

of liability, and that therefore the entire answer was admissible and no error resulted since the court fully instructed the jury as to the limited purpose for which it was received, citing such authority as *Symons v. Wooden*, 97 Cal.App. 39, 274 P. 987; *Rowe v. Rennick*, 112 Cal.App. 576, 297 P. 603; *Fleming v. Flick*, 140 Cal.App. 14, 35 P.2d 210; *Lafrenz v. Stoddard*, 50 Cal. App.2d 1, 122 P.2d 374; *Kroplin v. Huston*, 79 Cal.App.2d 332, 179 P.2d 575; *Freeman v. Nickerson*, 77 Cal.App.2d 40, 53, 174 P.2d 688; *Galbraith v. Thompson*, 108 Cal.App. 2d 617, 239 P.2d 468; 11 Sou. Cal. Law Review 407, 423; and 21 Sou. Cal. Law Review 236.

As opposed to these authorities, defendants claim the very statement thereof does not indicate any admission of liability but only a willingness "to stick the insurance company", citing *Mahnkey v. Bolger*, 98 Cal.App.2d 628, 636, 220 P.2d 824, and cases cited therein.

There appears to be some merit to the argument. If defendant did make the statement attributed to him, it was apparently made with the feeling that he was going to be sued for plaintiff's claimed injuries, and it indicates that he was willing to co-operate with the plaintiff in procuring a settlement with the insurance company, and he may have later awakened to the fact that he should not be "backing plaintiff up" in her claim. Just what claim, if any, she made to him about his negligence is not indicated. Subject to certain qualifications and exceptions, it is error to inform a jury in an action for damages that an adversary carries insurance. *Roche v. Llewellyn Iron Works Co.*, 140 Cal. 563, 74 P. 147; 11 Sou. Cal. Law Review 408, and cases cited. It is now the general rule that where a defendant makes a statement which may be fairly construed as an admission or acknowledgment of responsibility and as a part of the same statement makes incidental reference to the fact that he carries insurance, the entire statement is admissible, not to prove the fact of insurance but solely because the reference to the insurance is part of the admission. 21 Sou. Cal. Law Review 236. Certain expressions have been

held admissible under this theory such as in *Lafrenz v. Stoddard*, 50 Cal.App.2d 1, 122 P.2d 374 (hearing in Supreme Court denied), an automobile negligence case, where it is said that where a defendant stated to plaintiff after an automobile accident that "I don't want you to worry too much. I am well insured and they will have to make good", the entire statement, including the reference to insurance, may properly be admitted into evidence where the court instructs the jury to disregard the portion "I am well insured", and admonishes it that no insurance company is a party to the action and that the evidence is admitted only to show the admission of liability. See also *Symons v. Wooden*, 97 Cal.App. 39, 274 P. 987, in a similar action, where defendant said: "'Don't pay any of the damages, we are carrying insurance, we are fully protected, don't pay the repair bill, present your bill to the surety company, it will be paid'"; and *King v. Wilson*, 116 Cal.App. 191, 195, 2 P.2d 833, 834 [hearing in Supreme Court denied], where defendant said: "* * * he was sorry it all happened but he had insurance to pay for everything.'" It was there said that the added words "to pay for everything" might leave one to conclude that no other inference could logically be drawn therefrom except an acknowledgment of responsibility and declaration against interest. See 11 *Sou. Cal. Law Review* 423 for many other such instances. In the present case the court left that question to the jury and told it that the statement should not be considered for any other purpose. We must conclude that it does not here affirmatively appear that prejudicial error resulted, particularly where the trial court instructed the jury in reference to its limited effect, and also where the trial court reconsidered the question of the claimed prejudicial effect of the statement on a motion for new trial. *Hatfield v. Levy Bros.*, 18 Cal.2d 798, 117 P.2d 841; *Weis v. Davis*, 28 Cal.App.2d 240, 82 P.2d 487.

We have examined the instructions given and refused and conclude that the instructions given were adequate and sufficiently covered defendant's proffered instructions.

[8] Complaint is next made because the trial court refused to allow defendant to testify that when the ramp was constructed in 1938 his contractor secured a building permit for such construction, relying upon the inference that it must have been constructed at that time in accordance with the existing Uniform Building Code. The only question before the jury was whether defendant, at the time of the fall, maintained the premises in a proper manner. The fact that defendants did or did not have a permit 16 years before to make certain improvements at that location would not necessarily be determinative of the question before the jury. *Strandt v. Cannon*, 29 Cal. App.2d 509, 518, 85 P.2d 160; *Armenta v. Churchill*, 42 Cal.2d 448, 267 P.2d 303. Furthermore, it will be presumed that defendant did obtain a permit at the time, since it would have been a violation of the law not to do so. Section 1963, subd. 33, Code Civ.Proc. The statement of the architect to the effect that he assumed the provisions of the 1938 Uniform Building Code were the same as in 1952, was elicited by defendant's counsel on cross-examination. Otherwise, plaintiff offered no evidence to show that there was any violation of the law or such rules in respect to the construction of the ramp in the first instance. Accordingly, the evidence sought was inadmissible. *Head v. Wilson*, 36 Cal.App.2d 244, 253, 97 P.2d 509.

[9] It is next argued that the court erred in refusing to allow defendant to testify that no person had previously fallen in this area. Plaintiff produced no evidence to the contrary. It was held in *Owen v. Rheem Manufacturing Co.*, 83 Cal.App.2d 42, 50, 187 P.2d 785, that for certain limited purposes the plaintiff may prove previous accidents but a defendant at least in the first instance, may not prove absence of previous accidents.

[10, 11] Finally, it is claimed the court erred in receiving into evidence certain portions of Dr. Varney's testimony in reference to his prognosis as to plaintiff's lack of chances for a complete recovery. We see no merit to the contention. *Rohner v. Cross*, 121 Cal.App. 667, 9 P.2d 509; *Davis*

v. Renton, 113 Cal.App. 561, 298 P. 834. Furthermore, although the deposition was received in evidence it was not made a part of the record on this appeal, and we have no means of determining that error was committed in its reception into evidence. Utz v. Aureguy, 109 Cal.App.2d 803, 806, 241 P.2d 639; Rules 5 and 52, Rules on Appeal.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



140 Cal.App.2d 17

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Marie Julius MARTINA, Defendant and
Appellant.
Cr. 3110.

District Court of Appeal, First District,
Division 1, California.
March 20, 1956.

Defendant was convicted in the Superior Court of the City and County of San Francisco, Orla St. Clair, J., of second degree murder, and he appealed. The District Court of Appeal, Bray, J., held that instruction that defendant had burden of producing evidence to overcome presumption that he was conscious, arising from actions as if he were conscious, and to create a reasonable doubt as to consciousness, was not erroneous.

Affirmed.

1. Homicide $\S$ 234(1), 236(1)

Evidence sustained conviction of second-degree murder on issues of criminal means as cause of death and identity of defendant as assailant.

2. Criminal Law $\S$ 552(4)

Circumstantial evidence is as adequate to convict as direct evidence.

3. Homicide $\S$ 269

Apparent lack of motive for second-degree murder was a matter for jury to consider and did not overcome other evidence of defendant's guilt.

4. Criminal Law $\S$ 556

In murder prosecution, defendant's unsworn statements that he had blacked out, having previously suffered head injury and blacked out on other occasions, introduced in evidence by prosecution, did not conclusively establish that defendant was not conscious of his acts.

5. Criminal Law $\S$ 549

Mere statements "I don't remember" or "I can't recall" are insufficient to establish unconsciousness at time of commission of a particular act

6. Criminal Law $\S$ 556

Statements of a defendant, introduced by prosecution, are binding on prosecution and establish their truth only in absence of proof to contrary, and may be contradicted by circumstantial evidence alone.

7. Criminal Law $\S$ 554

Even testimony of defendant under oath as to lack of consciousness may be overcome by circumstantial evidence.

8. Criminal Law $\S$ 829(3)

Failure to give proposed instruction on unconsciousness could not have been harmful or even error where instructions as a whole covered the subject. West's Ann.Pen.Code, $\S$ 26.

9. Criminal Law $\S$ 781(4)

Proposed instruction to the effect that jury must acquit on reasonable doubt as to whether defendant's acts were committed while unconscious, and that jury must take defendant's statements as to unconsciousness "as unrefuted testimony as to the true condition of the defendant," was proper as to first portion but incorrect as to quoted portion, and hence was properly refused. West's Ann.Pen.Code, $\S$ 26.

10. Criminal Law ⇨789(8)

Giving of instruction in murder prosecution that if evidence shows that defendant acted as if he were conscious, law presumes that he was conscious, and defendant has burden of producing evidence which will overcome the presumption and create a reasonable doubt as to whether he was conscious, was not erroneous as requiring proof of unconsciousness beyond a reasonable doubt and to a moral certainty. West's Ann.Pen.Code, § 26.

11. Criminal Law ⇨721½(1), 1171(1)

Argument of assistant District Attorney asking why defendant's wife did not testify was improper but not prejudicial where defendant did not object thereto but took advantage thereof in argument, emphasizing wife's blindness in stating reasons for not calling her.

12. Criminal Law ⇨730(8)

District Attorney's argument that from evidence "given to me" defendant knew he couldn't take the stand, was not prejudicial, where court instructed jury to disregard the statement and district attorney indicated that he did not intend to discuss evidence out of the court room.

13. Homicide ⇨16

Normally, hitting a person with hands or feet does not constitute murder in any degree, on theory of torture, but if death or great bodily harm is a reasonable or probable consequence of the beating, the offense may be murder. West's Ann.Pen.Code, § 189.

14. Criminal Law ⇨1171(1)**Homicide** ⇨340(4)

Where there was some evidence, though slight, of torture before homicide, and defendant was found guilty of second degree murder only, there was no prejudice from instruction or argument raising theory of torture. West's Ann.Pen.Code, § 189.

Joseph C. Haughey, Toland C. McGettigan, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., William M.

Bennett, Deputy Atty. Gen., for respondent.

BRAY, Justice.

Defendant appeals from a jury verdict judgment of conviction of murder in the second degree and from an order denying new trial.

Questions Presented.

1. Sufficiency of the evidence (a) that death was due to criminal means; (b) that defendant was the assailant.

2. Defendant acted while unconscious (a) as a matter of law; (b) instructions.

3. Alleged misconduct of district attorney.

4. Instructions and district attorney's comment on first degree murder.

Evidence. (a) Means of Death.

In the early afternoon of Wednesday, September 1, 1954, a chambermaid opened hotel room No. 301 and found therein lying on the bed the partly unclothed body of 75 year old Florence Hopkins. Both her eyes were blacked and swollen shut. There was blood about her face. She was lying on her back upon her dress with her blouse and slip pulled back and torn. Her brassiere was unhooked, exposing her chest. Red matter, which a police inspector believed to be blood, was found on and about the bed, on the wall above the bed and on a pillow found on the floor. Mrs. Weir occupied the room adjoining No. 301. Between 2 and 4 a. m. September 1st she was awakened by the scream of a woman in that room. She then heard three or four bumpings which sounded like somebody had been hit. Between each bumping she heard a woman's voice saying, "You hurt me so." A man's voice said "Keep quiet," the utterances being a couple of minutes apart. The witness heard rather loud sobbing or crying during the entire time. The noise gradually got lighter and finally stopped.

The surgeon who performed the autopsy found a large bruised area over the left forehead extending from the hair line well down onto the cheek, bruises about both eyes, laceration of the right lower eyelid about an inch long; fracture of the

nasal bone, puffing and bruising of both lips; area of hemorrhage in the upper chest muscles, "bloodstaining of the trachea, larynx and bronchi, * * * with some mucoid matter and blood within their lumens * * * marked edema of the lungs." All injuries he considered to be of recent origin. In his opinion the injuries were caused by external force or violence. "It is even likely" that human fists caused the injuries, and if so, it would have taken at least six blows. Death was caused by filling of the lung with blood from the nose.

A pathologist who worked on the tissues and organs of the deceased found certain abnormalities, pinpoint hemorrhages in the brain, a hemorrhage between the brain covering and the brain itself, a large amount of bloodstained mucous material in the windpipes and air passages in the neck and lung. He attributed these conditions to direct physical violence or blows. He stated that there must have been severe physical violence to the chest (like being hit by an automobile or falling from a building) and not an ordinary mild injury. He attributed death to "a loss or a decrease in the ability of the body to get oxygen into the blood." The injuries mentioned all played a part, no one by itself producing the whole picture. The blood alcohol level indicated a moderate degree of intoxication. This made the victim more vulnerable to death of this type.

Defendant's contention that the evidence was not sufficient to establish death by criminal means is based mainly upon the following, the absence of external bruising of the chest and head area (other than around the eyes, nose and lips), the testimony of the surgeon and the pathologist that each of the conditions he found possibly could have been due to a fall,¹ the fact that a witness who saw defendant and deceased together in a bar about 10 p. m. saw deceased bump into the side of a booth and fall into the seat, and that there was no evidence of choking or damage to the neck nor of any sexual abuse or intercourse.

All of these were matters for the jury. Coupling the conditions found by the medical men, particularly that in their opinion these conditions could have been caused by blows, with the testimony of Mrs. Weir and the conditions in the room, plus the entire evidence in the case, it is obvious that there was sufficient evidence to support its implied finding that deceased met death by criminal means.

Evidence. (b) Defendant was the assailant.

A witness testified to seeing defendant and deceased about 10 p. m. Tuesday night seated and drinking beer together in a bar across the street from the hotel. They left the bar together about 12 or 12:30 a. m. There were then no marks or blood on deceased's face. Deceased staggered when leaving. The witness Shoup was the night clerk at the hotel. About 12:30 a. m. September 1st, defendant registered, signing "M. J. Martine, 3613 S. Ord, Eugene, Oregon." Shoup asked if his registration included a wife and when informed that it did, the clerk added "& Mrs." on the register. Defendant paid for the room, took the key and went up in the elevator. About 5 minutes later, defendant left the hotel, stating that he had to see if he could get his truck unloaded. About 1:15 or 1:20 defendant returned and stopped at the desk. When asked if he had brought his wife in yet, he replied, "No, we are coming in," what they call 'piecemeal.' Defendant left. About 1:30 the witness saw defendant and a woman standing in front of the elevator. Her back was towards the witness. She wore a red colored coat and "her legs were kind of shaking a little bit; not too much, but some." At 2:40 as the witness was checking the floors, he saw defendant coming down the stairs between the third and second floors. The witness asked defendant why he was not using the elevator and he replied, "No, I'll walk." The witness took the elevator to the lobby and again met defendant as the latter was going out the door. Defendant stated, "Well, I have

1. Defendant ignores the surgeon's testimony that it was unlikely that all con-

ditions could have occurred in a single fall.

got to wake up somebody now." Defendant appeared to be sober.

Inspector Murray testified that after defendant's arrest he took defendant to the bar and the hotel but that defendant insisted he could not recall anything from Tuesday afternoon until Wednesday morning. In defendant's clothing was found a paper written by defendant on September 1st which appears to be a will. The inspector found no blood on any of the furniture in the room except the bed. None of the furniture was overturned. No fingerprints were found except a "smudge" on the faucet in the wash basin. It was of no value for identification purposes.

Defendant neither testified nor offered any evidence. The day after the killing defendant made a statement to the assistant district attorney which was taken down in shorthand and was read to the jury. Among other matters he stated that on Tuesday he went down to the employment office where he picked up and cashed a \$21 unemployment check. He gave his wife \$16 of it. From 1 o'clock Tuesday until late Wednesday evening he could not remember what happened or even if he left home. The scratches on his neck and upper lip were the result of shaving and the black and blue bruises on his knuckles resulted from bumps received at work. He smoked Tareyton cigarettes (a partially used package of them was in his possession when arrested) and a pipe and had recently used Dill's tobacco but could not tell what date. He denied using pipe cleaners recently but had used them in the past. (In room No. 301 a package of Dill's pipe cleaners and a crumpled Tareyton cigarette were found.) To all questions concerning his connection with the crime, he answered similarly to "I don't deny it, sir, because I don't know."

[1-3] It is obvious from the foregoing statement of the evidence that while entirely circumstantial it clearly shows the defendant to have been the assailant responsible for the death of the deceased. Especially is this so, when one considers that it is equally obvious that the jury did not believe defendant's unsworn statements that he had

"blacked out." "* * * circumstantial evidence is as adequate to convict as direct evidence." *People v. Koenig*, 29 Cal.2d 87, 91, 173 P.2d 1, 3. The fact that there appeared to be a lack of motive for the crime was a matter for the jury to consider and did not overcome the other evidences of defendant's guilt.

Unconsciousness. (a) As a matter of law.

[4-7] Defendant places great emphasis upon his unsworn statement that he had blacked out. He also had stated that he had previously suffered a head injury and on a prior occasion had also blacked out, and contends that as these statements were introduced by the plaintiff, such statements conclusively establish that if defendant committed the crime he did it while he was not conscious of his acts. In the first place, the mere statements "I don't remember," or "I can't recall" are not sufficient to establish unconsciousness at the time of the commission of a particular act. But assuming that they were, the rule is not that statements of a defendant introduced by the prosecution are completely binding on the prosecution and fully establish their truth. They are binding on the prosecution and establish their truth only in the absence of proof to the contrary, *People v. Toledo*, 85 Cal.App. 2d 577, 581, 193 P.2d 953; see also *People v. Coppla*, 100 Cal.App.2d 766, 769, 224 P.2d 828; *People v. Marks*, 111 Cal.App.2d 357, 359, 244 P.2d 771; and such statements may be contradicted by circumstantial evidence alone. *People v. Shellenberger*, 25 Cal.App. 2d 402, 77 P.2d 506. Even testimony of a defendant under oath as to lack of consciousness may be overcome by circumstantial evidence. *People v. Rayol*, 65 Cal.App. 2d 462, 150 P.2d 812. Here from the circumstances of the case the jury could (and undoubtedly did) conclude that defendant's actions were normal actions and that defendant was conscious of his acts.

Unconsciousness. (b) Instructions.

[8,9] Defendant complains of the refusal of the court to give his proposed instructions 56, 57 and 58. No. 56 related the unconsciousness mentioned in section 26, Penal Code, as making a person incapable

of committing a crime (which section the court read to the jury) to the particular act with which the defendant was charged. The failure to give this proposed instruction could not possibly have been harmful or even error, as a reading of the instructions as a whole clearly shows that they cover the subject. The same is true of the refusal to give proposed instruction 57. This instruction attempted to further define unconsciousness. The instruction given by the court and taken from CALJIC 71-C gave practically the same definition. Defendant's proposed instruction 58 was to the effect that if the jury had any reasonable doubt as to whether defendant's acts were committed while unconscious, then it should find defendant not guilty, that consciousness must be proved by the prosecution beyond a reasonable doubt and that in determining if that burden had been met, the jury must take defendant's statements "as unrefuted testimony as to the true condition of the defendant * * *" While the first portions of this instruction 58 were correct statements of the law, the final statement is not, and hence the court properly refused to so instruct. As we heretofore pointed out, statements of defendant introduced by the prosecution are unrefuted only in the absence of proof to the contrary. See *People v. Toledo*, 85 Cal.App.2d 577, 581, 193 P.2d 953, and the other cases heretofore cited. The portions of this instruction dealing with burden of proof were fully covered by other instructions on that subject given by the court. While the evidence of unconsciousness was very slight, if any, the court fully instructed upon the subject.

The most serious question arises with reference to an instruction given by the court, which instruction was apparently based upon one condemned in *People v. Hardy*, 33 Cal.2d 52, 198 P.2d 865, but in which the objectionable feature was attempted to be eliminated. The first sentence of the instruction given follows: "If the evidence shows that the defendant acted as if he were conscious, the law presumes that he then was conscious." That sentence was approved in the Hardy case, the court saying, 33 Cal.2d at page 63, 198 P.2d at page 871: "There is no statutory presumption that a

man is conscious merely because he acted as if he were conscious. See Code Civ. Proc. §§ 1959, 1961, 1962 and 1963. Such a presumption, however, appears to have been recognized by judicial decision." The second sentence is: "Since the matter relates to the defendant personally, and lies peculiarly within his knowledge, the law places upon the defendant the burden of producing such evidence thereon as will overcome the presumption and create a reasonable doubt in the minds of the jury as to whether he was in fact conscious or unconscious." That sentence did not appear in the Hardy case instruction, although the court gave as one of the reasons for raising the presumption that the matter relates to the defendant personally and lies peculiarly within his own knowledge and that "hence for reasons of convenience and necessity he should have the burden of producing evidence thereon." 33 Cal.2d at page 64, 198 P.2d at page 872. There is nothing objectionable, however, in it. In the Hardy case the instruction went on to state in effect that the defendant must overcome the presumption by a preponderance of the evidence. The court held that such statement made the instruction erroneous as it deprived the defendant of the doctrine of reasonable doubt. It then held that when such presumption arises the defendant is only required "to produce sufficient evidence to raise a reasonable doubt in the minds of the jury." The defendant's burden, "however, involves merely the duty of going forward with the evidence and of raising a reasonable doubt, and not the duty to overcome the presumption by a preponderance of the evidence." 33 Cal.2d at page 64, 198 P.2d at page 872.

[10] Perhaps the instruction would be better if the language "overcome the presumption" were omitted. However, taking the instruction as a whole it told the jury that defendant's burden with reference to the presumption, if it arose, was to create a reasonable doubt as to whether defendant was conscious. Certainly the instruction did not, as claimed by defendant, require him to prove unconsciousness "beyond a reasonable doubt and to a moral certainty." We do not see how, under the facts of this

case and of the decision in the Hardy case, the instruction was erroneous.

Conduct of District Attorney.

[11] During his argument the assistant district attorney stated "Why didn't his wife come in and testify?" Defendant made no objection to this statement. In fact, in his argument defendant stated that the comment on this subject was "a two-edge sword used by the District Attorney." Defendant then for three pages of the transcript gave his reasons for not calling the wife, emphasizing her blind condition. It would appear that defendant welcomed the opportunity given him to discuss this subject. Certainly the remark of the district attorney was improper and should not have been made, and if called to the attention of the court would undoubtedly have been stricken and the jury admonished concerning it. Where objection is made and the court properly admonishes the jury to disregard the district attorney's comment it has been held repeatedly that such comment although misconduct is not prejudicial. See *People v. Klor*, 32 Cal.2d 658, 663, 197 P.2d 705; *People v. Harmon*, 89 Cal.App.2d 55, 61-62, 200 P.2d 32. *People v. Wilkes*, 44 Cal.2d 679, 284 P.2d 481, where the misconduct was held prejudicial, is not applicable here, because there on objection being made to the comment, the court not only failed to admonish the jury but appeared to approve the comment. Under the circumstances of our case the misconduct was not prejudicial.

[12] In commenting upon defendant's failure to take the stand the district attorney stated, "I'm not smug, but from the evidence *given to me* by George Murray and by Arthur Christiansen [two police officers who were witnesses at the trial] Mr. Martina knew he couldn't take the stand * * *" (Emphasis added.) Defendant immediately assigned this as misconduct, as being a statement of the district attorney concerning evidence outside of the courtroom. The court instructed the jury to disregard the statement and the district attorney stated that he made no statement of evidence out of the courtroom, that he was discussing the evidence. While the

statement appears to be equivocal the district attorney's later statement cleared it up. This fact and the admonishment by the court resulted in no prejudice to defendant.

Torture.

[13] Defendant complains of the giving of an instruction on first degree murder, claiming that as there was no element of poisoning, lying in wait, arson, rape, robbery, burglary or mayhem established there was no evidence to support such an instruction. For the same reason defendant also complains of the district attorney's asking for defendant's conviction of first degree murder and referring to defendant as a sadist. The testimony of Mrs. Weir that she heard a scream, sobbing and crying for 10 to 15 minutes and cries of "You hurt me so," together with the medical evidence that the deceased must have been struck several times, was evidence of "torture, or by any other kind of wilful, deliberate, and premeditated killing" (part of the definition of first degree murder, section 189, Penal Code) and that "the 'intention unlawfully to take away the life of a fellow creature' was a considered intent arrived at or carried out as the result of deliberation and premeditation" which *People v. Bender*, 27 Cal.2d 164, 178, 163 P.2d 8, 17, holds is necessary to constitute first degree murder. As we said in *People v. Teixeira*, 136 Cal. App.2d 136, 288 P.2d 535, 543: "Normally, hitting a person with the hands or feet does not constitute murder in any degree. *People v. Munn*, 65 Cal.2d 11, 3 P. 650; *People v. Kelley*, 208 Cal. 387, 281 P. 609; see annotation 22 A.L.R.2d 854. But if death or great bodily harm is a reasonable or probable consequence of the beating the offense may be murder. See annotation 24 A.L.R. 666. Thus, to constitute murder there has to be either an intent to kill or such wanton and brutal use of the hands without provocation as to indicate that they would cause death or serious bodily injury so as to indicate an abandoned and malignant heart." As stated in *People v. Taylor*, 36 Cal. 255, 265: "It is argued on the part of the defendant that the case made by the prosecution was, at most, but a homicide, committed in a sudden and mutual combat,

and that the Court should, therefore, have confined its charge to the law of manslaughter and the law of self defense. This would be so, doubtless, if the theory of the appellant was the only plausible theory, or if the prosecution accepted it as the true theory, (*People v. Byrnes*, 30 Cal. 206) but the prosecution claimed that it was a case of murder; and it cannot be denied that there was some testimony to support the claim. It may have been very slight, but if there was any testimony tending that way it would have been error to refuse to charge upon the question of murder."

[14] The jury did not find defendant guilty of first degree murder. Although there was evidence to permit the prosecution to try their theory of torture and hence the trial court rightly gave instructions on such theory, the jury failed to be persuaded and rejected the people's argument. Under these circumstances there could be no prejudice in the instructions of the court or the argument of the people.

The judgment and order are affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



**Hugh H. DANNER and Maxine Danner,
Husband and Wife, Plaintiffs
and Appellants,**

v.

**William ATKINS, Alex Bischel, Chester
Bischel, Insured Transport, Inc., et al.,
Defendants and Respondents.***

Civ. 4975.

District Court of Appeal, Fourth District,
California.

March 22, 1956.

Hearing Granted May 15, 1956.

Action for property damage and injuries sustained by cafe operators when parked truck and trailer rolled downgrade and struck cafe. The Superior Court, Kern

County, Warren Stockton, J., entered judgment adverse to plaintiffs, and plaintiffs appealed. The District Court of Appeal, Mussell, J., held that *res ipsa loquitur* doctrine was applicable and that, in absence of any explanation as to what caused truck to roll downgrade and strike cafe, defense was insufficient as a matter of law.

Judgment reversed.

1. Damages ⇐184

In action for property damage and injuries sustained when truck and trailer struck cafe operated by plaintiffs, finding that plaintiffs suffered no damage was unsupported by and contrary to the evidence which showed conclusively that personal property belonging to plaintiffs was damaged and destroyed by collision, that one of the plaintiffs suffered personal injuries therefrom, and that plaintiffs were deprived of use of building during time that it was being repaired.

2. Automobiles ⇐242(2)

Where truck and trailer rolled downgrade and struck cafe a few minutes after truck had been left by driver in front of garage to be checked over by mechanic and mechanic had exercised no control over truck, in action against owner, operators, and driver of truck for resulting property damage and injuries sustained by cafe operators, "*res ipsa loquitur*" doctrine was applicable.

See publication Words and Phrases, for other judicial constructions and definitions of "*Res Ipsa Loquitur*".

3. Negligence ⇐121(2)

Generally, "*res ipsa loquitur*" doctrine applies where accident is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence and that defendant is probably the person responsible.

4. Automobiles ⇐242(2)

Where the circumstances were such that *res ipsa loquitur* doctrine was applicable in action for property damage and injuries sustained by cafe operators when parked truck and trailer rolled downgrade and struck cafe, it was incumbent upon de-

* Opinion vacated 303 P.2d 724.

fendants to produce evidence sufficient to meet inference of negligence, and, in absence of any explanation as to what caused truck to strike cafe, defense was insufficient as a matter of law.

Deadrich, Bates & Stewart and Kenneth H. Bates, Bakersfield, for appellants.

Baker, Palmer, Wall & Raymond, Bakersfield, for respondents William Atkins, Alex Bischel and Chester Bischel.

Conron, Heard & James, Bakersfield, for respondent Insured Transport, Inc.

MUSSELL, Justice.

This is an action for property damage and personal injuries sustained by plaintiffs when a truck and trailer, owned by defendant Insured Transport, Inc., rolled into a cafe operated by plaintiffs on the east side of highway 99 at Wheeler Ridge in Kern county.

On October 14, 1952, William Atkins, an employee of defendants Alex and Chester Bischel, was driving the truck and trailer involved northerly on highway 99 at about 8:30 p. m., when, because of motor trouble, he stopped and parked his equipment 12-15 feet east of the pavement on the highway and at a point approximately 250 feet south of the cafe and near a garage. He called to a mechanic who was standing by the door of the garage and asked him to check the motor so that he could "call Fresno and tell them what the trouble was". Atkins testified that after he had parked the truck, the mechanic asked him to start the motor again; that he got back into the cab and started it and let it run for a while; that he then shut the motor off, left the truck in double low gear with the vacuum brakes on and the mechanical brakes set and walked down to the restaurant, where he had a cup of coffee and placed a call to Fresno; that the mechanic, who had been left with the truck, then came into the restaurant and was about to order a cup of coffee when the truck struck the side of the building; that the accident occurred seven or eight minutes after he had left the truck; that when he left it, the mechanic was standing on the

front part of the truck looking the motor over.

Ettry McElyea, the mechanic, testified that the truck was parked 10 or 12 feet off the pavement; headed north, when the driver, Atkins, asked him to see what the noise was in the motor; that he checked it out; that Atkins remained with him until he went to the cafe to call ahead to stop another driver; that Atkins stated that he would come back after making the telephone call and they would "check it out more"; that after Atkins left, he, McElyea, took his flashlight and looked into the motor to ascertain if he could see anything from the outside that would be wrong; that he went around to the back of the equipment to inspect it; that after Atkins had gone, he walked back to the garage for two or three minutes and then down to the cafe; that while he was ordering a cup of coffee, the truck hit the building; that before he left the truck, he looked inside the cab and checked the transmission and saw that it was in gear; that there was no one else around the equipment when he came from the garage and looked at it, and it was not moving.

Evidence was presented showing that the slope of the ground from the point where the truck was parked to the cafe was about 2.7 per cent and that there was considerable damage to the cafe building as well as to its contents, but there was no evidence presented to explain how the truck had rolled approximately 250 feet to strike the cafe.

On October 16, 1952, T. J. La Gess, a claims adjuster employed by the Colonial Insurance Company, insurer of the truck, called at the cafe and discussed the question of damages with plaintiff Hugh H. Danner. Danner stated that he and his wife were the owners of the real property. Danner made a demand for settlement which was not satisfactory to La Gess. La Gess told Danner that he would immediately contact the Driver and Eddy Construction Company and "if he would authorize the repairs, he, La Gess, would guarantee payment." On the following day Danner told La Gess that what he wanted was "to get the building repaired and get back in

business." La Gess testified that he contacted Mr. Eddy of the Driver and Eddy Construction Company, told him of his conversation with Danner, and asked him to contact Danner for authority in relation to it. Mr. Eddy testified that at the request of La Gess he called at the cafe on October 15, 1952, and made an estimate of the damages; that he reported to La Gess that the cost of repairs to the building would be between \$4,000 and \$4,500; that pursuant to this estimate, his firm repaired the building and the work was commenced in about a week after the estimate was made; that the total cost over the original replacement was \$2,860 and the total amount was \$6,907; that his firm received payment for the job from the Colonial Insurance Company. La Gess testified that when the work was almost completed he asked Danner whether or not the property was in the name of Myra B. Howe and Danner answered in the affirmative, stating that Mrs. Howe was his aunt and that he had power of attorney on the property so that any release executed by him was valid; that he would not have authorized the work except for the representations made by Danner in his original conversation with him; that he prepared a full release of all claims against the Bischels for the sum of \$1,000 in addition to the cost of repairs of the building and presented it to Danner for his signature; that Danner said it was a good offer and he was going to take it; that he left the release with Danner. The record shows in this connection that the offered release was never signed by Danner and no money was paid to him by virtue of it.

Danner testified that Myra B. Howe was the owner of the property and that he was operating the cafe under a lease from her; that he did not direct the Driver and Eddy Construction Company to do the repair work and that the construction work was completed about the middle of January, 1953; that about three days after the accident, La Gess came to the cafe but that he did not have a discussion with him as to the ownership of the building; that he refused to sign an agreement of settlement prepared by La Gess. He testified in detail as to loss of personal property in the build-

ing and to some personal injuries sustained by his wife.

It was alleged in the complaint that Atkins negligently stopped and parked the truck and caused it to run into and against plaintiffs' cafe, proximately causing damage to the personal property therein; that as a further result thereof, plaintiffs were deprived of the use of the cafe for a period of three months, and that as a further result of the negligence of the defendants, plaintiff Maxine Danner sustained personal injuries. The trial court found these allegations were untrue and that it was not true that plaintiffs suffered property damage or damage for personal injuries in the amounts alleged, or in any other sums. It was further found that plaintiffs represented to defendants Alex Bischel, Chester Bischel and William Atkins that they were the owners of said premises and induced said defendants to cause "certain physical damage inflicted upon the building to be repaired in such a manner as the value of said building was enhanced in excess of \$2,800; that but for such representation said defendants would not have caused said repairs to have been made; that such conduct constituted fraud upon defendants."

Plaintiffs appeal from the judgment entered against them and contend that the findings are contradictory and result in a decision upon matters not raised by the pleadings nor supported by the evidence; that negligence of defendants was shown as a matter of law and that the defense was not sufficient; that negligence being present, plaintiffs are entitled to compensation as a matter of right.

[1] The evidence shows conclusively that personal property belonging to plaintiffs was damaged and destroyed by the collision; that plaintiff Maxine Danner suffered personal injuries therefrom; and that plaintiffs were deprived of the use of the building during the time that it was being repaired. It is therefore apparent that the finding that plaintiffs suffered no damage is contrary to the evidence and unsupported by it.

[2,3] We are of the opinion that the doctrine of *res ipsa loquitur* is applicable to

the facts of the instant case. In *Zentz v. Coca Cola Bottling Co.*, 39 Cal.2d 436, 446-447, 247 P.2d 344, 349, it is said:

"* * * as a general rule, *res ipsa loquitur* applies where the accident is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and that the defendant is probably the person who is responsible. In determining whether such probabilities exist with regard to a particular occurrence, the courts have relied both upon common knowledge and the testimony of expert witnesses, and they have considered the circumstances relating to the accident in each particular case, such as the extent of control exercised by the defendant, the plaintiff's own conduct, the likelihood of negligence by some third person, and, in some situations, evidence that the defendant is better able than the plaintiff to explain what happened. All of these matters have been treated as aids to help the courts in determining whether the accident was of such a nature that the injury was more probably than not the result of the defendant's negligence."

In *Price v. McDonald*, 7 Cal.App.2d 77, 45 P.2d 425, plaintiff recovered judgment for injuries received when an automobile coasted out of a driveway in the nighttime, crossed a public street and crashed through the wall of a dwelling house where plaintiff was sleeping. The complaint alleged that the defendants negligently parked the automobile and so negligently controlled it that it caused plaintiff's injuries. The court said, 7 Cal.App.2d at page 81, 45 P.2d at page 427:

"We are of the opinion that under such allegations a presumption of negligence arises when an unattended automobile coasts down a hill and that, upon proof of these facts, it becomes incumbent upon the person having control to explain the cause of the car's movement. Defendants in the case at bar did not relieve themselves from liability by mere proof that they safely

parked the car. Their testimony to that effect enables them to argue with plausibility that someone else must have interfered with the car, but that argument was one for the jury, and does not constitute a sufficient defense, in the absence of all evidence that such was the fact. We are of the opinion that the case made by plaintiff satisfactorily establishes all the elements necessary to bring into operation the doctrine of *res ipsa loquitur*. If the doctrine is applied, then admittedly the plaintiff must prevail, because the cause of the accident remains unexplained."

In *Harlow v. Standard Improvement Co.*, 145 Cal. 477, 78 P. 1045, it appeared that the injury occurred when a steamroller used in street work by the defendant ran into the building of plaintiffs. The court held that "The manner in which it appeared that the injury was caused sufficiently sustains the finding of the jury that it was through the negligence of the defendant. *Judson v. Giant Powder Co.*, 107 Cal. 549, 40 P. 1020, 29 L.R.A. 718. The case is one in which the maxim *res ipsa loquitur* is peculiarly applicable."

[4] In the instant case, Atkins parked his equipment in front of the garage and asked the mechanic McElyea if he would check it over and "if it would be all right if he worked on it there." There is no indication in the record that McElyea was instructed to or did move the truck from the place where it was parked. The evidence shows that neither Atkins nor McElyea observed any one else around the equipment when they walked down to the cafe. Under the circumstances shown by the record, the doctrine of *res ipsa loquitur* was applicable and it was incumbent upon the defendants to produce evidence sufficient to meet the inference of negligence.

In *Talbert v. Ostergaard*, 129 Cal.App.2d 222, 228, 276 P.2d 880, 883, the court said:

"Procedurally, it is incumbent on defendant to rebut the inference by a showing "either (1) of satisfactory explanation of the accident, that is, an affirmative showing of a definite cause for the accident, in which cause no ele-

ment of negligence on the part of the defendant inheres; or (2) of such care in all possible respects as necessarily to lead to the conclusion that the accident could not have happened from want of care, but must have been due to some unpreventable cause, although the exact cause is unknown. In the latter case, inasmuch as the process of reasoning is one of exclusion, the care shown must be satisfactory, in the sense that it covers all causes which due care on the part of the defendant might have prevented.” *Dierman v. Providence Hospital*, 31 Cal.2d 290, 295, 188 P.2d 12, 15. In short, the ‘explanation which the defendant is required to make is an explanation of his conduct and, to be complete, it must be as broad as the inference.’ *Hinds v. Wheadon*, 67 Cal. App.2d 456, 464, 154 P.2d 720, 724. The question of the sufficiency of a defendant’s explanation of the accident or the sufficiency of his evidence of due care is ordinarily one of fact for the jury. *Druzanich v. Criley*, 19 Cal.2d 439, 444, 122 P.2d 53; *Ireland v. Marsden*, 108 Cal.App. 632, 291 P. 912. But if, in explaining his conduct, the defendant fails to produce substantial evidence of the use of due care, as where he fails adequately to disclose the nature of an inspection he was required to make, his defense may be held insufficient as a matter of law. *Chutuk v. Southern Calif. Gas Co.*, 218 Cal. 395, 399-400, 23 P.2d 285; *O’Connor v. Mennie*, 169 Cal. 217, 226, 146 P. 674. See *Dierman v. Providence Hospital*, *supra*.”

No explanation was offered in the instant case showing what caused the truck involved to roll down and into the building, and we conclude, therefore, as a matter of law, that the defense is insufficient.

Defendants argue that Atkins was not in control of the vehicle and that the last person shown to have control over it was the mechanic, McElyea. However, he did not exercise control over it and it is said in *Zentz v. Coca Cola Bottling Co.*, *supra*, 39 Cal.2d at page 444, 247 P.2d at page 348:

“* * * the fact that the accident occurs some time after the defendant relinquishes control of the instrumentality which causes the accident does not preclude application of the doctrine provided there is evidence that the instrumentality had not been improperly handled by the plaintiff or some third person, or its condition otherwise changed, after control was relinquished by the defendant. *Gordon v. Aztec Brewing Co.*, 33 Cal.2d 514, 517-518, 203 P.2d 522; *Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 458-459, 150 P.2d 436; see *Honea v. City Dairy, Inc.*, 22 Cal.2d 614, 617-618, 140 P.2d 369. Of course, it must appear that the defendant had sufficient control or connection with the accident that it can be said that he was more probably than not the person responsible for plaintiff’s injury.” See also *Burr v. Sherwin Williams Co.*, 42 Cal.2d 682, 687, 268 P.2d 1041.

Here, it appears that Atkins was more probably than not the person responsible for the accident.

The trial court found that the value of the building was enhanced in excess of \$2,800 by reason of the representation of plaintiffs that they owned it and that such conduct constituted fraud upon the defendants. The record shows that Mrs. Howe was the owner of the building and the question of whether she would be entitled to have it repaired depends upon proof that its destruction was a proximate result of the negligence of defendants. Plaintiffs did not ask for damages to the real property in their complaint, and the matter of fraud was not alleged in the answer.

Since we have concluded that the doctrine of *res ipsa loquitur* is applicable in the instant case, and since the action should be retried, we do not deem it necessary to pass upon other questions raised.

The judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

140 Cal.App.2d 71

Clair ENGLE, Petitioner,

v.

The SUPERIOR COURT of the State of
California IN AND FOR the COUNTY
OF SAN JOAQUIN, Respondent.

Civ. 8939.

District Court of Appeal, Third District,
California.

March 20, 1956.

Hearing Denied May 15, 1956.

Prohibition proceeding to restrain the Superior Court of San Joaquin County from taking any further action in modifying a support agreement entered into between petitioner and his former wife and approved by a Florida court in connection with a decree of divorce in Florida. The District Court of Appeal, Schottky, J., held, inter alia, that where support agreement gave wife the right to prosecute any legal remedy open to her when, after minor child of the parties reached the age of majority the parties were unable to agree on an amount for her support, and a Florida divorce decree approved such agreement but did not take away wife's right to prosecute such legal remedies, wife's action for a determination of an amount for her support did not involve modification of the decree, but was a proceeding to enforce a right given her by contract and California courts therefore had jurisdiction to hear such proceeding independently from an action to modify the decree.

Petition for writ of prohibition, or in the alternative a writ of mandate denied, and alternative writ discharged.

1. Divorce ⇨393

Where support agreement gave wife the right to prosecute any legal remedy open to her when, after minor child of the parties reached the age of majority, the parties were unable to agree on an amount for her support, and a Florida divorce decree approved such agreement but did not take away wife's right to prosecute such legal remedies, wife's action for a determination of an amount for her support did not involve modification of the decree,

but was a proceeding to enforce the right given her by contract, and California courts therefore had jurisdiction to hear such proceeding independently from an action to modify the decree.

2. Courts ⇨510

Florida statute purporting to give Florida courts exclusive jurisdiction in an action to enforce recovery of support, maintenance or alimony orders issued pursuant to a Florida judgment of divorce is not binding upon the California courts. F.S.A. § 65.15.

3. Courts ⇨510

Where a support agreement was entered into between husband and his former wife, and such agreement was approved by a Florida court in connection with a decree of divorce entered in Florida, jurisdiction of Florida court was not exclusive in so far as preventing wife from bringing an action for modification of the support agreement in the courts of another state.

4. Courts ⇨511

Where a support agreement was entered into between petitioner and his former wife and approved by a Florida court in connection with a decree of divorce entered in Florida, and later both parties became residents of California, considerations of comity did not require wife, who filed her petition for modification of the support agreement in the California court eight months before petitioner filed a similar motion in Florida, to go to Florida for determination of such matter.

Edmund M. Moor, Red Bluff, Daniel S. Carlton, Redding, for petitioner.

Blewett, Blewett, Macey & Garretson, Stockton, for real party in interest.

SCHOTTKY, Justice.

Petitioner seeks a writ of prohibition to restrain the Superior Court of San Joaquin County from taking any further proceedings in an action entitled Hazel Engle v. Clair Engle until the final determination of a modification proceeding now pending between the same parties in the Circuit Court of the Sixth Judicial Circuit of the State

of Florida. This court issued an alternative writ and stay order.

It appears from the record that petitioner Clair Engle and Hazel Engle were married in California in 1933. In 1947 Hazel Engle filed an action for divorce against petitioner in the State of Florida and a decree of divorce was entered on October 2, 1947, which decree included the following order: "It is further ordered, adjudged, and decreed that the agreement entered into by and between the parties hereto, introduced into evidence as Plaintiffs' Exhibit #2, be, and the same is hereby ratified, approved and confirmed by the Court, attached hereto and made a part hereof."

The agreement which was executed on August 12, 1947, prior to filing of the complaint for divorce, provided for a monthly payment of \$300 a month until the minor child of the marriage should reach her majority, at which time the payment would be modified to some mutually agreeable amount. Said agreement provided further that "In the event the parties cannot mutually agree upon the amount to be paid for the support and maintenance of said Wife, then, the Wife shall be entitled to prosecute any legal remedies open to her for that purpose only."

The parties further provided that in the event of divorce "this agreement may be made a part of said decree whether incorporated therein or adopted by reference." A copy of the agreement is on file with the Florida court which granted the decree.

In 1951 Hazel Engle returned to California and established residence. In 1954, after the minor child reached her majority, Clair Engle reduced the payment to \$100 per month. Thereafter Hazel Engle filed suit in the Superior Court of San Joaquin County praying that the court award her a fair and reasonable amount for her care and support. Her amended complaint alleged the making of said agreement and that it had never been revoked. It also alleged the granting of the decree of divorce in Florida and the reduction by petitioner of the support payments to her from \$300 per month to \$100 per month upon the minor child's reaching the age of majority. The said complaint alleged further that the

sum of \$100 per month was wholly insufficient for her support, that petitioner's salary as Congressman had increased and that petitioner was well able to pay the sum of \$500 per month for her care, support, needs and medical attention.

Petitioner moved the respondent Superior Court to dismiss said action upon the stated ground that said court had no jurisdiction over the subject of said action and had no power or authority to modify the term of the property settlement agreement referred to in said amended complaint. Petitioner at the same time filed a demurrer to said amended complaint upon the grounds that respondent court had no jurisdiction over the subject of the action and that said complaint failed to state a cause of action. Respondent court denied petitioner's motion to dismiss and overruled his demurrer to the amended complaint. Thereafter, on July 8, 1955, petitioner sought modification of the support decree in the Florida court which granted the decree. After taking this step, petitioner again sought dismissal on the ground of lack of jurisdiction, or, in the alternative, a stay of proceedings until the Florida court determined the modification proceedings pending before it. This was denied and petitioner then applied to this court for a writ of prohibition and in the alternative a writ of mandate.

Petitioner's first contention is that the agreement was merged in the Florida decree and no independent action remains thereon.

The agreement upon which the complaint is based was entered into before the divorce action was commenced. It provided for the payment of \$300 per month for the support of the wife and minor child until the child should reach the age of majority, at which time the amount would be reduced to some mutually agreeable amount. It then went on to provide that if the parties could not agree then "the wife shall be entitled to prosecute any legal remedies open to her." The agreement further provided that in the event of a divorce "this agreement may be made part of said decree." The divorce was granted and the decree provided that the "agreement is ratified, approved and confirmed."

Petitioner argues that the agreement was merged in the decree and that no cause of action can be brought on the agreement. We think that in the instant proceeding it makes little difference whether the agreement was or was not merged in the decree because the right which the wife is here seeking to enforce does not involve a modification of the decree but it is a right given to her by the agreement which was ratified and approved by the decree. It is to be noted that the decree, after ratifying and approving the agreement, provided that it retained jurisdiction for further order pertaining to the custody and support of the minor child but there is nothing in the decree which takes away the right given to the wife "to prosecute any legal remedies open to her" when, after the minor child should reach the age of majority, the parties were unable to agree.

[1] But even if we assume that, as argued by petitioner, the agreement was merged in the Florida decree, we are unable to agree with petitioner's contention that the courts of California have no jurisdiction in the instant action commenced by the wife, for all that the wife is here seeking to do is enforce the right given to her by the contract. The Florida court in its decree did not order petitioner to make any payments to the wife, but merely approved the agreement. While the decree stated that the court retained jurisdiction to make further orders as to the custody of the minor child, there was nothing in the decree which prevented the wife from prosecuting any legal remedies open to her under the contract after the minor child reached the age of majority.

Petitioner contends that only the Florida court can determine the question as to what amount the wife is now entitled to receive under the agreement and decree, the minor child having reached the age of majority.

Petitioner states that property settlement agreements and their construction and effect must be interpreted in the light of the law of the state in which they are executed. He quotes the following from *Hutchinson v. Hutchinson*, 48 Cal.App.2d 12, at page 18, 119 P.2d 214, at page 217:

"Upon this record the first question for determination is whether the law of California or the law of Illinois is here applicable. It is well established that the legality of a contract is to be determined by the law of the place where it was made and its interpretation likewise. Civil Code, sec. 1646; Restat., Conflict of Laws, sec. 347. If the contract is legal in the state where it was made it will be enforced in another state unless the contract is contrary to the strong public policy of the forum. Restat., Conflict of Laws, sec. 612."

Petitioner then states that the Florida law provided that the jurisdiction of the Florida circuit courts, for the purpose of modifying Florida divorce decree and property settlement agreements for such modification purposes, is to be exclusive, and quotes from section 65.15, F.S.A., as follows:

"* * * and it shall be unlawful to commence, or cause to be commenced as party, or attorney, or agent, or otherwise, in behalf of either party in any court any action or proceeding otherwise than as herein provided, nor shall any court have jurisdiction to entertain any action or proceeding otherwise than as herein provided to enforce the recovery of separate support, maintenance, or alimony otherwise than pursuant to such order or judgment. * * *

"This section is declaratory of existing public policy and laws of this state, which is hereby affirmed and confirmed in conformance with the provisions hereof * * *."

[2,3] Even if it be conceded that the only cause of action is on the decree, we do not believe that the jurisdiction of the Florida court is exclusive for the Florida statute purporting to give exclusive jurisdiction in the Florida courts is not binding upon the California courts. Section 617 of Restatement of Conflict of Laws states:

"An action can be maintained on a foreign cause of action although by the law of the state which created the

right, it is required that suit shall not be brought outside the state."

That this is true is clearly indicated by the decision of the United States Supreme Court in the case of *People of State of New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 67 S.Ct. 903, 91 L.Ed. 1133, which in some respects bears a striking similarity to the instant case. The Halveys were married in New York in 1937 and lived together in New York until 1944. In 1938 a son was born. Marital troubles developed in 1944. Mrs. Halvey went to Florida and established residence there. In 1945 she instituted a suit for divorce and a decree was granted awarding her custody of the child. The day before the decree was entered Mr. Halvey took the child back to New York without Mrs. Halvey's knowledge or approval. Mrs. Halvey returned to New York and commenced a habeas corpus proceeding in the New York Supreme Court to regain custody of the child. Mr. Halvey, in contesting the proceeding, sought to gain certain visitation rights including the right to keep the child during certain vacation periods, which rights were not given him by the Florida decree. After hearing, the New York court ordered (1) that the custody of the child remain with the mother; (2) that the father have rights of visitation including the right to keep the child with him during stated vacation periods in each year, and (3) that the mother file with the court a surety bond in the sum of \$5,000, conditioned on the delivery of the child in Florida for removal by the father to New York for the periods when he had the right to keep the child with him. Mr. Halvey appealed but both the Appellate Division and the Court of Appeals affirmed, and Mr. Halvey carried the case to the United States Supreme Court which granted a writ of certiorari. Although the Florida Statute, section 65.15, was then in force, the Supreme Court rejected the argument that only the courts of Florida had power to modify the divorce decree, and in affirming the order of the trial court said, 330 U.S. at pages 612, 613, 614, 615, 67 S.Ct. at page 905:

"The custody decree was not irrevocable and unchangeable; the Florida

court had the power to modify it at all times. * * *

"* * * Facts which have arisen since the original decree are one basis for modification of the custody decree. *Frazier v. Frazier*, 109 Fla. [164], at page 168, 147 So. at page 464; *Jones v. Jones*, 156 Fla. 524, 23 So.2d 623, 625. But the power is not so restricted. It was held in *Meadows v. Meadows*, 78 Fla. 576, 83 So. 392, 393, that 'the proper custody of the minor child is a proper subject for consideration by the chancellor at any time, even if facts in issue could have been considered at a previous hearing, *if such facts were not presented or considered at a former hearing.*' (Italics added.) Or, as stated in *Frazier v. Frazier*, 109 Fla. at page 168, 147 So. at page 465, a custody decree 'is not to be materially amended or changed afterward, unless on altered conditions shown to have arisen since the decree, or because of material facts bearing on the question of custody and existing at the time of the decree, but which were unknown to the court and then only for the welfare of the child.' The result is that custody decrees of Florida courts are ordinarily not res judicata either in Florida or elsewhere, except as to the facts before the court at the time of judgment. *Minick v. Minick*, 111 Fla. 469, 490, 491, 149 So. 483, 492.

* * * * *

"* * * It seems to us plain, therefore, that under the rule of *Meadows v. Meadows* [78 Fla. 576, 83 So. 392], supra, the Florida court would have been empowered to modify the decree in the interests of the child and to grant respondent the right of visitation, if he had applied to it rather than to the New York court and had presented his version of the controversy for the first time in his application for modification.

"So far as the Full Faith and Credit Clause is concerned, what Florida could do in modifying the decree, New York may do. * * *

"The general rule is that this command requires the judgment of a sister State to be given full, not partial, credit in the State of the forum. See *Davis v. Davis*, 305 U.S. 32, 59 S.Ct. 3, 83 L.Ed. 26, 118 A.L.R. 1518; *Williams v. State of North Carolina*, 317 U.S. 287, 63 S.Ct. 207, 87 L.Ed. 279, 143 A.L.R. 1273. But a judgment has no constitutional claim to a more conclusive or final effect in the State of the forum than it has in the State where rendered. * * *

* * * * *

"In this case the New York court, having the child and both parents before it, had a full hearing and determined that the welfare of the child and the interests of the father warranted a modification of the custody decree. It is not shown that the New York court in modifying the Florida decree exceeded the limits permitted under Florida law. There is therefore a failure of proof that the Florida decree received less credit in New York than it had in Florida."

Our own Supreme Court in the recent case of *Worthley v. Worthley*, 44 Cal.2d 465, 283 P.2d 19, in rejecting the contention of defendant husband that his obligations under a New Jersey divorce decree were not enforceable in California, said, 44 Cal. 2d at pages 468-474, 283 P.2d at page 22:

"* * * Since the New Jersey decree is both prospectively and retroactively modifiable, N.J.S. sec. 2A:34-23 [1951], we are not constitutionally bound to enforce defendant's obligations under it. *Sistare v. Sistare*, 218 U.S. 1, 30 S.Ct. 682, 54 L.Ed. 905 [28 L.R.A.,N.S., 1068]; *Lynde v. Lynde*, 181 U.S. 183, 21 S.Ct. 555, 45 L.Ed. 810; *Barber v. Barber*, 21 How. 582, 16 L.Ed. 226. Nor are we bound *not* to enforce them. *People of State of New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 615, 67 S.Ct. 903, 91 L.Ed. 1433; *Cummings v. Cummings*, 97 Cal. App. 144, 151, 275 P. 245. The United States Supreme Court has held, however, that if such obligations are enforced in this state, at least as to ac-

rued arrearages, due process requires that the defendant be afforded an opportunity to litigate the question of modification. *Griffin v. Griffin*, 327 U.S. 220, 233-234, 66 S.Ct. 556, 90 L.Ed. 635; see also, *Gough v. Gough*, 101 Cal.App.2d 262, 267-268, 225 P.2d 668. It has also clearly indicated that as to either prospective or retroactive enforcement of such obligations, this state 'has at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the State where it was rendered.' *People of State of New York ex rel. Halvey v. Halvey*, *supra*, 330 U.S. 610, 615, 67 S.Ct. 903, 906.

* * * * *

"* * * It was stated in the *Biewend* case, however, that the Missouri decree would be established as a decree of the California courts 'until such time as the Missouri court modifies its decree.' [*Biewend v. Biewend*] 17 Cal.2d 108, 114, 109 P.2d 701, 705 [132 A.L.R. 1264]. On reconsideration we have concluded, for reasons that appear below, that this statement was erroneous insofar as it implied that the California courts will not try the issue of modification on its merits, and that the courts of this state should undertake to try such issues.

"The District Court of Appeal for the Third Appellate District in a recent case has prospectively modified a support obligation created in a Nevada decree. *Starr v. Starr*, *supra*, 121 Cal. App.2d 633, 263 P.2d 675. In that case the plaintiff-wife obtained a divorce in Nevada in 1949, at which time she was awarded custody of her minor child and the defendant-husband was ordered to contribute \$25 per month toward the support of the child. Subsequently the wife and child became residents of California, and in 1951 she brought an action asking that the husband's support payments be increased to \$75 per month. In affirming the trial court's order increasing the husband's obligation to \$75 per month, the District Court of Appeal drew an analogy to

Sampsell v. Superior Court, 32 Cal.2d 763, 197 P.2d 739, in which it was held that custody rights established in one state were modifiable in any other state that had jurisdiction over the subject matter. The court concluded that if the California courts could modify the custody rights created in the Nevada decree, there was no reason why the support obligation created in the same decree could not also be modified. Similarly, the courts of a number of other states have affirmed their willingness to undertake prospective modification of alimony and support obligations created in sister-state decrees. [Citing cases.]

"Although the question of retroactive modification has been seldom litigated, the United States Supreme Court has expressed its approval of the proposition that actions to enforce retroactively modifiable decrees should be tried in a forum that has personal jurisdiction over both parties, and that in the trial of such actions the defendant must be afforded an opportunity to set up any mitigating defenses that would be available to him if the suit were brought in the state where the alimony or support decree was originally rendered. *Griffin v. Griffin*, 327 U.S. 220, 233-234, 66 S.Ct. 556, 90 L.Ed. 635; see, also, *Gough v. Gough*, 101 Cal.App.2d 262, 267-268, 225 P.2d 668. * * *

"It is suggested that even if there are no binding California authorities on the question, we should follow certain sister-state decisions holding that alimony and support obligations created by a prospectively and retroactively modifiable decree are enforceable only in the state in which the decree was rendered. The policy implicit in those decisions is that a modifiable duty of support in one state 'is of no special interest to other states and * * * is not enforceable elsewhere under principles of Conflict of Laws.' Restatement, Conflict of Laws, § 458, comment a. This policy was rejected by this court in the *Biewend* case, see,

also, *Hiner v. Hiner*, 153 Cal. 254, 257, 94 P. 1044, and by the Legislature of this state in enacting the Uniform Reciprocal Enforcement of Support Act. Code Civ.Proc., §§ 1650-1690. In proceedings commenced pursuant to the provisions of that act, the California courts must recognize and enforce foreign alimony and support decrees whether modifiable or not, Code Civ.Proc., § 1670, and must afford the defendant an opportunity to litigate the issue of modification. Code Civ.Proc., § 1682; *Griffin v. Griffin*, supra, 327 U.S. 220, 233-234, 66 S.Ct. 556. If we should now refuse to follow the policy expressed by the Legislature in the Uniform Act, and by this court and the United States Supreme Court in the *Sampsell* and *Griffin* cases, and should hold that even though the courts of this state have personal jurisdiction over the defendant his obligations under a prospectively and retroactively modifiable sister-state support decree cannot be enforced in this state, the result would be anomalous. There would then be two rules in California, one for proceedings commenced under the Uniform Act, and a contrary one for all other proceedings to enforce foreign created alimony and support obligations.

"Moreover, there is no valid reason, in a case in which both parties are before the court, why the California courts should refuse to hear a plaintiff's prayer for enforcement of a modifiable sister-state decree and the defendant's plea for modification of his obligations thereunder. * * *

"Furthermore, there is no merit to the contention that as a matter of practical convenience the issue of modification should be tried in the courts of the state where the support decree was originally rendered. Proof of changed circumstances in support cases is no more difficult than in custody cases and, as noted above, a California court that has jurisdiction of the subject matter must undertake to adjudicate a plea for modification

of custody rights established by a sister-state decree."

In the still more recent case of *Hopkins v. Hopkins*, 46 Cal.2d 313, 294 P.2d 1, a wife brought an action in California to collect arrearage claimed to be due under a 1927 Colorado decree of divorce, which incorporated a property settlement agreement providing that defendant should pay to plaintiff "in lieu of all payments of alimony and support money, and by way of support and maintenance for the first party (plaintiff) and their said minor children, the sum of One Hundred Fifty Dollars (\$150) per month * * *" in addition to certain lump-sum payments that were to be made within three years from the date of the decree of divorce. The property settlement agreement also provided that "If the first party hereto [plaintiff] shall at any time remarry, such re-marriage on the part of the party of the first part shall relieve second party (defendant) from the payment of any further alimony to the first party. But such marriage, if any such takes place, shall not relieve the party of the second part from the payment to the first party of such proportionate part of the monthly payments hereinbefore provided for as shall be reasonably necessary for the support, maintenance, and education of their said children as long as said children or any of them remains a minor and in the custody of the first party." Defendant husband contended that the California courts were "without power" to determine the proportion of the total support obligation attributable to plaintiff, and thus that defendant's obligation cannot be enforced in California until plaintiff obtains a determination by a Colorado court of the proportion of the total support obligation attributable to her." The trial court held that the Colorado "Judgment and Decree sought to be sued upon is too uncertain to be sued on and is unenforceable in California."

In reversing the lower court, the Supreme Court said, 46 Cal.2d at page 316, 294 P.2d at page 2:

"* * * In the *Worthley* case this court rejected the contention that a prospectively and retroactively modifiable sister-state support decree is too

uncertain to form the basis of an action in this state for a money judgment, and we held 'that foreign-created alimony and support obligations are enforceable in this state. In an action to enforce a modifiable support obligation, either party may tender and litigate any plea for modification that could be presented to the courts of the state where the alimony or support decree was originally rendered.' 44 Cal. 2d at page 474, 283 P.2d at page 25.

"Plaintiff's contractual right to receive her proportionate share of the \$150 monthly payment under the Colorado decree is not subject to modification by this or any other court, *Zlaten v. Zlaten*, 117 Colo. 296, 298-299, 186 P.2d 583; *Hall v. Hall*, 105 Colo. 227, 235-239, 97 P.2d 415; cf. *Dexter v. Dexter*, 42 Cal.2d 36, 40, 265 P.2d 873, and the crucial question presented to the trial court in the present case was to resolve the ambiguity latent in the property settlement agreement by determining the proportion of defendant's obligation attributable to plaintiff. See *Meek v. Meek*, 51 Cal.App.2d 492, 495, 125 P.2d 117; *Putnam v. Putnam*, 51 Cal.App.2d 696, 699, 125 P.2d 525. * * * The trial court should have made a finding on the basis of that evidence and entered judgment accordingly."

Petitioner's final contention is that "Respondent court abused its discretion in failing to stay, as a matter of comity, further proceedings in that court until a final determination of the identical issue in the Florida modification proceeding."

Petitioner argues that if this court should hold that respondent court is not proceeding in excess of its jurisdiction, then as an alternative form of relief a writ of mandate should issue ordering said court to stay proceedings as a matter of comity until the modification proceeding in Florida (which was filed by petitioner after the wife commenced her action in the respondent court) is finally determined.

Petitioner contends that the respondent court abused its discretion in not staying the instant proceeding and cites the case of

Simmons v. Superior Court, 96 Cal.App.2d 119, 214 P.2d 844, 19 A.L.R.2d 288. The facts of that case are quite different from those in the instant case. Mr. and Mrs. Simmons were both residents of Texas and Mrs. Simmons commenced an action for divorce in Texas. Mr. Simmons took possession of some stock certificates and came to Los Angeles and there filed an action against Mrs. Simmons in which he claimed ownership of the stock. After various proceedings in both actions Mrs. Simmons moved the Superior Court in Los Angeles County to stay all proceedings in California until the final determination of the Texas action. Her motion was denied and she sought a writ of prohibition to restrain the California court from proceeding until the Texas action was determined. The court in granting the writ said, 96 Cal.App. 2d at page 131, 214 P.2d at page 852:

"The parties are residents of Texas. The Texas action will determine all the issues involved in the California action. The courts of Texas are as competent to administer justice as those of California. A trial in Texas under the circumstances is more likely to accomplish full justice than a trial in California of the comparatively narrow issues involved in the action here. The remedy which may be afforded by the Texas courts is equally as effective and advantageous as any that may be afforded by the California courts. Only confusion, inconvenience, and possible defeat of the rights of the wife can result from trying the California action. Further proceedings in California should be stayed where it appears, as it does in the present case, that complete justice cannot be done here, that the wife will be subjected to great and unnecessary inconvenience and expense, and that the trial, if conducted here, will be attended with many, if not insuperable, difficulties. All of this can be avoided with no hardship to the husband if the Texas action, commenced prior to the California action in the jurisdiction where the parties reside, in which the issues can be more easily and effectively tried, and in which complete justice

can be done, is first heard and determined.

"Since the Texas court first assumed and exercised jurisdiction and the parties are residents of that state, comity and the expediency and the practical desirability of avoiding a multiplicity of forms necessitate the holding that respondent court abused its discretion in not staying further proceedings until the final determination of the Texas action. Decent respect for Texas and its courts demands that respondent court wait until the Texas courts have spoken."

[4] It is at once apparent that **Simmons v. Superior Court** does not support petitioner's contentions. In that case both parties were residents of Texas and Mrs. Simmons' action was filed first. In the instant case both parties are residents of California and the wife's action in California was filed eight months before petitioner filed his petition for modification in the Florida action. California has a greater interest in the matter than has Florida because if the wife were to become a public charge California would have to provide for her welfare. While comity is entitled to great consideration, it is unthinkable that considerations of comity should compel either the wife or petitioner to journey across the continent to Florida for the determination of a matter which under all the circumstances can be better determined in the California courts, for all of the reasons mentioned in the above quotation from **Simmons v. Superior Court**.

In view of the foregoing we conclude that the respondent Superior Court correctly refused to dismiss the instant action or to stay it until the Florida court has determined the modification proceedings filed in that court by petitioner after the commencement of the instant action.

The petition for a writ of prohibition, or, in the alternative a writ of mandate, is denied, and the alternative writ heretofore issued by this court is discharged.

VAN DYKE, P. J., and PEEK, J., concur.

Hearing denied; CARTER, J., dissenting.

140 Cal.App.2d 156

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Lloyd Eli OLDS, Defendant and Appellant.
Civ. 21119.

District Court of Appeal, Second District,
Division 1, California.

March 22, 1956.

Rehearing Denied April 10, 1956.

Proceedings under the Welfare and Institutions Code. The Superior Court, Los Angeles County, Joe Raycraft, J., entered judgment adverse to defendant and defendant appealed from the verdict of the jury only. The District Court of Appeal, Nourse, J. pro tem., held that the notice of appeal from the verdict that defendant was a sexual psychopath within the meaning of Welfare and Institutions Code did not invoke the jurisdiction of the court.

Appeal dismissed.

1. Mental Health ⇐444, 449

Sexual psychopathy proceedings under the Welfare and Institutions Code are special proceedings of a civil nature, collateral to the criminal action and the right to appeal is governed by the Code of Civil Procedure. Welfare and Institutions Code, § 5500; West's Ann.Code Civ.Proc. § 963.

2. Appeal and Error ⇐108

Appeal does not lie from a verdict. West's Ann.Code Civ.Proc. § 963.

3. Mental Health ⇐449

Notice of appeal from verdict finding defendant to be a sexual psychopath within Welfare and Institutions Code did not invoke jurisdiction of district court of appeal. Welfare and Institutions Code, § 5500; West's Ann.Code Civ.Proc. § 963.

David C. Marcus, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., James C. Maupin, Deputy Atty. Gen., for respondent.

NOURSE, Justice pro tem.

After his conviction of violation of section 286 of the Penal Code but before sen-

tence and without any ruling upon his application for probation, the defendant was committed to the state hospital at Norwalk for a period not to exceed 90 days and for observation as a sexual psychopath pursuant to section 5512 of the Welfare and Institutions Code.

Before the expiration of the 90-day period the superintendent of the hospital made a verified report in writing to the court in which he stated that in his opinion defendant was a sexual psychopath within the meaning of section 5500 of the Welfare and Institutions Code, that he was a menace to the health and safety of others, and that he would benefit by treatment in the state hospital at Atascadero.

Upon the basis of this report, the court committed the defendant to the state hospital at Atascadero for an indeterminate period. Defendant then, pursuant to section 5512.5, Welfare and Institutions Code, demanded a jury trial to determine the issue as to whether he was a sexual psychopath within the meaning of section 5500 of the Welfare and Institutions Code. The trial court then suspended proceedings and committed the defendant to the county jail and thereafter a jury trial was had and the jury returned a verdict finding the defendant to be "a sexual psychopath within the meaning of 5500 Welfare and Institutions Code."

Defendant moved for a new trial, which was denied, and upon denying the new trial the court again entered an order committing the defendant to the "Department of Mental Hygiene at Atascadero State Hospital for an indeterminate period."

[1] The proceedings had under the Welfare and Institutions Code are special proceedings of a civil nature, collateral to the criminal action. *Gross v. Superior Court*, 42 Cal.2d 816, 820, 270 P.2d 1025. The proceeding being civil in nature, the right to appeal is governed by section 963 of the Code of Civil Procedure.

[2, 3] In the present case defendant has appealed from the verdict of the jury only. His notice of appeal reads, "The defendant, Lloyd Eli Olds, hereby appeals from the verdict rendered in the above entitled

matter on the 15th day of February, 1955, and from the whole thereof."

A verdict is not one of the orders specified in section 963, Code of Civil Procedure, and appeal does not lie from a verdict. *Robins v. Weis*, 97 Cal.App.2d 144, 145, 217 P.2d 156.

A notice of appeal from a non-appealable order fails to invoke the jurisdiction of this court. *Rossi v. Caire*, 189 Cal. 507, 508, 209 P. 374; *Sherman v. Standard Mines Co.*, 166 Cal. 524, 137 P. 249; *Robins v. Weis*, supra.

The appeal is therefore dismissed,

FOURTH, J., concurs.



140 Cal.App.2d 308

**Alverta GAMWELL, Plaintiff and
Respondent,**

v.

**KEY SYSTEM TRANSIT LINES, a
corporation, Defendant and
Appellant.
No. 16613.**

District Court of Appeal, First District,
Division 1, California,
March 28, 1956.

**As Modified on Denial of Rehearing
April 27, 1956.**

Hearing Denied May 23, 1956.

Action for injuries sustained by passenger when folding doors of bus she was entering closed on her. The Superior Court, Alameda County, Thomas J. Ledwich, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Bray, J., held that evidence sustained verdict for passenger.

Affirmed.

1. Carriers $\Rightarrow$ 318(8), 346(1)

In action for injuries sustained by passenger when folding doors of bus she was entering closed on her, evidence sustained verdict for passenger.

2. Negligence $\Rightarrow$ 121(2)

There has been a general liberalization of tests for application of doctrine of *res ipsa loquitur*, and regardless of whether complaint alleges general acts of negligence alone, general and specific acts of negligence, or even specific acts of negligence only, the doctrine may apply, depending not upon type of pleading but whether allegations show that plaintiff knows specific or underlying cause of accident or is ignorant thereof.

3. Carriers $\Rightarrow$ 314(2)

Passenger's complaint, in which it was alleged that, at time of her entrance thereon, doors of bus were so negligently maintained and operated by employee of defendant as to cause plaintiff to be caught in, thrown about and struck by said doors, causing her to be eventually thrown to pavement, was not subject to claimed infirmity of rendering doctrine of *res ipsa loquitur* inapplicable.

Stafford P. Buckley, Edward J. Rice, Jr., Donahue, Richards, Rowell & Gallagher, Oakland, for appellant.

Smith & Parrish, Oakland, George W. Hauer, Oakland, for respondent.

BRAY, Justice.

Defendant appeals from a judgment of \$7500 awarded plaintiff by a jury in an action for personal injuries.

Defendant's contentions are (1) that as a matter of law the evidence is insufficient to support the verdict, and (2) that the doctrine of *res ipsa loquitur* could not apply because of allegations of the complaint.

Evidence.

Taking the evidence and the reasonable inferences therefrom most strongly in favor of plaintiff, as we are required to do,

the following is a summary of it. Plaintiff, a 77 year old school teacher, was boarding one of defendant's buses. She had "both feet inside the bus" when, without any warning, the folding doors between which she was entering closed on her. "I was just clinched right there. I didn't know anything from then on until I found myself in the gutter." She explained "clinched" as meaning that she was struck by the doors. The next thing she knew she was being helped out of the gutter and taken into a nearby drug store where they put her in a chair. A man came up to her and asked what had happened to her. She answered "The bus driver closed the doors on me." The man said, "Well, I am the bus driver," and nothing more.

1. Sufficiency of The Evidence.

[1] Defendant's brief is mainly made up of arguments why the evidence of defendant should be accepted rather than the testimony of plaintiff, which arguments would be of considerable value to a jury, but are of no value to an appellate court, which may not resolve conflicts in the evidence. Thus the fact that a woman passenger in the bus and the bus operator testified that no one was entering the bus when it started up and the doors closed, and in other respects contradicted plaintiff's version of the accident, did not dispel as a matter of law the inference of negligence deducible from plaintiff's own testimony. It was defendant's theory that plaintiff's injuries came from her falling against a hydrant on the sidewalk, although there was no direct evidence that she so fell. Defendant argues that the inference of negligence was dispelled by the physical facts. While that conclusion and its theory of the cause of plaintiff's injuries are reasonably deducible from the evidence, they are not compelled by the evidence. The conclusions of the jury are at least equally reasonable. We have studied the transcript and conclude that while a finding to the contrary of that made by the jury would have been supported, the finding

which the jury made is well supported and that this is purely a factual case in which the jury resolved, as it was its duty to do, the conflict in the evidence.

2. Res Ipsa Loquitur.

[2, 3] The complaint alleged that at the time plaintiff was entering defendant's bus, "the doors of said bus were so negligently maintained and operated by an employee" of defendant "as to cause the plaintiff to be caught in, thrown about and struck by said doors, causing her to be eventually thrown to the pavement" causing her to sustain certain injuries "as a result of negligence and carelessness" of defendant. In *Sherman v. Hartman*, 137 Cal.App.2d 589, 290 P.2d 894, we pointed out that there had been considerable confusion in the cases as to what constitutes the pleading of special acts of negligence which would bar the application of the *res ipsa loquitur* doctrine. We reviewed many of the cases upon the subject, including *Leet v. Union Pac. R. Co.*, 25 Cal.2d 605, 155 P.2d 42, 158 A.L.R. 1008, which reviewed other cases, and we concluded that in this state there has been a general liberalization of the tests for the application of the doctrine, and that regardless of whether the complaint alleges general acts of negligence alone, general and specific acts of negligence, or even specific acts of negligence only, the doctrine may apply depending not upon the type of pleading but whether the allegations show that "the plaintiff knows the specific or underlying cause of the accident or is ignorant thereof." 137 Cal.App.2d at page 599, 290 P.2d at page 900, emphasis added. If he knows such cause then the doctrine may not apply. Using such test here, it is obvious that the plaintiff has not alleged any knowledge of the specific acts of defendant's negligence which caused plaintiff "to be caught in, thrown about and struck by said doors * * *" There was nothing in the complaint which barred the application of the doctrine.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

140 Cal.App.2d 224

Margaret GOODRICH, Virginia Shull, Lane Williams, Ray Williams, Sidney Williams, Rowland Williams and Howard Williams, heirs of Nancy M. Bryant, deceased, Plaintiffs and Appellants,

v.

Joe EDGEWORTH, doing business under the firm name and style of Tulare Ice Company, Leonard Dewaine Brownlee and Leonard S. Brownlee, Defendants and Respondents.

Oliver Earl BRYANT, S. Ellis Bryant, Olean Jackson, Leroy S. Bryant, William S. Bryant, Ethel Baird, Vernie Starbuck, Robert Bryant and James Bryant, heirs of Wiley S. Bryant, deceased, Plaintiffs and Appellants,

v.

Joe EDGEWORTH, doing business under the firm name and style of Tulare Ice Company, Leonard Dewaine Brownlee and Leonard S. Brownlee, Defendants and Respondents.

Civ. 4982.

District Court of Appeal, Fourth District, California.

March 23, 1956.

Rehearing Denied April 18, 1956.

Hearing Denied May 15, 1956.

Proceeding on motion to vacate and set aside judgments on the ground of extrinsic fraud in that plaintiffs were prevented from fully exhibiting their cases of alleged wrongful death by the actions of the defendants in causing the absence of a material and necessary witness at the trial. The Superior Court, Tulare County, W. G. Machetanz, J., entered its order denying plaintiff's motion and plaintiff appealed. The District Court of Appeal, Mussell, J., held that where reasons for witness' nonattendance were not established, evidence reasonably supported inference and implied finding that plaintiffs failed to establish extrinsic fraud or that plaintiffs were prevented from fully exhibiting case by acts or conduct of defendant.

Order affirmed.

1. Judgment ⇨392

On motion to vacate judgment on ground of alleged fraud in causing absence

of material witness, where reasons for witness' nonattendance were not established, evidence reasonably supported inference and implied finding that plaintiffs failed to establish extrinsic fraud or that plaintiffs were prevented from fully exhibiting case by acts or conduct of defendant.

2. Appeal and Error ⇨1024(5)

On appeal from order denying motion to vacate judgment, where evidence reasonably supported findings, court could not interfere with order.

3. Appeal and Error ⇨1024(5)

On motion to vacate and set aside judgments on ground of extrinsic fraud in that plaintiffs were prevented from fully exhibiting their case by actions of defendants in causing absence of material and necessary witness at trial, weight and sufficiency of evidence, the construction to be put upon it and inferences to be drawn therefrom were matters for trier of fact.

4. Evidence ⇨317(2)

On motion to vacate judgment on ground of alleged fraud in causing absence of material witness, it was proper for trial court to exclude as hearsay testimony by investigator relating to statements made to witness by another.

5. Judgment ⇨375

Where plaintiffs did not move for continuance or ask for bench warrant when material witness failed to appear in action for wrongful death and where plaintiffs delayed investigation of reason for failure to appear until after appeal was taken from judgments, plaintiffs were not prevented from fully exhibiting case by defendants.

Lane Williams, San Fernando, for appellants.

Crowe, Mitchell & Hurlbutt, Visalia, for respondents.

MUSSELL, Justice.

These are actions for the alleged wrongful deaths of Wiley S. Bryant and Nancy M. Bryant, who were killed in a collision between a car in which they were riding and an ice truck driven by Leonard D.

Brownlee, an employee of defendant ice company. The actions were tried in the superior court in Tulare county in October, 1953, and a jury returned a verdict in favor of the defendants in both actions. Plaintiffs appealed from the judgments thereupon entered and said judgments were affirmed on appeal by this court on May 27, 1954, in *Bryant v. Tulare Ice Co.*, 125 Cal.App.2d 566, 270 P.2d 880. On January 3, 1955, appellants filed in the superior court a notice of motion to vacate and set aside the judgments on the ground of extrinsic fraud, in that the plaintiffs were prevented from fully "exhibiting" their case by the actions of the defendants in causing the absence of a material and necessary witness at the trial. Plaintiffs here appeal from the order denying said motion.

The notice of motion contained the statement that it would be supported by the attached affidavits of James F. Reese and Lane Williams and by oral evidence to be introduced at the hearing thereon.

Reese stated in his affidavit that he was one of the attorneys for the plaintiffs; that on or about October 26, 1953, he contacted one George L. Jones in his garage in Tulare; that Jones stated he had examined the truck involved after the accident; that there was nothing at all wrong with the front wheel assembly and that he could find nothing out of order with it; that a subpoena was served on Jones but he failed to appear at the trial; that he searched for Jones for about one and one-half hours but was unable to find him.

Lane Williams stated in his affidavit that he was with Reese when Jones was interviewed and heard Jones state that he had inspected the front end assembly of the truck and had found nothing wrong with it; that it was also understood that Leonard D. Brownlee had stated in the presence of Jones and others that he and his boy friend, who was with him at the time of the collision, had a bee in a cup of ice while they were driving along the highway prior to the collision; that after the trials were concluded, affiant felt that the circumstances surrounding the absence of witness Jones should be investigated but that he did not wish to jeopardize plaintiffs' right to appeal

and therefore delayed such investigation until such appellate procedure was exhausted; that further delay was due to the fact that Mr. Reese had not been available to secure his affidavit.

On January 17, 1955, plaintiffs' motions were heard and Jones was called as a witness for the plaintiffs. He was questioned by plaintiffs' counsel as to his residence and occupation and the service of the subpoena upon him, but was not asked why he did not appear at the trial or whether he had heard the defendant Leonard Brownlee make any statements after the accident, or whether he, Jones, had made any statements relative to the condition of the truck.

An investigator for the plaintiffs testified that during September, 1954, he questioned Jones as to his reasons for not appearing as a witness. Counsel for defendants objected to the introduction of statements made by Brownlee to Jones on the ground that such statements, if any, were hearsay. The objection was sustained and plaintiffs then made an offer of proof, after which the court declined to change its ruling. Plaintiffs' counsel then suggested a continuance to secure the presentation of the defendant at the hearing and apparently this motion was denied.

[1-3] The evidence presented at the hearing on the motion to vacate the judgments reasonably supports the inference and the implied findings of the court that plaintiffs failed to establish extrinsic fraud or that the plaintiffs were prevented from fully exhibiting their case by the acts or conduct of the defendants. Under such circumstances we cannot interfere with the orders from which this appeal is taken. The weight and sufficiency of the evidence, the construction to be put upon it and the inferences to be drawn therefrom were matters for the trier of the facts. *Dillard v. McKnight*, 34 Cal.2d 209, 223, 209 P.2d 387, 11 A.L.R.2d 835; *Berniker v. Berniker*, 30 Cal.2d 439, 444, 182 P.2d 557. And, as is said in *Farmers Automobile Inter-Insurance Exchange v. Calkins*, 39 Cal.App.2d 390, 393, 103 P.2d 230, 232:

"There is strong presumption of innocence of fraud and the burden of

proving these allegations rested heavily on the plaintiff. As was said in *Everett v. Standard Acc. Ins. Co.*, 45 Cal.App. 332, 187 P. 996, 998: "The presumption is always against fraud. This presumption approximates in strength that of innocence of crime. *Truett v. Onderdonk*, 120 Cal. 581, 588, 53 P. 26. One who seeks relief from fraud must allege it, and prove it by clear and satisfactory evidence. A mere suspicion of fraud is not sufficient."

[4] We find no error in the exclusion of the testimony of plaintiffs' investigator. The basis of the hearsay rule is stated in 19 Cal.Jur.2d Sec. 379, p. 111, as follows:

"*Basis of Rule.* The exclusion of hearsay evidence is based on the principle that a litigant in a court of justice has a right to have the witness whose statement is introduced face him in court so that his veracity may be tested by cross-examination under the sanction of an oath, and on the common experience of mankind as to the unreliability of relating by one person of statements made to him by another. To these reasons may be added considerations of public interest and convenience, the avoidance of unnecessary expense and vexation which the adverse party must incur to rebut or explain such evidence, with inevitable consumption of time, the multiplication of collateral issues for decision by the jury, and the danger of losing sight of the main question and of the justice of the case."

Under the rule announced, evidence of the investigator as to statements made by Jones (who was not a party to the action) as to what was said by Brownlee on another occasion was hearsay. Jones was present in court and was not questioned as to such statements, if any.

[5] Appellants' argument that they were prevented from fully "exhibiting" their case by defendants is without merit. When Jones did not appear at the trial after having been served with a subpoena, counsel for plaintiffs made no motion for a continuance of the trial or request for a bench warrant. Admittedly, plaintiffs delayed investigation of the reasons for the failure of Jones to

appear until long after an appeal was taken from the judgment.

In *Godfrey v. Godfrey*, 30 Cal.App.2d 370, 379, 86 P.2d 357, 362, it is said:

"When the alleged fraud or coercion is of such nature that it may reasonably be presented to the court at the trial so as to afford full and fair protection to the rights of the interested parties and they fail or neglect to avail themselves of that opportunity, a court of equity will not disturb the judgment rendered under such circumstances, but will leave the parties in the position in which they placed themselves. *Hendricks v. Hendricks*, 216 Cal. 321, 14 P.2d 83; *In re Estate of Bell*, 153 Cal. 331, 95 P. 372; *Short v. Short*, 106 Cal.App. 210, 288 P. 1111; 9 Cal.Jur. 751, sec. 104; 25 Cal.Law Rev. 79."

The record does not show that Jones was prevented from attending the trial by reason of the acts or conduct of defendants and the reasons for his nonattendance were not established.

The order is affirmed.

BARNARD, P. J., and GRIFFIN, J.,
concur.



140 Cal.App.2d 173

Arthur Paul SCOTT, a minor, by and
through his guardian ad litem, Henry R.
Scott, Plaintiff and Appellant,

v.

PACIFIC COAST BORAX CO., a corpora-
tion; Borax Consolidated, Ltd., a cor-
poration, et al., Defendants.

Borax Consolidated, Ltd., doing business as
Pacific Coast Borax Co., Division of Bo-
rax Consolidated, Ltd., Respondent.

Civ. 21417.

District Court of Appeal, Second District,
Division 2, California.

March 23, 1956.

Rehearing Denied April 16, 1956.

Hearing Denied May 15, 1956.

Action to recover for injuries sus-
tained by plaintiff who was requested by

fellow employee to hold straight a handle on a gasoline pump, after working hours, and who received injuries when the gasoline exploded. Defendant's motion for non-suit was granted in the Superior Court of Los Angeles County, John J. Ford, J., and the plaintiff appealed. The District Court of Appeal, Fox, J., held that the evidence disclosed that the injury was compensable under the compensation act precluding a civil action for the injuries by the plaintiff.

Judgment affirmed.

1. Administrative Law and Procedure ⇨393 Courts ⇨1

Whenever a court or board is authorized to act upon the existence of a certain state of facts, it has jurisdiction to determine the existence or nonexistence of the requisite facts.

2. Workmen's Compensation ⇨52

Provisions of the Workmen's Compensation Act must be liberally construed for the benefit of persons injured in the course of their employment. West's Ann.Labor Code, § 3202.

3. Workmen's Compensation ⇨615

Where there is any reasonable doubt as to whether the act of the employee is contemplated by employment or whether injuries were sustained in course of employment, courts must resolve such doubts in favor of the jurisdiction of the Industrial Accident Commission. West's Ann. Labor Code, § 3202.

4. Workmen's Compensation ⇨52

The rule of liberal construction of the compensation act in favor of its applicability is not altered because an employee believes that he can establish negligence by the employer and bring a civil suit for damages.

5. Workmen's Compensation ⇨604

Employee is entitled to compensation when he suffers an injury arising out of employment and to which he has been exposed in the course of employment. West's Ann.Labor Code, §§ 3600-3601.

6. Workmen's Compensation ⇨605

Generally, the phrase "arising out of" employment is the causal element and refers to the origin of the accident while the words "in the course of employment" has reference to the time, place and circumstances of the disabling event. West's Ann.Labor Code, §§ 3600-3601.

See publication Words and Phrases, for other judicial constructions and definitions of "Arising Out Of" and "In The Course of Employment".

7. Workmen's Compensation ⇨605

Although the two elements of "arising out of" and "in course of employment" must exist concurrently to sustain a compensation award, they are often so intertwined that no valid line of demarcation can be drawn. West's Ann.Labor Code, §§ 3600-3601.

8. Workmen's Compensation ⇨710

The formulae for a compensable injury is met when the employment has brought the employee to the place where the accident occurred, and if at that time he is engaged in some activity or conduct reasonably attributable to the employment or properly incidental thereto. West's Ann. Labor Code, §§ 3600-3601.

9. Workmen's Compensation ⇨669

A workman sustaining an injury while rendering reasonably needed assistance to a fellow workman in furtherance of the employer's business, suffers an injury arising out of and in course of his employment, when the act done is in the reasonable contemplation of what the employee may do in the service of the employer.

10. Workmen's Compensation ⇨669

Where assistance rendered a coworker is reasonably related to the injured employee's duties in the furtherance of his employer's business interests, the assistance is not to be treated merely as a gratuitous act of personal accommodation, and not within the compensation act.

11. Workmen's Compensation ⇨706

The Workmen's Compensation Act does not confine injuries which it embraces, to those arising out of and in course of employment during regular working hours.

12. Workmen's Compensation ⇨2090

Where plaintiff was requested by fellow employee in charge of a gasoline station to hold straight a handle on a gasoline pump so that repairs might be made thereon, and although plaintiff's regular working hours had ended about two and one-half hours earlier, plaintiff lent the required assistance and the pump exploded, plaintiff's injuries were compensable under the Workmen's Compensation Act precluding resort to a civil action against employer for the injuries sustained. West's Ann.Labor Code, §§ 3600-3601.

13. Workmen's Compensation ⇨2084

If any reasonable doubts exist that any of the circumstances attending an injury carried an employee outside the scope of the compensation act, such doubt must be resolved in favor of the compensation coverage.

Hindman & Davis, Los Angeles, for appellant.

Dryden, Harrington, Horgan & Swartz, Los Angeles, for respondent.

FOX, Justice.

The question in this case is whether the circumstances of plaintiff's injury bring compensation therefor under the exclusive jurisdiction of the Industrial Accident Commission. In granting defendant's motion for a nonsuit, the trial court so held. We have concluded that decision is correct.

In 1951, plaintiff, then 16 years of age, began working for defendant on weekends, when needed, in its hotel and coffee shop at Death Valley Junction, in Inyo County. This hamlet is owned exclusively by defendant. It consists of a hotel, coffee shop, store, small first aid station, a gas station and garage, an old, inoperative mill, and eight or ten houses, some of which were occupied by defendant's employees and others were rented. Plaintiff's father, who was an employee of the State Highway Department, resided in one of them. With the arrival of summer, defendant closed its hotel operations. Thus plaintiff's intermittent, part-time employment at the Junction

was terminated. He did, however, work "a few days" for defendant in August at its Furnace Creek Ranch in Death Valley "colonizing trees and cutting dates and thinning them." After plaintiff resumed school in the fall of 1951 and until May, 1952, when the season ended, he waited on tables and acted as bus boy at defendant's coffee shop on weekends and holidays when needed. But this "wasn't very often."

When school closed the middle of May, 1952, plaintiff went to work in Ash Meadows, Nevada (about 15 miles from Death Valley Junction), for a Mr. McCall, digging clay in the clay pits. He worked there until the middle of July, when he returned home.

Plaintiff was ready to leave on a vacation with his parents in late July, 1952, when Hank Kimbrough, assistant superintendent of all defendant's operations in that area, offered plaintiff a job at the Junction which had formerly been held by Dick Hobbs, who had left. Kimbrough asked plaintiff whether he would work a couple or three days—until they could get somebody—and told him "it would be a good summer job for you to work in the gasoline station * * *" Kimbrough explained he would gather the garbage in the morning, take it to the dump, and then pull the ice, and deliver it to the different ice boxes. The other duties would be to stay around the gas station and service the cars that came in. The hours were from 6:00 a.m. to 2:30 p.m., with half an hour off at noon for lunch on his own time. Although there was no discussion about wages, plaintiff decided to forego his vacation plans and take the job. He started to work that noon. Plaintiff did the same things that Dick Hobbs had done, except plaintiff did not start the power generator in the morning. This was started by Jim Kennedy, an older employee, who usually got there before plaintiff, who, however, had his own key. Kennedy would be leaving about the time plaintiff arrived for work at the station. Kennedy's regular shift, however, was from 2:30 p.m. to eleven at night. Kennedy acquainted plaintiff with the prices of the

items that were for sale in the service station. Plaintiff worked seven days a week but otherwise did not put in any overtime.

On August 15, plaintiff left the job at 2:30 as usual and Kennedy took over. After cashing his paycheck and taking care of some personal matters, plaintiff came back to the station about 3:30 and went into the garage, where he and a friend, Rozzie Fox, started cleaning up and working on an old motor which belonged to a woman who was employed in the coffee shop. This project was unrelated to plaintiff's employment. At approximately 5:00 o'clock plaintiff and Fox were leaving the garage by the side door to go to Shoshone in an effort to find some needed spare parts for the motor they were working on. Just then Kennedy called to plaintiff and asked him if he "would help him a second." Plaintiff inquired, "Well, how long will it take?" Kennedy replied, "just a minute or two." Kennedy needed plaintiff's assistance in repairing the middle pump in front of the service station. This was an old fashioned gravity-type gasoline pump with a glass bowl on top and a handle for pumping gasoline. Plaintiff had noticed this pump was leaking some days previously and had mentioned it to Ben Barlow, who was superintendent of defendant's operations in the Valley. Kennedy asked plaintiff "to hold the handle straight so he could tighten the U-bolts up on it." Plaintiff did this, and in not more than a minute Kennedy said: "Well, that does it * * * OK." Plaintiff then stepped back "a couple or three feet." As Rozzie Fox stepped back to get a drink at the fountain which was next to the door of the station, he remarked there was "a lot of gas in the top of that bowl." Kennedy replied, "it won't hurt anything * * * I guess I can let it out." As Kennedy made this remark, plaintiff turned to see what he was doing and observed Kennedy's hand go up to the box and heard a "whirling of the motor and then everything blew apart." At the instant of the explosion plaintiff "was about three feet from the pump on the street [highway] side."

Plaintiff was injured as a result of the explosion and seeks to recover damages for

his injuries by this action. The trial court, however, took the view that this was an industrial injury and that the authority to fix the compensation therefor was vested exclusively in the Industrial Accident Commission. As a consequence, a judgment of nonsuit was granted, from which plaintiff appeals.

[1] "Whenever a court or board is authorized to act upon the existence of a certain state of facts, it has jurisdiction to determine the existence or non-existence of the requisite facts." *Palermo Land & Water Co. v. Railroad Comm.*, 173 Cal. 380, 385, 160 P. 228, 230. The legal effect of the granting of defendant's motion for a nonsuit was a determination that the superior court was without jurisdiction to grant relief, since the injuries suffered were compensable under the Workmen's Compensation laws. See, *Scott v. Industrial Acc. Comm.*, 46 Cal.2d 76, 293 P.2d 18, where the prior judicial history incident to this litigation is set forth. The essence of plaintiff's argument is that the issue of jurisdiction was incorrectly decided. He contends that his injury was not one "arising out of and in the course of the employment", Labor Code, § 3600, and hence not within the exclusive purview of the Industrial Accident Commission. We cannot agree.

[2-4] At the very outset, we deem it pertinent to remark that merely because this case reaches us in the form of a common law negligence action for damages, brought by an employee seeking to avoid the exclusive remedy of the Workmen's Compensation Act, we cannot be oblivious to the time-honored rules which have been established to implement the remedial purposes of the Act. First and foremost is the principle that the provisions of the act "shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment." Lab. Code, § 3202. The effect of this statutory injunction is to require, where there is any reasonable doubt as to whether the act of the employee is contemplated by the employment or whether the injuries were sustained in the course of the employment,

that the courts resolve such doubts in favor of jurisdiction in the Industrial Accident Commission. *Freire v. Matson Nav. Co.*, 19 Cal.2d 8, 10, 118 P.2d 809; *Peterson v. Moran*, 111 Cal.App.2d 766, 768, 245 P.2d 540; *Moise v. Owens*, 96 Cal.App.2d 617, 619, 216 P.2d 22. Though it may be more opportunistic for a particular plaintiff to seek to circumscribe the purview of compensation coverage because of his immediate interest and advantage, the courts must be vigilant to preserve the spirit of the act and to prevent a distortion of its purposes. That the question before us in this case arises out of litigation prosecuted in the superior court is all the more reason for care lest rules of doubtful validity, out of harmony with the objectives of the Act, be formulated. As was aptly stated in *Freire v. Matson Nav. Co.*, supra [19 Cal.2d 8, 118 P.2d 810]: "The rule [of liberal construction of the act in favor of its applicability] is not altered because a plaintiff believes that he can establish negligence on the part of his employer and brings a civil suit for damages. If the injury falls within the scope of the act, a proceeding thereunder constitutes his exclusive remedy [citations]."

[5-8] The law is clear that an employee is entitled to an award of compensation when he suffers an injury "arising out of * * * the employment," and to which he has been exposed "in the course of the employment." Lab.Code, §§ 3600-3601; *Freire v. Matson Nav. Co.*, supra; *Baugh v. Rogers*, 24 Cal.2d 200, 207, 148 P.2d 633, 152 A.L.R. 1043. It has generally been held that the phrase "'arising out of'" is the causal element and refers to the origin of the accident. *Elk Grove Union High School Dist. v. Industrial Acc. Comm.*, 34 Cal.App. 589, 594, 168 P. 392, 394, while the words "'in the course of employment'" have reference to the time, place and circumstances of the disabling event. *Griffin v. Industrial Acc. Comm.*, 19 Cal.App.2d 727, 732, 66 P.2d 176, 179. Although the two elements must coexist concurrently to sustain an award, they are nonetheless often so intertwined that no valid line of demarcation can be drawn, so that in certain cases an injury has been considered to have oc-

curred "in the course of employment" because the employment was its cause. *Zolkover v. Industrial Acc. Comm.*, 13 Cal.2d 584, 91 P.2d 106; *Gardner v. Industrial Acc. Comm.*, 73 Cal.App.2d 361, 166 P.2d 362; *Winter v. Industrial Acc. Comm.*, 129 Cal. App.2d 174, 276 P.2d 689, while in others the injuries, though emanating from some external instrumentality, were regarded as "arising out of the employment" because they were sustained during and at the place of employment. *Kimbol v. Industrial Acc. Comm.*, 173 Cal. 351, 160 P. 150, L.R.A. 1917B, 595; *Pacific Indem. Co. v. Industrial Acc. Comm.*, 86 Cal.App.2d 726, 195 P. 2d 919. As expressed in the recent case of *Madin v. Industrial Acc. Comm.*, 46 Cal.2d 90, 292 P.2d 892, 895: "Where the injury occurs on the employer's premises, while the employee is in the course of the employment, the injury arises out of the employment unless the connection is so remote from the employment that it is not an incident of it." It is unmistakable from the tenor of the modern cases that the statutory formula for a compensable injury is clearly met when the employment has brought the employee to the place where the accident occurred and if at that time he is engaged in some activity or conduct reasonably attributable to the employment or properly incidental thereto. *Madin v. Industrial Acc. Comm.*, supra; *Freire v. Industrial Acc. Comm.*, supra; *Pacific Indemnity Co. v. Industrial Acc. Comm.*, 26 Cal.2d 509, 159 P.2d 625; *Zolkover v. Industrial Acc. Comm.*, supra; *Winter v. Industrial Acc. Comm.*, supra.

[9] In the instant case it is patent that plaintiff's injury was so substantially connected with and incident to his employment as to make the case justiciable only before the commission and not before the court. Plaintiff was requested by a fellow employee, who at the time was in charge of the gasoline station, to hold straight a handle on a gasoline pump so that he might complete repairs thereon by tightening some U-bolts. Although plaintiff's regular working hours had ended about two and a half hours earlier, plaintiff consented to lend the required assistance, held the handle straight until the bolts were tightened, and then stepped back from the pump. Plaintiff was

standing about three feet from the pump on the highway side when the pump exploded within a minute or so after the work was completed. These being the salient facts, it cannot be doubted that plaintiff was engaged in something incidental to his employment in furthering and facilitating his employer's business. Had Kennedy been repairing the pump several hours earlier during plaintiff's shift, and had plaintiff then rendered the requested assistance, it could not be doubted that in so doing plaintiff would be performing a service within the reasonable and expected scope of his duties and that the resultant injury arose out of and occurred within the course of his employment. Plaintiff's general work in attending the gasoline station clearly encompassed so simple a task as holding upright a pump handle while another worker tightened its bolts. There was no apparent increase in the risk of injury to himself beyond that contemplated by the terms of his employment. He would be doing no more than that which any reasonable employer would naturally expect from a responsible worker and which any employee with a sense of job obligation would do for a coworker. *Pacific Indemnity Co. v. Industrial Acc. Comm.*, 26 Cal.2d 509, 517, 159 P.2d 625; *County of Los Angeles v. Industrial Acc. Comm.*, 89 Cal.App. 736, 739, 265 P. 362; *Martin v. Guiberson*, 9 I.A.C. 82, writ of review denied. It is well established that a workman who sustains injury while rendering reasonably needed assistance to a fellow workman in furtherance of the employer's business is considered to have suffered an injury arising out of and in the course of his employment when the act done is within the reasonable contemplation of what the employee may do in the service of his employer. *County of Los Angeles v. Industrial Acc. Comm.*, supra;

Pacific Indemnity Co. v. Industrial Acc. Comm., supra; *United States Fidelity, etc., Co. v. Industrial Acc. Comm.*, 174 Cal. 616, 621, 163 P. 1013.*

[10] Where, as here, the assistance rendered a coworker is reasonably related to the injured employee's duties in the furtherance of his employer's business interests, the cases categorically reject the suggestion that such assistance is to be treated merely as a gratuitous act of personal accommodation. *County of Los Angeles v. Industrial Acc. Comm.*, supra; *Pacific Indemnity Co. v. Industrial Acc. Comm.*, supra. An excellent illustration of this principle appears in *County of Los Angeles v. Industrial Acc. Comm.*, supra. In that case, the claimant was an election inspector engaged in counting ballots in a small real estate office used as a polling place. In the course of tallying the votes, in the early morning hours, a member of the election board fainted. There was no water on the premises, so claimant went to an adjacent service station to get water from a faucet. In the darkness, she fell into a service pit on the station lot and was injured. It was contended that the injury having occurred off the working premises and while claimant was engaged in rendering a purely personal favor to the coworker who fainted, the injury was not compensable. The court affirmed the commission's award, pointing out that such assistance to the coworker was reasonably incidental to the employment "so that the work of the board could be completed." 89 Cal.App. at page 739, 265 P. at page 263. *A fortiori*, in the instant case, plaintiff was not in the category of one rendering a service purely for the personal convenience of a fellow employee but was doing an act whose predominant and ultimate effect was to serve his master's interest.

* The following jurisdictions also support this rule: *Demetre's Case*, 322 Mass. 95, 76 N.E.2d 140, 142; *Houser v. Young*, 247 Ala. 562, 25 So.2d 421; *Ocean Accident & Guar. Corp. v. Pallero*, 66 Colo. 190, 180 P. 95; *Hartz v. Hartford Finance Co.*, 90 Conn. 539, 97 A. 1020; *Ramezik v. Winona Machine & F. Co.*, 174 Minn. 156, 218 N.W. 545; *Ransdell*

v. International Shoe Co., 329 Mo. 47, 44 S.W.2d 1, 82 A.L.R. 1249; *Bernier v. Greenville Mills, Inc.*, 93 N.H. 165, 37 A. 2d 5; *Associated Employers' Reciprocal v. State Ind. Comm.*, 82 Okl. 229, 200 P. 174; *Conley v. Pittsburgh Coal Co.*, 157 Pa.Super. 567, 43 A.2d 605; *Wegimont v. Argonne Worsted Co.*, 69 R.I. 360, 33 A.2d 215.

[11] To hold that the service was non-compensable because rendered after regular hours of work would not only penalize an employee's spirit of helpful loyalty to his employer, but would be a restrictive rather than liberal construction of the Compensation Act. It must be borne in mind that the statute does not confine the injuries which it embraces to those arising out of and in the course of employment during regular working hours. In *Griffin v. Industrial Acc. Comm.*, 19 Cal.App.2d 727, 733, 66 P.2d 176, 179 (hearing denied) the court states: "Where the statute by its terms embraces all injuries by accident arising out of and in the course of the employment, it is immaterial that the injury occurred outside of working hours." (Emphasis by court.) To the same effect is *Ramczik v. Winona Machine & F. Co.*, 174 Minn. 156, 218 N.W. 545, and *Perdew v. Nufer Cedar Co.*, 201 Mich. 520, 167 N.W. 868.

[12] Similarly, in the matter before us, although the service performed by plaintiff was rendered after his usual working hours, it was a simple act of a type which he would have been reasonably expected to render a fellow employee as an incident of his regular duties as a gasoline station attendant. The service was performed on the employer's premises at the request of the employee then in charge and was calculated to advance the employer's interest by keeping his equipment in effective operating condition. The service rendered would also have facilitated plaintiff's conduct of his employer's business on his next shift the following morning, plaintiff having reported the defective condition of the pump. The accident occurred just after the bolts were tightened, while plaintiff was standing within three feet of the pump. In the light of the authorities and the liberal construction of the act enjoined upon the courts, it is manifest that the conditions of compensation coverage existed in favor of plaintiff.

[13] A rule of law which would put such an employee outside the scope of his employment and deprive him of the right to compensation would punish loyalty and helpfulness and promote indifference in

employees and would be inimical to the interests of both industry and labor. (7 *Schneider*, *Workmen's Compensation Law*, 3d ed., sec. 1668(a), p. 525.) But the authorities previously adverted to place no such unrealistic limitation on the quantum of work-connection encompassed in the phrase "arising out of and in the course of employment" and leave no room for doubt that such an injury falls within the benign purview of the compensation laws. But if any reasonable doubts did exist that any of the circumstances attending the injury carried plaintiff outside the scope of the act, such doubts would have to be resolved in favor of compensation coverage. *Madin v. Industrial Acc. Comm.*, 46 Cal.2d 90, 292 P.2d 892; *Pacific Indemnity Co. v. Industrial Acc. Comm.*, 26 Cal.2d 509, 514, 159 P.2d 625. The *Madin* case also effectively disposes of plaintiff's argument that the compensation act "excludes an injury which comes from a hazard to which the workman would be equally exposed apart from his employment." The fact that plaintiff had ceased rendering his service to Kennedy a minute or so prior to the accident and was leaving the premises is immaterial. "The right to compensation is by no means restricted to those cases where the injury occurs while the employé is actually presently manipulating the tools of his calling." *Judson Mfg. Co. v. Industrial Acc. Comm.*, 181 Cal. 300, 302, 184 P. 1; *Hartford Acc. & Indem. Co. v. Industrial Acc. Comm.*, 202 Cal. 688, 692, 262 P. 309, 58 A.L.R. 1392. In *Freire v. Matson Nav. Co.*, 19 Cal.2d 8, 118 P.2d 809, a janitor employed by defendant was injured by a car operated by defendant's employee as he, the janitor, alighted from a cab on a public thoroughfare adjacent to his employer's premises 15 minutes before he was scheduled to work. The traffic congestion was caused by vehicles using the street on the employer's business. In holding that the injury arose out of and in the course of the janitor's employment, the court observed that where the danger of injury is created by the conditions of the employment it is immaterial that the injury occurs on a public street adjacent to the employer's premises a few minutes before or after the working period. The court

stated, 19 Cal.2d at page 13, 118 P.2d at page 812: "The employment contemplated [the employee's] entry upon and departure from the premises as much as it contemplated his working there, and must include a reasonable interval of time for that purpose."

The authorities cited by plaintiff are not controlling because of significant factual distinctions. In *Robbins v. Yellow Cab Co.*, 85 Cal.App.2d 811, 193 P.2d 956, 958 an employee whose normal working shift commenced at midnight, was injured on her employer's premises when she came to get her paycheck at 3:00 p.m. instead of waiting until her shift began. The court pointed out that she was there for her own personal convenience, the procurement of the check at that particular time being "an extra-curricular endeavor by her in no way related to her employment." In *State Dept. of Institutions v. Industrial Acc. Comm.*, 46 Cal.App.2d 439, 116 P.2d 79, the employee was a hospital attendant who had finished her day's work and drove her automobile from the hospital parking lot to its front entrance to wait for her passenger. When the passenger failed to appear after ten minutes, the employee decided to enter the building to ascertain the reason for the delay. In mounting the front steps, she fell and was injured. Under these facts, the court held the employee was on a purely personal mission not incident to any service for her employer and unrelated to her employment duties. In *Garcia v. Yedor*, 67 Cal.App.2d 367, 154 P.2d 1; *Seymour v. Setzer Forest Products, Inc.*, 124 Cal.App.2d 608, 268 P.2d 1084, and *Langendorf United Bakeries, Inc. v. Industrial Acc. Comm.*, 6 Cal. App.2d 46, 43 P.2d 1106, the facts showed that the employees were not engaged in their master's business at the time of the injury, but had either deviated therefrom on a private venture or were engaged in matters of purely personal convenience. In *Ruff v. Industrial Acc. Comm.*, 123 Cal. App. 168, 11 P.2d 17, the employee was killed when he voluntarily assisted a stranger at the latter's business establishment. In *San Francisco & S. R. Co. v. In-*

dustrial Acc. Comm., 201 Cal. 597, 258 P. 86, a ferry boat captain attempted to repair an electric line instead of calling a lineman for the purpose. Compensation was denied because the employee was under express instructions that such hazardous repair work was the responsibility of the line crew. In *Poteete v. North State Pyrophyllite Co.*, 240 N.C. 561, 82 S.E.2d 693, a foreman visited a work crew after his own hours of work to collect a debt owed him by one of the employees. While there he worked about one-half hour to help unchoke a machine. Thereafter, he sat on a nearby wall to wait for a lull in the work operations so he could collect his debt. Shortly after he sat down, he felt a blinding sensation and toppled off the wall. The North Carolina court held that the claimant's falling from the wall while waiting to collect a debt was not an injury traceable to the employment. These facts afford no parallel to the case at bar.

We are cognizant of the fact that plaintiff, believing himself without fault, regards it to his decided advantage to maintain an action for damages against his employer rather than to receive an award of workmen's compensation. But in deciding whether an injury is compensable, we must disregard completely the question of fault and be mindful that the rules we lay down in this particular case must be salutary and consonant with the spirit and purpose of the Compensation Act, since they will govern other cases where the Act will provide the worker disabled by industrial injury with his sole remedy. Inasmuch as this state is committed to the view that the Workmen's Compensation Act must be liberally construed in favor of coverage for the employee and jurisdiction in the commission and since the facts adduced show there existed a concurrence of the conditions of section 3600 of the Labor Code, the trial court correctly ruled that the commission was the exclusive tribunal for the prosecution of plaintiff's rights.

The judgment is affirmed.

MOORE, P. J., and ASHBURN, J., concur.

140 Cal.App.2d 193

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Sidney BLAU et al., Defendants.

Sidney Blau and Sidney Fisher, Appellants.

Cr. 5371.

District Court of Appeal, Second District,
Division 3, California.

March 23, 1956.

Hearing Denied April 18, 1956.

Certain defendants were convicted of conspiracy to commit theft and to falsify corporate records and of petty theft. The Superior Court of Los Angeles County, Arthur Crum, J., entered judgment and order denying motion for new trial, and defendants appealed. The District Court of Appeal, Shinn, P. J., held that evidence sustained conviction for conspiracy to commit theft and conviction for petty theft, but did not sustain conviction of conspiracy to falsify corporate records.

Judgment and order denying motion for new trial affirmed.

1. Criminal Law ⌘511(1)

In prosecution for conspiracy to commit theft and to falsify corporate records, evidence was sufficient to corroborate testimony of alleged accomplices. West's Ann.Pen.Code, §§ 484, 1111; West's Ann.Corp.Code, § 3020(b).

2. Criminal Law ⌘511(2)

Rule that even slight evidence is sufficient to corroborate the testimony of an accomplice if it tends to connect defendant with the commission of the offense, does not mean evidence that raises merely a suspicion, even though a strong one, of connection with the offense. West's Ann.Pen.Code, § 1111.

3. Criminal Law ⌘511(2)

Corroborative evidence is sufficient if it tends to connect defendant with the commission of the crime charged in such a way as may reasonably satisfy jury that witness, who must be corroborated, was telling the truth, and, in determining such question, corroborative evidence must be

considered without the aid of testimony, which is to be corroborated, and is not sufficient if it requires the interpretation and direction of such testimony in order to give it value. West's Ann.Pen.Code, § 1111.

4. Criminal Law ⌘511(1)

There is no need for corroboration of the entire testimony of an accomplice. West's Ann.Pen.Code, § 1111.

5. Conspiracy ⌘47

Evidence sustained conviction for conspiracy to commit theft. West's Ann.Pen.Code, § 484.

6. Criminal Law ⌘1144(13)

In passing on the sufficiency of evidence in a criminal case, reviewing court must give the evidence the effect most favorable to the validity of the judgment.

7. Larceny ⌘65

Evidence sustained conviction for petty theft.

8. Conspiracy ⌘47

Evidence was insufficient to sustain conviction for conspiracy to falsify corporate records. West's Ann.Corp.Code, § 3020(b).

9. Corporations ⌘324

The phrase "books, papers, writings or securities belonging to the corporation" as used in statute providing that every director, officer, agent, or shareholder of any corporation, domestic or foreign, who, with intent to defraud, destroys, alters, mutilates or falsifies any of the "books, papers, writings, or securities belonging to the corporation," or makes or concurs in making any false entries, or omits or concurs in omitting to make any material entry in any book of accounts or other record or document kept by corporation is guilty of a public offense, embraces writings of some permanency, such as a corporation would be required to keep in order to maintain a true record of the condition of its affairs, and does not include every writing of whatever nature issued by agent of the corporation. West's Ann.Corp.Code, § 3020(b).

10. Conspiracy ⚭45**Criminal Law** ⚭369(2)

Generally, with respect to proof of a conspiracy, it is no objection that evidence covers a great many transactions and extends over a long period of time, that it may show another crime, that the acts, evidence to show which is offered, occurred some time before alleged formation of the conspiracy, provided that the facts shown had some bearing on and tendency to prove the ultimate fact in issue.

11. Conspiracy ⚭45

In prosecution for conspiracy to commit theft, it was proper to show the relationship of one of the defendants and alleged accomplice and that they had engaged in the same type of dishonest practices before the formation of the conspiracy alleged in the information. West's Ann. Pen.Code, § 484.

12. Criminal Law ⚭423(1, 2)

In prosecution for conspiracy to commit theft, court properly denied motions of defendants to strike all evidence of statements and occurrences outside the presence of defendants, since, after proof of a conspiracy, evidence of declarations of any of the conspirators and their acts within the scope of the conspiracy, is admissible against all, including those who are not present at the occurrences. West's Ann.Pen.Code, § 484.

13. Conspiracy ⚭45

In prosecution for conspiracy to commit theft, evidence as to searches made of records of various corporate customers of defendants and testimony that delivery slips in addition to those produced could not be found, and exhibits evidencing deliveries relating to transactions in issue were relevant. West's Ann.Pen.Code, § 484.

14. Criminal Law ⚭412(1)

In prosecution for conspiracy to commit theft, testimony of one who was a juror at former trial, that while the former trial was under way, she patronized the cafeteria of defendants, and that one of the defendants said in her hearing that he intended to take the jurors to dinner

after the trial, and that the other defendant said that he hoped the jurors would see it his way and that it would be to the jurors' advantage if they did, was properly admitted as tending to show a consciousness of guilt.

15. Criminal Law ⚭351(8, 10)

Efforts of defendant to suppress or fabricate evidence or to influence wrongly or intimidate witnesses may be given in evidence as tending to prove consciousness of guilt, and attempts to influence jurors are in the same category.

16. Criminal Law ⚭173

Where trial is to a jury, jeopardy attaches when jury has been impaneled and sworn.

17. Criminal Law ⚭173

Where it is proposed that a cause will be submitted on evidence adduced at preliminary without additional evidence, jeopardy does not attach prior to commencement of the trial.

18. Criminal Law ⚭295

In prosecution for conspiracy to commit theft, evidence was insufficient to prove former jeopardy. West's Ann.Pen.Code, §§ 484, 1017.

19. Criminal Law ⚭292(1)

The plea of once in jeopardy must be oral and be entered in the minutes, and in substantially the form "The defendant pleads that he has been once in jeopardy for the offense charged", specifying the time, place, and court. West's Ann.Pen.Code, § 1017.

20. Criminal Law ⚭292(1)

Where plea of former jeopardy failed to state the time, place, and court where former jeopardy allegedly occurred, the plea was defective. West's Ann.Pen.Code, § 1017.

21. Criminal Law ⚭296

Where plea of former jeopardy was defective, statement of trial court that there was no plea of once in jeopardy before the court, was a sufficient determination that defense of former jeopardy as pleaded was insufficient as a matter of law. West's Ann.Pen.Code, § 1017.

22. Criminal Law ⇨829(15)

In prosecution for conspiracy to commit theft, wherein court instructed that jury was not permitted, on circumstantial evidence alone, to find a defendant guilty of any crime charged against him unless the proved circumstances not only are consistent with the hypothesis that defendant is guilty of a crime but are irreconcilable with any other rational conclusion, court did not err in refusing to give defendants' requested instruction that if evidence was susceptible of two equally reasonable constructions, the one favoring innocence of defendants should be adopted. West's Ann. Pen.Code, § 484.

23. Criminal Law ⇨829(9)

In prosecution for conspiracy to commit theft, refusal of defendants' requested instruction that private transactions are presumed to be fair and regular, was not error, in view of instructions given and in view of the evidence. West's Ann.Code Civ.Proc. § 1963, subd. 19.

24. Criminal Law ⇨814(16)

In prosecution for conspiracy to commit theft, wherein there was evidence of a great number of statements allegedly made by defendants to their accomplices indicating defendants' guilt, court did not err in instructing that testimony relating to oral admissions of defendants should be viewed with caution, though defendants did not make any admissions of guilt. West's Ann.Pen.Code, § 484.

25. Criminal Law ⇨957(1)

Jurors may not impeach their verdict by affidavit that it was the result of compromise or for other irregularity other than that it was arrived at by chance.

26. Criminal Law ⇨921

In prosecution for conspiracy to commit theft, wherein testimony of one, who was a juror at a former trial, was introduced to show that defendants allegedly attempted to influence her and to show a consciousness of guilt on part of defendants, court did not abuse its discretion in denying defendants a new trial when they were subsequently acquitted of charge of attempt to corruptly influence a juror,

since acquittal of defendants would not have rendered the testimony of the former juror inadmissible or incompetent. West's Ann.Pen.Code, § 182, subds. 1, 5.

Murray M. Chotiner, Albert Jack Chotiner and Russell E. Parsons, Beverly Hills, for appellants.

Edmund G. Brown, Atty. Gen., Martin M. Ostrow, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Sidney Blau, Sidney Fisher, Joseph Mays and Mike Meceirow were accused by information of criminal conspiracy in that they did conspire with each other and with Joseph A. Ricca, William Vincent Johnston, Kenneth K. Olson, Richard G. Costan, Edward L. Waymire, Jerry Goddard, Edward Butterfield and Jerry Wells to commit theft in violation of Section 484 of the Penal Code and "falsify corporate records" (not naming the corporation) in violation of Section 3020, Subd. (b) of the Corporations Code. By Count II of the information they were accused of grand theft on or about October 1, 1953 and by Count III of grand theft on or about December 7, 1953, in the taking of money from Andrew Brown Company, a corporation. The alleged conspirators other than Blau, Fisher, Mays and Meceirow were not accused of any offenses by the information. In due course the cause came on for trial. On July 27, 1954, certain proceedings were had in Department 44 of the Superior Court respecting a proposed submission of the cause on the transcript of the preliminary hearing and for waiver of a jury trial; the waiver of jury trial and consent to submit the cause on the preliminary transcript was vacated on motion of the People and the cause was set for trial to a jury; the cause was tried and submitted; a verdict was returned finding Meceirow not guilty; there being no verdict as to defendants Blau, Fisher and Mays and upon stipulation of counsel a mistrial was declared and the cause was retransferred to Department 44 for resetting; it was assigned to Department 46 for trial to a

jury and in that trial Mays was acquitted and Blau and Fisher were convicted of violation of Count I of the information as charged and of petty theft as charged in Counts II and III of the information. They made a motion for new trial which was denied and they appeal from the judgment and the order denying their motion for a new trial.

The first contention of the appellants to be noticed is that the only substantial evidence against them was the uncorroborated testimony of witnesses who were accomplices and who were named as co-conspirators although not charged as defendants. It is not questioned that the conduct and statements of the appellants as described by these witnesses were sufficient to constitute the offenses of theft and conspiracy to commit theft.

Blau and Fisher were brothers-in-law. From 1946 Blau had operated a company called American Drum Company, herein-after called American. His business was the buying, selling and servicing of steel drums. With Fisher, Blau also operated a cafeteria in the civic center in Los Angeles. Fisher left this business in 1952 and went to work for American. The company had 50 or 60 customers and handled many thousands of drums in a year's time. To one customer alone, Pioneer Flintkote, it sold in 1952 between 9,000 and 10,000 drums. Its servicing business consisted of cleaning and repainting drums, and was conducted on a large scale. It was constantly buying drums wherever they could be obtained. Its purchases were made in part through its drivers and from peddlers. The drivers were furnished with \$50 each morning and bought drums for cash. The prices ranged from \$1 to \$3 or \$4. Drums were sometimes acquired in small numbers from businesses that wished to get rid of them and made no charge for them. Purchases in large numbers were made when the same were available. American was in sharp competition with H. Levine Cooperage Company, hereinafter called Levine, which was described as one of the largest cooperage companies in the country and which also bought, sold and processed drums. It was the duty of Levine's drivers to pur-

chase drums. Both Blau and Fisher were active in the operation of their company. Fisher attended to most of the office work and Blau had control of the money. The evidence of the People consisted principally of testimony of employes of Levine and of customers of American. These witnesses had confessed to speculations from their employers and they implicated Blau and Fisher and American's drivers, Mays and Meceirow, in numerous transactions. Generally speaking, these witnesses testified to having cheated their employers by buying drums upon the credit of Levine and selling them to American, by delivering to American more drums than were receipted for and by giving receipts for more drums than were delivered by American to the concerns for which the witnesses were working as purchasing agents or receiving clerks. They testified that in all these transactions they were given money by Blau, Fisher or their drivers for each drum lost to their employers through their various methods of cheating. Several of the witnesses testified that these schemes originated with Blau and that Fisher had knowledge of the same and participated directly in some of the transactions. Others testified their arrangements were made with Mays or Meceirow.

No contention is made that the testimony of the accomplices with respect to the fraudulent scheme was incomplete in any respect. The crucial question is whether there was evidence sufficient in law to establish guilty knowledge and participation in the thefts or any of them on the part of Blau and Fisher. We have concluded that there was sufficient evidence to establish the necessary corroboration of the testimony of the accomplices.

Many witnesses testified and the record is voluminous. It would serve no good purpose to state the testimony of the conspirators at length. The substance of their testimony will be stated. The matter of corroboration will be discussed later.

Jerry Goddard testified that commencing in April 1953 he was a buyer of used drums for Levine. In August, in the presence of his brother-in-law Waymire, Mays and Meceirow, Blau suggested that he (God-

dard) could make some money on the side and that he and Waymire could each make as much as \$5,000 a year and that Waymire would explain to him how it could be done. He learned from Waymire what Blau meant. He (Goddard) purchased 98 drums which he charged to Levine and upon instructions from Blau delivered them to the Garfield dump; he telephoned Fisher who said there would be a driver there to pick them up; Mays met Goddard at the dump, hauled the drums away and he (Goddard) received money from Waymire. In October Blau requested more drums. In November Goddard left 45 drums at the dump; these had been purchased on Levine's credit; November 28 he drove to the dump with 77 drums which he had purchased for Levine's account. He telephoned Fisher who arranged to have the drums picked up. He received money from Waymire. Shortly thereafter Goddard when accused by detectives and police officers admitted his dishonest transactions with American. December 17 at the request of one Duber, a detective employed by Levine, Goddard called Blau and told him he had some more drums; Blau replied that he had better lay off because he, Blau, had discovered a "bug" in his office and that things were hot and for Goddard to take the drums back to the Levine plant. On the same day Goddard left 68 drums at the dump and notified Fisher. He told Mays over the telephone where the drums had been left and Mays said he would pick them up. He went with Waymire to American where Waymire collected \$108 from Blau which he turned over to a Mr. Forbes, a district attorney investigator.

Waymire was employed as shipping clerk for Levine. He testified that during a former employment with Andrew Brown Company he had furnished drums to Blau, had been paid for them and divided the money with one Wells and one Butterfield. In July or August 1953, while employed by Levine, he discussed with Blau the subject of taking drums from Levine to American Drum; they would be left at a place where American could pick them up. He met again with Blau and Fisher and they arranged to have the drums left at the Gar-

field dump; Blau took Waymire to the dump. He collected from American \$180 for the drums which Goddard had delivered on September 23 and he divided with Goddard. In October he and Waymire met Blau at the latter's home. Blau wanted him to bring more drums. In November Waymire discussed the delivery of drums with Blau and Fisher; he received money for the drums, which he divided with Goddard. On December 17 he went to American's office to see the defendants; Fisher pointed to the ceiling where the "bug" had been discovered. He (Waymire) was paid \$108 for the drums that had been left at the dump and this money was turned over to Mr. Forbes.

One Ricca testified that he was an employe of the California Extraction Company and in charge of the purchase of drums. In July 1952 Mays suggested that if he (Ricca) was short of money something could be worked out on drums. Mays discussed the matter of Ricca's buying drums in July and September 1953 and promised Ricca \$1.25 for every drum he signed for that was not delivered. On November 20 Ricca called Mays and asked for a full load of drums, telling him to make out a ticket for 140 drums and to bring only 60. Mays brought a delivery slip for 140 drums and \$100 in cash. Ricca receipted for the drums and received the money. December 14 Ricca called Mays and asked for 120 drums and said he would sign for them. He went to American's office, signed a delivery slip for 120 drums and received from Fisher \$150. December 17, after Ricca had admitted his thefts, he called Mays and asked for a delivery ticket for 120 drums. Mays drove in his truck, gave Ricca a receiving ticket for 120 drums and \$150 in cash; Ricca signed the delivery slip. After his thefts had been discovered by his employer he went to American where Blau offered to give him the money to pay for the drum shortage and wanted Ricca to call Mr. Jerome, owner of Ricca's company, and arrange with him to make a deal which Blau said would clear Mays of any conspiracy.

One Johnston testified that he was foreman of Pioneer Flintkote, handling drums.

In February 1953 Mays told him he could make some extra money by shipping out more drums to American for cleaning than were receipted for and that he would be paid for those extra drums. In April 1952 10 more drums were put on Mays' truck than were receipted for and he was paid money. In September 1952 Johnston borrowed \$300 from Blau who said it would be repaid in similar drum transactions. In January and February 1953 Mays picked up a load of drums for which no confirmation was given. Johnston went to see Blau, saying it was too many drums to go out at once, but Blau insisted the shortage would not show up and said to let the matter stand and it would finish paying off Johnston's debt of \$300. In May 1953 Fisher paid Johnston \$15 to cover a shortage of 10 drums and later Johnston was paid \$15 for another shortage of 10 drums. Johnston gave a receipt for a delivery on November 24, for 134 drums, when 124 were delivered and a receipt for 108 drums when only 100 were received. For the shortage of 18 drums Fisher paid Johnston \$27. Between April 1952 and September 1953 there were 18 or 20 such transactions involving drums coming into or going out of Flintkote and Johnston was paid for all the shortages by either Mays, Fisher or Blau. December 3, American took another truck load without confirmation slip. On the following day Blau paid Johnston \$165. A few days later Johnston borrowed \$100 from Blau and arranged that it was to be repaid through similar drum transactions.

One Olson handled drums for W. P. Fuller Co. In May 1953, Meceirow, making deliveries for American, presented to Olson 2 receipts, one for 10 more drums than the other. When Meceirow explained that Olson would be paid for signing the receipt for the greater number, he signed a slip for 33 drums although only 23 were delivered, and was given \$20 by Meceirow. November 12 Olson had 90 drums loaded on Mays' truck and Mays signed a receipt for only 84 drums and paid Olson \$6. There were 4 or 5 other similar transactions in which Olson was paid \$1 to \$2 a drum. He testified that altogether there were shortages amounting to 100 or 125 drums;

sometimes he received \$1, sometimes \$2 per drum; the total amount he received was around \$150 but he signed a note to Fuller's bonding company for \$500.

One Coston was the receiving clerk for Arco. In the fall of 1950 Blau asked him if he would sign delivery receipts for drums not delivered by American for which he would be paid. After this he signed fictitious delivery slips in Blau's office and was paid in cash. From the fall of 1950 until around Christmas 1951, he was paid for approximately 35 transactions involving shortages of drums in American's deliveries. After an interval in which no business was done with American and between February and November 1953 there were about 25 more shortages of drums in American's deliveries for which Coston was paid. On December 16 he received from Meceirow \$60 for a shortage of 40 drums. After Coston's thefts had been discovered he had a telephone conversation with Fisher January 18, 1954. Fisher informed Coston, who was living in Las Vegas, that Blau and Mays were coming to see him. They went to Las Vegas, discussed the matter with Coston and told him his confession amounted to nothing because it was given under intimidation.

Edward Butterfield was receiving clerk for Andrew Brown Company from April to December 1953. During a previous term of employment he had had a conversation with Blau in the summer of 1951 in which it was arranged that Butterfield would be paid for shortages in deliveries of drums. There were about 2 shortages during the summer of 1951. Butterfield left the employ of Brown in October 1951 and returned in April 1953. Between April and December 1953 there were 5 or 6 transactions involving fictitious delivery slips signed by Butterfield when no deliveries were made, for which Butterfield was paid \$750. He testified that these delivery slips were typed by Fisher either at Blau's or Fisher's apartment and on a black portable typewriter. Butterfield was paid from 50¢ to \$1 per drum. Yellow copies of the receipts were put in Brown Company files. Brown Company paid for all these fictitious deliveries, the slips of which were identi-

fied by Butterfield. One receipt dated December 16, 1953 was for 24 drums when only 20 were delivered. The shortage was discovered by an accountant. American was called on the telephone; Fisher explained that it was a typographical error and it was corrected. Butterfield's thefts were discovered in December 1953.

There were introduced on behalf of the People numerous exhibits identified with many of the drum transactions. One was a charge slip showing the purchase on Levine's account of 77 drums which Goddard testified he sold to American. Another was a charge slip for 98 drums also delivered to American by Goddard and 2 receipts, one showing the purchase of 6 drums and the other 7 drums on Levine's account. Numerous delivery slips were identified and placed in evidence. Of these it may be said, generally, that they corroborated the testimony of the several witnesses that they had issued such receipts. There was a receipt signed by Ricca November 20 for 140 drums; a receipt for 120 drums signed by Ricca December 14 and another receipt for 120 drums; a receipt dated November 20 signed by Obrite for 140 drums, one dated December 16 for 20 drums and one dated December 17 for 120 drums, one dated September 4, 1953 for 12 drums, another of the same date for 68 drums which was signed by Johnston; a receipt dated November 24 for 25 drums and one of the same date for 109 drums signed by Johnston. There was a record made out by Coston indicating the receipt of 100 drums on November 17 and another record of a delivery of 37 drums on November 30; and a record calling for 100 drums to go out December 16 when, according to Coston, 140 drums were delivered to American; also another record calling for delivery of 100 drums to Arco on December 17. Butterfield identified typed delivery slips which he testified were fictitious and which indicated deliveries to Andrew Brown Company. These bore dates from October 2, 1953 to December 12, 1953 and were 12 in number, also checks of Brown Company showing payments for these deliveries. There was another deliv-

ery ticket dated December 16 showing a change from 24 drums to 20 drums which was corrected by American. The delivery tickets furnished corroboration of the testimony of the accomplice witnesses that receipts had been given evidencing the delivery to the employers of the witnesses of certain numbers of drums although there was nothing upon these receipts and records to indicate that the numbers of drums receipted for had not been delivered on the several dates on which the receipts were issued.

The records of Levine Company were corroborative of the testimony of Goddard that the 77 drums and the 98 drums, which he testified were delivered to American, were the property of Levine. In addition to the foregoing evidence testimony was given by detectives employed by Levine. One Duber was employed to investigate Levine's transactions with American some time in October 1953. He testified that on November 28 he followed a Levine truck driven by Goddard to the Garfield dump. There were 77 drums on the truck. On the way Goddard had stopped and made a phone call. He saw the 77 drums transferred to an American truck from the Levine truck and saw the American truck return to the American yards.

On December 15 Goddard was interviewed by Coker, a detective in the employ of Duber, and by two police officers, and confessed his thefts. Don M. Forbes, an investigator from the district attorney's office, testified that on December 17 he saw Goddard leave the Levine plant with 68 drums which he took to the Garfield dump, that he saw them picked up by Mays driving an American truck on December 22 and saw the American truck with the drums return to the American plant; on the same day he searched Waymire's pockets and took what money he had; saw Waymire enter the American office around 6 p.m.; looked through a window and saw Waymire, Blau and Fisher; Blau put what appeared to be money on the desk in front of Waymire who picked it up and put it in his pocket; 5 minutes later he met Waymire at Atlantic and Florence and received \$108 from him.

Coker testified that on November 17 he saw an American truck loaded at the plant with 50 black drums; he saw the truck enter the yard of Arco, a customer of American and leave empty 10 minutes later. He did not identify the truck driver. He also testified that on November 20 he saw an American truck driven by Mays arrive at California Extraction Company with 60 drums. He did not see Ricca. Forbes testified that on the morning of December 17 he saw Mays driving an empty American truck into California Extraction; Mays handed Ricca something on which Ricca wrote; Mays gave Ricca a piece of paper and 2 other objects; after Mays left, Ricca gave him (Forbes) a delivery receipt for 120 drums, a calendar and \$150 cash.

Coker also testified that on November 12, 1953, he saw an American truck fully loaded with 140 drums leave the W. P. Fuller Company plant and that on November 24 he saw an American truck loaded with 124 drums go to Flintkote but did not count the drums at Flintkote. On November 20 he saw the truck take 100 drums from American but did not recognize either of the drivers.

Forbes testified that he listened in on the phone in December when Goddard was talking with Blau and Mays and his testimony corresponded with that of Goddard with reference to those conversations. His testimony was the same as that of Waymire as to the conversation with Blau respecting the 68 drums.

Butterfield identified a number of delivery slips, which he testified were fictitious. These were written by Fisher on a black portable typewriter on American delivery ticket forms. He had signed them and returned the yellow carbon copy to Andrew Brown Company; Blau kept the originals. B. P. Yanez, an investigator for the district attorney's office was shown a black portable typewriter and testified that he first saw it at Fisher's residence on March 2, 1954. He identified a standard type typewriter as one he had first seen at American's office February 26 or 27, 1954. Donn E. Mire, an examiner of questioned documents, employed by the district attorney, testified that a delivery ticket No. 3785 was typed in part

on the portable and in part by the standard typewriter and that 6 other exhibits shown him, all relating to the Andrew Brown account, were typed in part or in whole on the black portable typewriter and other portions on the standard typewriter. There was evidence that all the delivery tickets typed on the portable typewriter were fictitious.

Defendant Fisher testified that he went into the drum business with Blau in 1952, invested no money but was to get a share of the profits. He drew \$75 per week which was raised to \$125 when he gave up working in the cafeteria. His duties with the company included buying materials and supplies, buying drums from peddlers, hiring and firing; he had charge of the office, assisted with the books and payroll, handled calls and made deliveries. Sometimes when the girl in the office was busy, he would make out delivery tickets on the portable typewriter; at times they would be commenced on one typewriter and finished on another. There were times when several delivery slips would be signed to correspond with several orders although there would be but one combined delivery.

As we have mentioned, there was no standard price for drums but the amounts given to employes of the customers in cases of shortages were below the value of the drums. Goddard testified that the 98 drums he delivered to the dump on September 23 were charged to Levine Fiber Company at \$2 apiece or \$196, and that he received as his half from Waymire \$90 or \$95. The 45 drums he took to the dump on November 27 were bought for \$82, 25 at \$2 apiece, and 20 at \$1.60 apiece and they were charged to Levine. The 77 drums he delivered on November 27 were purchased at \$1.50 each, or a total of \$115.50. He received from Waymire as his share from the sale of the 45 and the 77 drums \$80 or \$90. He did not question Waymire as to the difference between the cost of 98 drums and the supposed selling price. He received for all the drums taken from Levine the fair market price of the drums. He reported none of his receipts in his income tax returns. As to the prices paid by American Waymire's testimony was substantially

to the same effect. Neither Goddard nor Waymire kept any account of the moneys they received. They approximated those amounts.

Butterfield testified that he received \$1 or \$1.50 for each missing drum in deliveries to or from Andrew Brown Company. He testified some reconditioned, used, thinner drums were worth \$4.50 each. It was these drums that were covered by the fictitious transactions. Some drums that needed reconditioning were worth \$3.25 each.

In the foregoing recital we have not stated all the evidence that was corroborative of the testimony of the accomplices nor have we recited all the testimony which they gave with respect to their direct dealings with appellants. Considered by itself, the testimony of the accomplices could not be deemed sufficient to establish the existence of a conspiracy with the appellants or Mays and Meceirow. As we have stated, there was no direct evidence other than the testimony of the accomplices fastening upon appellants' knowledge of the thefts. There was direct corroboration as to comparatively few of the many transactions to which the accomplices testified. But this evidence, as we shall see, was sufficient when considered with the indirect evidence not only as corroboration of the testimony of the accomplices as to the existence of a conspiracy but also of their testimony of the knowledge of appellants of the scheme and their participation therein.

As previously mentioned there were many exhibits consisting of delivery tickets, originals and copies, which corresponded with the testimony of several of the accomplices with respect to receipts which they had given or received. We shall mention but a few of them.

Coker testified that on November 17 he witnessed the loading of an American truck with 50 drums which were taken to Arco. An exhibit received in evidence was a record of Arco made out by Coston showing receipt by Arco of 100 drums. Coston had testified to this effect. Coker also testified that on November 20 he saw 100 drums loaded at American for delivery to Flintkote. An invoice and delivery slips were

introduced in evidence showing receipt of 108 drums by Flintkote. On November 24 Coker watched an American truck being loaded with 124 drums and followed it to Flintkote where they were delivered. Flintkote's delivery receipts were issued for 134 drums. There were other receipts which Johnston testified were for 8 more drums than were delivered. This evidence was corroborative of the testimony of Johnston that there was a shortage of 18 drums in the two deliveries for which he was paid \$27 by Fisher. Coker also testified that on November 12 he saw 90 drums loaded at Flintkote by American. Flintkote's record showed that a receipt was given for only 84 drums. He also testified that on November 20 he saw 60 drums loaded at American, for delivery to California Extraction where delivery was made. A delivery slip in evidence was a receipt on that date for 120 drums. Ricca had testified that in this transaction in which only 60 drums were delivered, he was paid \$100 for the ones that were missing. Forbes testified that on December 17 he saw Mays drive into California Extraction in an empty American truck, saw him hand Ricca something on which Ricca wrote, saw him give Ricca a piece of paper and two other objects and that after Mays left Ricca gave him (Forbes) a copy of the delivery receipt for 120 drums and \$150 in cash. There was convincing evidence of the existence of a conspiracy.

The corroborative evidence with respect to the guilty knowledge of appellants must be weighed in view of the fact that Levine, Brown Company, Arco, California Extraction, Fuller Co. and Pioneer Flintkote had been systematically defrauded in their dealings with American. The testimony of Coker and Forbes, considered with the documentary evidence, substantially corroborated the testimony of the seven employes, Goddard, Waymire, Butterfield, Ricca, Olson, Coston and Johnston, who represented their companies in dealing with American, as to the existence of a concerted plan of theft. And these seven men who had been corrupted by some representatives of American had confessed their wrongdoing. The appellants say that if there were thefts

from American's customers they had no knowledge of it, which, if true, would fasten the entire blame on the drivers Mays and Meceirow. This is not a reasonable explanation. When Goddard delivered drums to the dump they were sold to American, not to Mays or Meceirow. When there were shortages in American's deliveries the customers paid American, not Mays or Meceirow, for drums for which they had receipted but had not received. There were necessarily countless discrepancies between American's records and the number of drums on hand. A few might have gone unnoticed but in the multitude of instances of pickups in excess of numbers receipted for and numbers receipted for in excess of those delivered the inventories of American as shown by count would have vastly exceeded in the aggregate the numbers on the records.

Fisher had charge of the delivery and receipt of drums. The delivery slips typed on the typewriter which he used were identified as fictitious. None was genuine. It is scarcely conceivable that he could have remained in ignorance of the discrepancies between the numbers of drums brought into or taken from the plant and the receipts signed by American's drivers or the receiving clerks of the customers. Neither is it conceivable that Fisher, who owned no interest in the business, was consistently fleeing its customers unknown to Blau.

In addition to the evidence relative to shortage in deliveries the transactions with Goddard and Waymire disclosed the eagerness of appellants to obtain drums wherever they might be had, even from employees of Levine whom they knew to be under suspicion.

Appellants contend that they believed the drums purchased from Goddard had been purchased by him and Waymire for resale and did not suspect that they had been purchased on Levine's credit. There was no direct evidence that they knew the drums did not belong to Goddard and Waymire. There were, however, circumstances which tended to disprove their assertions of innocence. By prearrangement, exchanges from Levine trucks to American trucks were made at the Garfield dump. Defend-

ants knew it to be the practice for drivers to purchase drums for their employers and that Goddard and Waymire were working for Levine. They say they adopted the furtive method of exchange because they wished to conceal the transactions from Levine, knowing it was the duty of Goddard and Waymire to give Levine the benefit of their purchases. They knew Goddard and Waymire were unfaithful to their employer and they knew that for their unfaithfulness they sought some personal advantage. They did not claim they inquired why Goddard and Waymire would sell drums to them instead of taking them to the Levine plant, nor did they investigate Goddard's claim of ownership. It was less apparent that they trusted to the honesty of the men they were dealing with than that they were indifferent as to how far their dishonesty might go. The jury could have believed with good reason that defendants were encouraging Goddard and Waymire in their dishonesty and willing to profit by it. The stealthy and sordid methods employed by appellants, in which they saw no wrong, was indicative of their standards of business integrity.

[1-4] We have stated the substance of the corroborative evidence and that we deem it sufficient in law. The test of sufficiency is stated in section 1111 Penal Code. It is "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." It has been stated frequently that even slight evidence is sufficient if it tends to connect the defendant with the commission of the offense. This, of course, does not mean evidence that raises merely a suspicion, even though a strong one, of connection with the offense. *People v. Davis*, 210 Cal. 540, 293 P. 32. At least as a guide to a reviewing court, judging the sufficiency of corroboration, the rule is that the corroborative evidence is sufficient if it "tends to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the

jury that the witness who must be corroborated is telling the truth." and in determining this question the corroborative evidence must be considered without the aid of the testimony which is to be corroborated and it is not sufficient if it requires the interpretation and direction of such testimony in order to give it value. *People v. MacEwing*, 45 Cal.2d 218, 288 P.2d 257. It is, of course, well-settled that there is no need for corroboration of the entire testimony of an accomplice. *People v. Temple*, 102 Cal.App.2d 270, 227 P.2d 500.

[5] In the present case, the jury having found the corroborative evidence to be sufficient to connect appellants with the commission of the offense of conspiracy to commit theft, the question we have answered is merely whether the evidence reasonably justified that factual conclusion. It would be futile to attempt a comparison of the evidence in the present case with that in other cases which involved the sufficiency of corroborative evidence. The facts of our case are unique. We have already stated our reasons for holding that the implied finding of the jury was a reasonable conclusion with respect to the existence of the conspiracy; upon that issue the independent, direct evidence, to say nothing of the circumstantial evidence, furnished strong corroboration of the testimony of the accomplices. It was firmly established that there was a conspiracy between the representatives of American and the employees of the customers who were systematically defrauded. The representatives of American, parties to the conspiracy, were Blau, Fisher, Mays and Meceirow, or some of them. The corroborative evidence which tended to connect Blau and Fisher with the conspiracy also implicated Mays and Meceirow but was wholly inconsistent with the claim that only the latter two could have been the conspirators on the side of American. Although the independent evidence which tended to implicate Blau and Fisher was circumstantial, it was convincing, and it pointed to them as the principals and ringleaders more logically than to the drivers who were acquitted by different juries. And this being true, and the corroboration being legally sufficient, the added

testimony of the accomplices with respect to the direct and active participation of appellants in the unlawful scheme furnished satisfactory evidence of their guilt.

[6] In an elaborate argument appellants call attention to particulars in which the testimony of the accomplices was contradictory and to the facts that most of them were retained in their employments and were not prosecuted, claiming that they were offered inducements to give testimony favorable to the People. The argument also dwells upon the explanations and the denials uttered by appellants. But counsel must realize that in passing upon the sufficiency of the evidence a reviewing court must give it the effect most favorable to the validity of the judgment. The case long since passed the stage when the credibility of the witnesses was in issue.

[7] The second contention of appellants is that the evidence was insufficient to prove the offenses of petty theft, being lesser offenses necessarily included in the offenses of grand theft charged in Counts II and III of the information. The offenses were alleged to have been committed on or about October 1 and December 7, 1953. It is argued that the evidence as to these offenses consisted entirely of the testimony of Butterfield, an admitted accomplice. The evidence which tended to furnish corroboration of his testimony included receipts signed by him which have already been referred to and we hold it to be sufficient.

[8,9] As previously mentioned appellants were charged in Count I with conspiracy to commit two crimes, namely, theft and falsification of corporate records. Although the evidence justified the verdict with respect to a conspiracy to commit theft it was insufficient, in our opinion, to establish a violation of or conspiracy to violate section 3020(b) of the Corporations Code. An affirmance of the judgment without mention of our views as to the insufficiency of the evidence to prove violation of that section would imply approval of a judgment based upon a verdict which we deem to be partly in error. Moreover, since we believe the conspiracy proved was one for the commission of a single crime and not two crimes it would seem

that the appellants have a right to an expression of our views. Section 3020 (b) reads as follows: "Every director, officer, agent, or shareholder of any corporation, domestic or foreign, who, with intent to defraud, destroys, alters, mutilates, or falsifies any of the books, papers, writings, or securities belonging to the corporation, or makes or concurs in making any false entries, or omits or concurs in omitting to make any material entry in any book of accounts or other record or document kept by the corporation is guilty of a public offense." The section deals with two subjects, first, the records of the corporation and second, with the matter of keeping accounts. In our opinion "the books, papers, writings, or securities belonging to the corporation" would embrace those held in ownership of some permanency, such as a corporation would be required to keep in order to maintain a true record of the condition of its affairs. All these would belong to the corporation. We think it is clear that it was not the intention to include as writings belonging to the corporation every writing of whatever nature issued by an agent of the corporation. If every such writing were deemed to be within the scope of the section there would be included writings made and issued to serve some temporary purpose and which would be destroyed after that purpose had been served.

American was given receipts by its customers for more drums than it delivered. Acceptance of such a receipt would not be a falsification of American's records. When American issued a receipt to a customer for fewer drums than the customer delivered, this would not be a falsification of American's records. Either transaction would merely furnish the basis for a charge against the customer. If the shortage was of drums delivered by American on a sale to a customer the latter would apparently owe American an excess of money; if drums were delivered to American in excess of the number receipted for the customer would owe American drums. None of these transactions involving shortages was completed at the time the transaction took place. They entered into the

matter of accounting and were paid for in settlement of accounts. It is altogether probable that the delivery memoranda were used as a basis for entries in American's books of account since some one in American's office force would have had that duty. But there was no evidence that Blau or Fisher ever made or caused to be made such entries. In the absence of evidence upon that score, we think the verdict and judgment in so far as they adjudged appellants guilty of violation of section 3020(b) of the Corporations Code were erroneous.

Error is assigned in the receipt of evidence of events occurring prior to April 13, 1953, the date of the formation of the conspiracy as alleged in the information. The testimony referred to is that of Butterfield, who related transactions in which he furnished drums to Blau in 1950 and 1951, during an earlier employment by Andrew Brown Company. Appellants moved to strike this testimony and the motion was denied. It is contended that the evidence was not relevant to the conspiracy charged in the information. The contention is untenable.

[10,11] The general rule with respect to proof of a conspiracy is that it is no objection that the evidence covers a great many transactions and extends over a long period of time, that it may show another crime, that the acts, evidence to show which is offered, occurred some time before the alleged formation of the conspiracy, provided, however, that the facts shown have some bearing on and tendency to prove the ultimate fact in issue. *People v. Stevens*, 78 Cal.App. 395, 406, 248 P. 696; *People v. Black*, 45 Cal.App.2d 87, 102, 113 P.2d 746. It was proper to show the relationship of Butterfield and Blau and that they had engaged in the same type of dishonest practices before the formation of the conspiracy alleged in the information. In weighing the probabilities with respect to the existence of an unlawful agreement between them, it was proper for the jury to take into account evidence that they had previously engaged in similar practices which they found to be to their mutual advantage. Moreover, all the evidence with respect to the activities of Blau,

Fisher, Mays and Meceirow in the transactions in evidence would have demonstrated that if Blau and Fisher were innocent, Mays and Meceirow alone were guilty of conspiring with the agents of American's customers. One contention seriously urged by appellants is that even if a conspiracy existed they had no part in it. But Mays was not employed by Blau in the handling of drums in 1950 and 1951 and for that additional reason evidence of Blau's earlier transactions with Butterfield was relevant.

[12] Each appellant made motions to strike all evidence of statements and occurrences outside his presence, and the motions were denied. This was not error. It is elementary that after proof of a conspiracy evidence of the declarations of any of the conspirators and their acts within the scope of the conspiracy is admissible against all, including those who were not present at the occurrences. *People v. Cook*, 10 Cal.App.2d 54, 51 P.2d 169; *People v. Correa*, 44 Cal.App. 634, 186 P. 1055; *People v. Mazzurco*, 49 Cal.App. 275, 193 P. 164.

[13] Appellants made motions to strike evidence as to searches made of the records of the various corporate customers and testimony that delivery slips in addition to those produced could not be found, and also to strike certain exhibits evidencing deliveries relating to the transactions in issue. The evidence was relevant to the issues and was properly admitted. It was not error to deny the motions.

[14, 15] A Mrs. Littke, a juror in the first trial in which, pursuant to stipulation, a mistrial was declared, testified on behalf of the People that while the former trial was under way she was patronizing the cafeteria of appellants; Fisher said in her hearing that he intended to take the jurors to dinner after the trial and Blau said he hoped the jurors would see it his way and that it would be to the jurors' advantage if they did. It is contended that this evidence was improperly received over objection and that the statement of the prosecutor in his opening statement that he intended to produce such evidence constituted misconduct. The claims of error

and misconduct are unfounded. The statements, if made by appellants, tended to show a consciousness of guilt and under well-settled rules the evidence was admissible. Efforts of the defendant to suppress or fabricate evidence or to wrongfully influence or intimidate witnesses may be given in evidence as tending to prove a consciousness of guilt. 22 C.J.S., Criminal Law, § 633, p. 966; *Clark v. Tulare Lake Dredging Co.*, 14 Cal.App. 414, 437, 112 P. 564; *Silva v. Northern California Power Co.*, 32 Cal.App. 139, 146, 162 P. 412; *Ross v. San Francisco-Oakland Terminal Rys. Co.*, 47 Cal.App. 753, 767, 191 P. 703. Attempts to influence jurors are in the same category.

The record shows that appellants had entered a purported but inadequate plea of former jeopardy. It was stated in the minutes "Each defendant enters an additional plea of 'Not Guilty having once been in jeopardy.'" During the course of the trial they sought leave to amend their plea so as to state the title of the court and cause, and the time and circumstances of a waiver of jury trial to which the amended plea would relate, and they relied upon a transcript of the proceedings of July 27, 1954 in support of their motion. Their motion to amend was denied. The proceedings relied upon by appellants related to the proposed submission of the cause upon a transcript of the evidence at the preliminary. The reporter's transcript discloses that on July 27 in Department 44 before Judge Schweitzer it was stated by the court that the cause was to be tried in Department 42 (Judge Walker) and the court understood that the parties intended to submit it upon the preliminary transcript without further evidence. The attorneys stated that it would be so submitted, whereupon the court ordered the cause assigned to Department 42 on August 3 for further proceedings and the parties were ordered to appear at that time. Judge Walker could not try the case and it was re-transferred to Department 44, Judge Nye, for resetting. The People made a motion for vacation of the waiver of trial by jury and the tentative stipulation that the cause be submitted on the pre-

liminary transcript. There was no objection by appellants and the motion of the People was granted. The cause was then assigned to Department 46, Judge Crum.

[16] Where the trial is to a jury jeopardy attaches when the jury has been impaneled and sworn. *People v. Hawkins*, 127 Cal. 372, 59 P. 697; *In re Harron*, 191 Cal. 457, 217 P. 728; *People v. Young*, 100 Cal.App. 18, 279 P. 824; *Jackson v. Superior Court*, 10 Cal.2d 350, 74 P.2d 243, 113 A.L.R. 1422.

At the time of the waiver of jury trial when the court was told by counsel the cause would be submitted on the preliminary transcript, there was a further stipulation that each side reserved the right to move to strike any of the evidence. In seeking leave to amend their plea appellants offered a transcript of the proceedings which we have thus summarized. There was no showing that appellants had formerly been placed in jeopardy. The proceedings on July 27 in the department of the presiding judge of the criminal departments were preliminary to the designation of a trial department. Appellants were not placed on trial in Department 44 either before Judge Schweitzer or Judge Nye, nor in Department 42 before Judge Walker. The cause was not submitted to any of those judges nor was a trial commenced in any manner at any time before the trial to a jury was commenced in the department of Judge Crum.

[17,18] Where it is proposed that a cause will be submitted upon the evidence adduced at the preliminary without additional evidence, jeopardy does not attach prior to the commencement of the trial. This is all we are called upon to decide. Inasmuch as there was insufficient proof of former jeopardy as shown by the record offered in support of the motion to amend, there was no error in denying the motion.

[19-21] It is contended that the court was required to render a decision upon the plea of former jeopardy and failed to do so. The plea of once in jeopardy must be oral, entered in the minutes and in substantially the following form: "The de-

fendant pleads that he has been once in jeopardy for the offense charged" (specifying the time, place and court). Pen.Code, § 1017. The purported plea was defective in that it failed to state the time, place and the court. In discussing the merits of the plea of former jeopardy, the court said: "Then, we come down to a point that up to this present time, as a matter of law, there is no plea of once in jeopardy before the court." We think this was a sufficient determination that the defense of former jeopardy as pleaded was insufficient as a matter of law. The plea was insufficient, and the ruling to that effect was all the decision the court was required to make. The plea being insufficient in form and obviously unfounded upon the admitted facts, and the amendment having been properly denied, mere informality in the form of the court's ruling and the absence of an express finding would not be an irregularity which would justify a reversal and a retrial of the cause.

Several errors are assigned in the receipt and exclusion of evidence. These do not justify particular discussion. The testimony in question was inconsequential. We are satisfied that the rulings were neither erroneous nor in any respect prejudicial to the appellants.

A point is made of the fact that Forbes was permitted to testify as to the telephone conversations he overheard between Blau and Waymire and Goddard. It is said that his testimony was improperly admitted under the doctrine of *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905. The point does not require discussion; appellants could have suffered no prejudice through the testimony of Forbes. The matters to which the conversations related, namely, the delivery of drums and the payment of money, were not in dispute since it was admitted by appellants that they did receive the drums and pay the money.

[22] Appellants requested an instruction to the effect that if the evidence was susceptible of two equally reasonable constructions, the one favoring innocence of the defendants should be adopted. They say that no instruction was given "which in effect covered the same subject matter"

and "since there was circumstantial evidence submitted to the jury the court should have instructed the jury which construction to adopt where the evidence was susceptible of different constructions." The People quote an instruction that the court gave, reading: "I instruct you further that you are not permitted, on circumstantial evidence alone, to find a defendant guilty of any crime charged against him unless the proved circumstances not only are consistent with the hypothesis that the defendant is guilty of the crime but are irreconcilable with any other rational conclusion." This is a sufficient answer to the criticism of the court's failure to give appellants' requested instruction.

[23] Appellants requested an instruction, which the court refused, to the effect that private transactions are presumed to be fair and regular, Code Civ.Proc. § 1963, subd. 19, and they assign the refusal as error. In view of the instructions that were given, including those as to the presumption of innocence we cannot see that the refused instruction would have aided appellants. Moreover, they had testified fully with respect to all the transactions in question. The court gave an instruction: "* * * Defendants are presumed to speak the truth; and unless this presumption is destroyed by the evidence in this case your oath requires you to find that they have spoken the truth." In view of the evidence this was a sufficient instruction. If the jury had believed the explanations of appellants the transactions in which they engaged would have been found to have been fair and regular.

[24] There was no error in instructing to the effect that the testimony of Mrs. Littke was received for consideration only as it might tend to show a consciousness of guilt on the part of the defendants and that the significance of it, if any, was solely a matter for consideration of the jury. Neither was it error to instruct that testimony purporting to relate oral admissions of the defendants should be viewed with caution. While appellants did not make any admissions of guilt, there was evidence of a great number of statements

made to their accomplices which, if made, would have been even more potent evidence against them than mere admissions of guilt. Appellants were not harmed by the instruction and it may have been interpreted by the jury as favorable to them.

[25] On their motion for a new trial appellants submitted an affidavit of one of the jurors in which she stated that the verdict was the result of a compromise; some of the jurors who were inclined to vote in favor of Mays' guilt voted for his acquittal when other jurors who were in favor of acquittal of the appellants agreed to vote in favor of the guilt of Blau and Fisher of a lesser offense. It was not error to refuse a new trial on the ground of misconduct of the jury. Jurors may not impeach their verdict by affidavit that it was the result of compromise, or for other irregularity other than that it was arrived at by chance. *People v. Kromphold*, 172 Cal. 512, 157 P. 599; *People v. Reid*, 195 Cal. 249, 232 P. 457, 36 A.L.R. 1435; *People v. Gidney*, 10 Cal.2d 138, 73 P.2d 1186; *People v. De Voe*, 123 Cal.App. 233, 11 P.2d 26; *People v. Richards*, 1 Cal.App. 566, 82 P. 691; *People v. Maggio*, 90 Cal. App. 683, 266 P. 813; *People v. Denton*, 22 Cal.App.2d 673, 72 P.2d 191.

[26] On their motion for new trial appellants presented the affidavit of one of their attorneys by which it was made to appear that appellants were charged with, tried and acquitted of conspiracy to violate section 182, subdivisions 1 and 5 of the Penal Code, based upon a charge that they had attempted to corruptly influence the juror, Mrs. Littke. It was alleged that the trial resulted in an acquittal after the conviction of the appellants in the instant case. The testimony of Mrs. Littke was introduced in the trial of appellants as tending to show a consciousness of guilt on their part; their acquittal of an attempt to corruptly influence the juror meant only that they were not guilty of that offense, and upon a retrial would not have rendered inadmissible or incompetent the testimony of Mrs. Littke, and most assuredly did not require the court in the exercise of its discretion to grant a new trial. There was no abuse of discretion.

There are no other contentions of the appellants that merit particular discussion.

Although, as we have stated, the charge of conspiracy in Count I of the information was broader than the conspiracy proved, this does not affect the validity of the conviction upon that count and it must be affirmed.

The judgment and order denying motion for new trial are affirmed.

WOOD and VALLÉE, JJ., concur.

Hearing denied; GIBSON, C. J., not participating.



140 Cal.App.2d 138

The PEOPLE of the State of California,
Plaintiff and Respondent,
v.

Alden SAGEHORN, Defendant and
Appellant.
Cr. 3180.

District Court of Appeal, First District,
Division 2, California.
March 22, 1956.

Hearing Denied April 18, 1956.

Defendant was convicted of conspiring, falsely and maliciously, to procure another to be charged and arrested for a crime, of false imprisonment, and of perjury. The Superior Court, County of Alameda, Chris B. Fox, J., entered judgment and order denying new trial, and defendant appealed. The District Court of Appeal, Kaufman, J., held that evidence was sufficient to sustain conviction.

Judgment and order affirmed.

1. Conspiracy ⚡47

Evidence was sufficient to sustain conviction for conspiring, falsely and maliciously, to procure another to be charged and arrested for a crime. West's Ann.Pen.Code, § 182, subd. 2.

2. Conspiracy ⚡23

If indictment simply charges defendant and his codefendants with conspiring to

falsely and maliciously procure arrest and imprisonment of another, acquittal of the codefendants would make defendant's conviction erroneous. West's Ann.Pen.Code, §§ 236, 237.

3. Conspiracy ⚡23

Where, in prosecution for conspiring, falsely and maliciously, to procure another to be charged and arrested for a crime, indictment charged that defendant had conspired with codefendants and with others unknown, defendant's conviction would stand, even though codefendants were acquitted, if there was evidence from which it would be inferred that persons other than codefendants had conspired. West's Ann.Pen.Code, §§ 236, 237.

4. Conspiracy ⚡24, 47

Conspiracy could consist of tacit mutual understanding to commit a crime and could be proved by circumstantial evidence, and it would not be necessary to show that the parties met and agreed to performance of the unlawful acts or that they had a previously arranged plan. West's Ann.Pen.Code, §§ 236, 237.

5. False Imprisonment ⚡44

In prosecution for false imprisonment, evidence was sufficient to establish that the arrest had been made without justification. West's Ann.Pen.Code, §§ 236, 237, 836.

6. False Imprisonment ⚡44

To establish offense of false imprisonment, people need only show the imprisonment, and defendant has burden of proving justification and lawfulness of the imprisonment. West's Ann.Pen.Code, §§ 236, 237.

7. Perjury ⚡12

Where defendant had testified before grand jury that he did not have any recollection of things he was alleged to have done on certain previous date, any falsity in testimony of defendant who was being prosecuted for perjury would not lie in whether he did the things on date involved but whether he actually remembered those things when he stated before grand jury that he did not have any recollection of them. West's Ann.Pen.Code, §§ 118, 1103a.

8. Perjury ⇨34(4)

Under statute providing that perjury must be proved by testimony of two witnesses or of one witness and corroborating circumstances, the corroborative circumstances must be considered without aid of testimony which is to be corroborated, and evidence as to such circumstances is not sufficient if it requires the interpretation and direction of such testimony in order to give it value. West's Ann.Pen.Code, § 1103a.

9. Perjury ⇨11(1)

Even though testimony before grand jury is false, it cannot support a conviction for perjury unless it influenced grand jury upon a material issue. West's Ann.Pen.Code, § 118.

10. Perjury ⇨34(6)

Under statute providing that perjury must be proved by testimony of two witnesses or of one witness and corroborating circumstances, corroborating circumstances may come from a defendant's own testimony when he testifies in his own behalf. West's Ann.Pen.Code, § 1103a.

11. Perjury ⇨34(4, 6)

Under statute providing that perjury must be proved by testimony of two witnesses or of one witness and corroborating circumstances, corroborative evidence need not be strong nor even sufficient in itself to establish the fact, but circumstances legally sufficient to sustain a conviction may consist of the extrajudicial statements, declarations, admissions, or confessions of accused or his silence in face of accusatory statements. West's Ann.Pen.Code, § 1103a.

12. Perjury ⇨33(1)

Evidence was sufficient to sustain conviction for perjury. West's Ann.Pen.Code, § 118.

13. Perjury ⇨12

If person wilfully swears falsely to a belief in the existence of a fact which he knows does not exist, he is guilty of perjury. West's Ann.Pen.Code, § 118.

14. Criminal Law ⇨780(1)

Where there is evidence which would justify jury in concluding that witness was an accomplice, failure to give instruction

that conviction cannot be had upon testimony of an accomplice unless testimony is corroborated by such other evidence as shall tend to connect defendant with commission of the offense is error. West's Ann.Pen.Code, § 1111.

15. Criminal Law ⇨780(1)

Where witness, who was claimed by defendant to be an accomplice, could not have been liable to prosecution for the identical offense, refusal to give an accomplice instruction was proper.

16. Criminal Law ⇨507(1)

An "accomplice" is one who knowingly, with common intent with principal offender, unites in commission of a crime and who is liable for prosecution for the same offense.

See publication Words and Phrases, for other judicial constructions and definitions of "Accomplice".

17. Criminal Law ⇨552(1)

Jury has duty to accept the construction pointing to defendant's innocence where two reasonable constructions are possible, and, if two constructions, one reasonable and one unreasonable, are possible, jury has duty to reject the unreasonable one.

18. Criminal Law ⇨559

If reasonable deduction points to defendant's guilt, entire proof must carry the convincing force required by law to support a verdict.

19. Criminal Law ⇨1173(2)

Where, in perjury prosecution, state's case was based primarily on eyewitnesses' direct testimony, and the circumstantial evidence was merely incidental and corroborative of the direct evidence, refusal to give circumstantial evidence instruction was not prejudicial. West's Ann.Pen.Code, §§ 118, 1111.

20. Criminal Law ⇨554

Contradictory statements, which had been made by defendant may be considered in determining truth or falsity of such statement and defendant's innocence or guilt.

21. Perjury ⇨37(1)

In prosecution for perjury allegedly committed before grand jury, instructing

jury, as matter of law, that certain excerpts from the testimony before grand jury were material, was not error. West's Ann.Pen.Code, § 118.

22. Perjury **↪**37(1)

Trial judge has exclusive right to determine, in a criminal action, the materiality of alleged perjured testimony and to instruct jury thereon. West's Ann.Pen.Code, § 118.

23. Criminal Law **↪**783(1)

Where, in prosecution for perjury allegedly committed before grand jury, court instructed jury that testimony of certain witnesses before grand jury was read into evidence against defendant merely for purpose of showing that such testimony had been given, not to prove that testimony anew, such instruction was proper for purpose of informing jury of limited purpose for which such testimony was introduced. West's Ann.Pen.Code, § 118.

24. Criminal Law **↪**857(1)

Where, in prosecution for perjury allegedly committed before grand jury, petit jury was instructed by trial court as to what parts of testimony before grand jury were material, such parts were only portions which could be considered by petit jury in its deliberations. West's Ann.Pen.Code, § 118.

25. Criminal Law **↪**1169(1), 1170(2)

In prosecution for conspiring, falsely and maliciously, to procure the charging and arresting for a crime of an alleged alcoholic, false imprisonment of such alleged alcoholic, and perjury, refusal to allow questions whether alleged alcoholic had been an alcoholic at certain time and had been treated at sanatorium for alcoholism and permitting alleged alcoholic to state that he had never been in particular police station was not error, especially in view of fact that defendant introduced evidence of alleged alcoholic's staying at a sanatorium for alcoholism. West's Ann.Pen.Code, §§ 118, 182, subd. 2, 236, 237.

26. Witnesses **↪**388(2)

In prosecution for conspiring to falsely and maliciously procure another to be charged and arrested for crime, for false

imprisonment, and for perjury, defendant was not entitled to question police officer as to whether he had told any one at police department or any one else that he had arrested such other because he was drunk, even though defendant sought to thereby show prior inconsistent statements, in view of fact that he failed to introduce the prior inconsistent statement. West's Ann.Code Civ.Proc. § 2052.

27. Perjury **↪**10

For purposes of subsequent perjury prosecution of witness before grand jury, witness' oath before grand jury was not limited to date of his first appearance, but bound him for duration of the proceeding, and witness did not have to be sworn on succeeding days. West's Ann.Pen.Code, § 118, West's Ann.Code Civ.Proc. § 2094.

28. Criminal Law **↪**672

Where evidence, which was admitted over objection was admitted subject to motion to strike if prosecution did not later show connection between such testimony and other matter, failure to move to strike constituted a waiver of objection to admission of the evidence.

29. Perjury **↪**32(6)

In prosecution for perjury allegedly committed before grand jury, reading into evidence of testimony of others before grand jury was necessary to enable trial judge to determine materiality of defendant's statements and, therefore, was not error. West's Ann.Pen.Code, § 118.

30. Criminal Law **↪**412(1)

Defendant's extrajudicial declarations were, except for admissions and confessions, subject to same restrictions as those of any other person.

31. Criminal Law **↪**695(2)

In prosecution for perjury allegedly committed before grand jury, general objection to all of defendant's testimony, which was given before grand jury, and which was read into evidence in perjury prosecution over defendant's motion to strike, was not sufficient, since it did not constitute a making of specific objection to portions of the testimony asserted to be prejudicial.

32. Criminal Law ⚡1169(5)

Where, in prosecution for perjury allegedly committed before grand jury, jury was properly instructed that statements of counsel were not evidence and were to be disregarded by them, and defendant made only general objection to admission in evidence of defendant's testimony before grand jury, admission of such testimony was not prejudicial error, even though such testimony contained antagonistic statements of district attorney and jury foreman. West's Ann.Pen.Code, § 118.

33. Criminal Law ⚡419(10), 1186(4)

In prosecution for conspiring, falsely and maliciously, to procure another to be charged and arrested for a crime, for false imprisonment, and for perjury, testimony of codefendant that superior police officer had told codefendant to come out and help book such other person was inadmissible as to defendant and was hearsay as to defendant, but such admission was not prejudicial and did not result in miscarriage of justice, in view of entire testimony in the record. West's Ann.Pen.Code, §§ 118, 182, subd. 2, 236, 237; West's Ann.Const. art. 6, § 4½.

Robert H. Kroninger, Kennedy Jackson, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., J. Frank Coakley, Dist. Atty., Alameda County, Lawrence Dayton, Asst. Dist. Atty., Thomas J. Buckley, Deputy Dist. Atty., Oakland, for respondent.

KAUFMAN, Justice.

This is an appeal by defendant Alden Sagehorn from an order granting probation under certain conditions, after jury verdict of guilty on all three counts of an indictment. Appellant was charged with violation of Penal Code, section 182, subd. 2 (conspiracy falsely and maliciously to procure another to be charged and arrested for a crime), violation of Penal Code, sections 236 and 237 (false imprisonment), and perjury. The appeal is also taken from the order denying a new trial.

Appellant was tried with his co-defendants Raymond Gaudinier and Oliver Yothers who were also charged with the first two offenses set forth in the indictment. Gaudinier and Yothers were acquitted. The conspiracy count charged that appellant had conspired with these co-defendants and with "others unknown."

William McClure, out of whose alleged false arrest and imprisonment this case arose, was a merchant engaged in a hardware and paint business at 5221 Foothill Boulevard, Oakland. The defendants named in the indictment were all members of the Oakland police force. Late one evening in November, 1954, Sergeant Simin of the Oakland police found McClure asleep in his automobile in front of his store. Simin awakened him and asked for identification. He handed the officer his wallet which contained between \$1,200 and \$1,300 in currency. Simin handed it back, asked McClure if he had shotgun shells in his store, and when McClure said that he did, Simin said he would be in the next day. The officer came into the store the next morning, asked for two boxes of shotgun shells which McClure procured for him. Simin told McClure that he could have rolled him for \$1,000 on the previous night and could have put him in jail. He then left without paying for the shotgun shells.

Appellant Sagehorn, a lieutenant in the Oakland Police Department, first met McClure early in November, 1954 at Benny Campisi's Fairfax Tavern. Campisi had asked McClure to join the Footprinters, a club of which appellant was secretary. McClure gave appellant his application and the \$15 initiation fee. The initiation was to be held on November 19, 1954.

On the evening of November 16, 1954, McClure had been drinking at Campisi's tavern. He and Campisi decided to go to McClure's store, a few blocks from the bar. Each took his own car. As McClure was making a left turn into a parking lot he collided with another vehicle, but drove on into the lot. Campisi tried to convince the driver of the other car that everything could be taken care of without calling the police, but since the other driver insisted

that it be reported, Campisi put in a telephone call from McClure's store. Shortly thereafter a police officer arrived at the store and escorted McClure out to the sidewalk where Campisi was talking with two other police officers. They placed McClure in the back of a patrol car. Sergeant Simin was among the officers present but he took no part in the investigation. McClure was given a citation for an illegal left turn with the notation "HBD", meaning "had been drinking." He and Campisi then went back into the store where Campisi asked him for money to take care of the officers. There was \$60 in McClure's wallet. Campisi took \$50. There were then five police officers in the store. McClure went behind a partition, telling Campisi that he didn't want to see to whom he gave the money. When he came out again, Campisi had gone but the officers were still there. Simin then asked if he wanted to take care of the patrolmen and McClure asked him, "Well, how about tomorrow?" Simin then said "When do you want to take care of me?" McClure replied, "How about Monday or Tuesday?" Simin said "O. K." and then helped himself to two boxes of shotgun shells which he had McClure put in a bag, saying that otherwise some one might think he had stolen them. Two other officers also took boxes of shotgun shells. The officers left and McClure went to the rear of his store. When he looked to the front again, Simin was approaching him. He told McClure that he could go to jail, be charged with drunk driving, probably lose his license for a year, and perhaps cost him \$1,000. He said McClure could make it easy on himself if he wanted to. When McClure asked him what the deal was, Simin asked him if it wasn't worth \$1,000 to avoid the publicity. McClure then took \$1,000 from the safe and gave it to Simin.

On the evening of November 17, 1954, Officer Morehead who had been one of the officers at the scene of the accident, came into McClure's store and asked him for money. McClure said there was no money after last night as the shakedown had been a little heavy, that all he had was his merchandise. He told Morehead that he had

given the sergeant \$1,000. The officer then looked around the store, took a skillet without paying for it, and had McClure put it in a box for him.

The following morning when McClure was in Campisi's bar, Simin came in, berated McClure for being a "blabber-mouth", saying that he had 21 years seniority on the Oakland Police force and was not going to have it jeopardized. He told him to keep his mouth shut or he would find himself in the estuary.

On November 20, McClure complained of these matters to the Oakland Chief of Police who sent Lieutenant Guidici and Inspector Lawrence to see him. They gave him a card with their names and telephone number and asked him not to discuss the fact that they had seen him. They commenced an investigation and on December 2, 1954, questioned Campisi. That same day Campisi told appellant Sagehorn about the investigation. On December 4, 1954, Officer Warren, who had been at McClure's store on the night of the accident was called from duty for questioning at about 6:00 p. m., returning to duty afterward.

On the evening of December 4, 1954, McClure went to the Here's How Tavern at Laverne and Foothill in Oakland between 8:00 and 9:00 p. m., parking his station wagon in front of the tavern. He had two bottles of beer, two sandwiches and two cups of coffee during the time he spent there. He talked to a Carol Bowers for about two and one-half hours during which time he drank nothing alcoholic. While there, he created no disturbance. When he left, Miss Bowers went with him to the car, and stood talking to him after he had got in behind the wheel. An officer in uniform came from across the street, opened the car door, and took McClure by the arm, saying that he was wanted.

Officer Beedle, who took McClure in to Eastern Station with him, was assigned to districts 55 and 56 which did not include the area where the Here's How Tavern was situated. At about 1:15 a. m. on the morning of December 5, Officer Beedle had reported in by radio, and a message was broadcast to him to call his lieutenant at once. He called in and was connected with

appellant. Appellant informed him that there was a man in a bar at Foothill and Laverne, about 55 years old, with grey hair, wearing brown pants and brown shirt, and that he had a green station wagon. Beedle was told to find this man and bring him into the station. After receiving these orders, Beedle went to the corner of Laverne and Foothill, parked across the street from the tavern, and waited till he saw a man answering the description, enter the station wagon.

When Beedle and McClure arrived at Eastern Police Station, Beedle showed McClure to appellant, asking if he was the man. Appellant said he was, and told Beedle to take him into the booking room. He did so, giving Officer Yothers, one of defendants, McClure's name, address, and where he had picked him up. He said that appellant would supply the other information.

McClure stated that the first thing said at the booking desk by one officer was "Here is your ringer". Officer Gaudinier, one of the defendants, said, "Oh, a fink." He was then searched. McClure attempted to tear up the card given to him by the investigators, Lieutenant Guidici and Inspector Lawrence, but it was snatched from him, and Gaudinier told him that he would break his arm if he destroyed it. Gaudinier handed the card to Yothers saying, "Well, he is the ringer all right." Gaudinier asked McClure how much money he had. He said about \$50. When they counted it and found he had \$50.15, they remarked on how smart he was, calling him a vulgar name. Gaudinier asked if Simin was around, and an unidentified voice replied that he had just left.

McClure was searched, placed in a cell and given a receipt for his property. He was taken in a patrol wagon to the jail at the City Hall. At about 8:00 a.m. he was released after putting up \$25 bail. Later, he appeared in court on the charge of "drunk in a public place", a violation of the Oakland Municipal Code, and the charge was dismissed. Shortly after McClure had been brought into Eastern Station, appellant left and did not return

until after McClure had been taken to the City Hall.

An arrest report by the Oakland Police Department is made up in a set of five, each in a different color. The white one is kept by the station in whose jurisdiction the arrest is made, the remaining copies are brought to the City Hall when the prisoner is brought in. It is customary to have all copies approved by the commanding officer of the station before leaving with the prisoner. The station copy in the present case contained appellant's signature, and the offense was described thereon as "Drunk and exposed to public view." The copies did not bear appellant's signature, and those copies contained the additional words "Creating a disturbance at the above address." The additional language made the bail for the offense \$25. The offense described on the original required bail of \$10. The addition was found to have been made on a typewriter at the City Hall which was located in the search room into which prisoners are brought from outlying stations. All officers on duty at the time at City Hall denied making the addition.

Appellant Sagehorn appeared as a witness before the Alameda County Grand Jury. At the trial he denied he had broadcast a message to Officer Beedle on December 5 and denied that he had had any telephone conversation with him concerning McClure. Before the grand jury he had stated that he had no recollection of any such radio message or telephone conversation.

[1] Appellant contends that the evidence was insufficient to support the verdict of guilty as to any of the counts of the indictment. As to the conspiracy count it is argued that there is nothing more in the record than a suspicion of guilt, and that since appellant's co-defendants Gaudinier and Yothers were acquitted, the jury did not believe that they participated in a conspiracy with appellant or with any other persons. Even if it be assumed that appellant described McClure to Beedle and had him brought in, he contends there is no showing that other persons had any direct

or tacit mutual understanding to accomplish such unlawful purpose.

[2-4] If the indictment had simply charged appellant and his two co-defendants with conspiracy to falsely and maliciously procure the arrest and imprisonment of McClure, the acquittal of the two co-defendants would have made appellant's conviction erroneous. However, the indictment herein charged also "other persons to the grand jury unknown." If there is evidence from which it can be inferred that persons other than the co-defendants conspired with appellant then the conviction may stand. *People v. McCollum*, 26 Cal.App.2d 89, 96, 78 P.2d 1030. Such agreement may consist of a tacit mutual understanding to commit a crime. *People v. Yeager*, 194 Cal. 452, 484, 229 P. 40. It may be proved by circumstantial evidence, and it is not necessary to show that the parties met and agreed to the performance of the unlawful acts, nor that they had a previously arranged plan. *People v. Steccone*, 36 Cal.2d 234, 237, 223 P.2d 17. Here there is evidence that appellant was a close friend of Campisi, that he was told by Campisi of the investigation in the police department initiated by McClure's report prior to the night of December 5, 1954. He was the person who ordered Officer Beedle to bring in McClure and described him in detail. There was Beedle's testimony that he had asked appellant if McClure was the man he wanted, and that appellant had ordered him booked. Although the co-defendants were acquitted of participation in the conspiracy, their conversation in which they abused McClure as a "ringer" and a "fink" shows knowledge on the part of police at that station that McClure was looked upon with contempt as an informer. Sergeant Simin, the officer who allegedly extorted the \$1,000 from McClure was in the station at about the same time, as Gaudinier asked for him while booking McClure, and was told he had just left. It is noteworthy that appellant who had not seen McClure earlier that night was able to describe his clothing to Beedle and name the tavern where he could be found. This fact shows activity in a plan which necessarily had to be car-

ried out by some one other than the appellant. There were several possible confederates. There was Campisi, Sergeant Simin who certainly had a motive, and who although not on duty was around the police station at about the time McClure was brought in. There were the other officers who had taken bribes at the time of McClure's accident. The changing of the arrest report at the City Hall, which could not have been done by appellant personally is further evidence of a conspiracy against McClure.

[5,6] As to the false imprisonment count, the evidence is sufficient to show that the arrest was without justification. Officer Beedle arrested McClure on the order of his superior. While the evidence is conflicting as to McClure's intoxication, there is substantial evidence that he was not intoxicated. In order to establish the offense of false imprisonment the people need only show the imprisonment, and the burden is on the defendant to prove justification and that the imprisonment was lawful. *People v. McGrew*, 77 Cal. 570, 571, 20 P. 92.

[7-9] Appellant claims that the record contains no proof of perjury and that furthermore there was no corroboration. Perjury is defined by section 118 of the Penal Code as the statement under oath "as true any material matter" which the witness "knows to be false". "Perjury must be proved by the testimony of two witnesses, or of one witness and corroborating circumstances." Penal Code, sec. 1103a. It is argued that even if Beedle's testimony is regarded as true, it does not support the charge of perjury, for perjury is not wilful where the oath is according to the belief and conviction of the witness. In *re Lindley*, 29 Cal.2d 709, 723, 177 P.2d 918. Any falsity in appellant's testimony would not lie in whether he did or did not do certain things on the night of December 5, but whether at the time that he testified before the Grand Jury he actually remembered those facts when he stated that he had no recollection of them. The corroborative circumstances must be considered "without the aid of the testimony which is to be corroborated"

and "it is not sufficient if it requires the interpretation and direction of such testimony in order to give it value." *People v. MacEwing*, 45 Cal.2d 218, 288 P.2d 257, 261. Furthermore, appellant says, there is no showing that the testimony alleged to be false was in any way material. Unless it could have influenced the Grand Jury upon a material issue, though false, it could not support a conviction for perjury. *People v. Ah Sing*, 95 Cal. 657, 30 P. 797; *People v. Brophy*, 49 Cal.App.2d 15, 24, 120 P.2d 946.

[10,11] If a matter falsely sworn to is connected in such manner with facts directly in issue that it would tend to prove or disprove such facts "by giving weight or probability to the testimony of a witness testifying thereto", it has been held to be a "material matter." *People v. Guasti*, 110 Cal.App.2d 456, 461, 243 P.2d 59, 62. Appellant testified directly that he did not talk to any one about bringing McClure into the police station. There was introduced in evidence the official record made in the regular course of duty at the police station showing that Beedle had received an order shortly before McClure's arrest to call his lieutenant, who was appellant. It is true that the message in itself "Call your lieutenant" proves nothing except that he was asked to talk to appellant. Corroborating circumstances may come from a defendant's own testimony when he testifies in his own behalf. As said in *People v. Todd*, 9 Cal.App.2d 237, 241, 49 P.2d 611, 613, "corroborative evidence need not be strong, nor even be sufficient in itself without the aid of other evidence to establish the fact. [Citations.] The circumstances legally sufficient to sustain a conviction may consist of the extrajudicial statements, declarations, admissions, or confessions of the accused [citations]; his silence in the face of accusatory statements [citations]; or, as stated, where he voluntarily becomes a witness in his own behalf, it may be gathered from his own testimony (*People v. Watson*, supra [21 Cal.App. 692, 132 P. 836]) or his conduct and attitude as a witness (*State v. Miller*, supra [24 W.Va. 802])."

[12] In his testimony before the Grand Jury appellant denied knowing anything about the investigation until *after* the arrest of McClure on December 5. He also said that the time he talked with Campisi in regard thereto was on the day that the investigating officers had talked to Campisi. That day was shown by the records of the stenographer for the police department to have been on December 2, 1954. Before the Grand Jury appellant had testified that he could not recall having given any order to Beedle to pick up McClure, that he did not know whether he had given such instruction or not. Shortly thereafter he testified that he wouldn't give such an order, for how would he know where the man was, that one never gives orders to go out and pick somebody up, that it can only be done with a warrant, that it was unbelievable, that even a rookie knows better. The jury was certainly justified in believing that if he had given an order which he claimed was so unusual, he would surely remember it; and if he had not given such an order at a time about two months earlier he could certainly say positively that he had not. In *People v. Guasti*, 110 Cal.App.2d 456, 243 P.2d 59, 61, a perjury case in which appellant was asked if a letter allegedly signed by him, had in fact been written by him, he answered, "I don't recall writing such a letter; no, sir." The court there said that the jury could believe that since it was something defendant himself had done he would not have forgotten it, and that because he knew he had written it, he wilfully and knowingly denied having done so. Appellant, herein, at the trial flatly denied having had a conversation with Officer Beedle over the telephone concerned with the description of McClure, and denied having talked with any person on the morning of December 5 in regard to the arrest of McClure. This was clearly testimony that at a much later date he had a distinct recollection of the events of that evening whereas his testimony before the Grand Jury was that he had no recollection. This inconsistent position on the part of appellant could be considered by the jury as a corroborating circumstance.

[13] There is no merit in the argument that assuming the truth of Beedle's testimony it does not contradict or make false appellant's testimony where he testified that he did not recollect having done or said the things that Beedle testified to. Even though appellant there phrased his answers as opinions, their effect was to discredit Beedle's testimony in a material matter. If a person wilfully swears falsely to a belief in the existence of a fact which he knows does not exist, he is guilty of perjury. *People v. Dixon*, 99 Cal.App.2d 94, 96, 221 P.2d 198.

[14] Appellant claims error was committed by the trial court in failing to instruct the jury that a conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense. Penal Code, sec. 1111. Whenever there is evidence that would justify the jury in concluding that a witness was an accomplice, it is error to fail to give the instruction. *People v. Buffum*, 40 Cal.2d 709, 724-725, 256 P.2d 317. Respondent points out that such an instruction was not requested, but the case cited above holds that in an appropriate case the jury must be instructed by the court on its own motion in regard to corroboration.

[15-19] Respondent simply states that Officer Beedle was not an accomplice, but a helpless vehicle used by appellant to realize his aim and cites *People v. Haley*, 102 Cal.App.2d 159, 227 P.2d 48, a case wherein it was held that the accomplice instruction was not erroneously refused where defendant was convicted of solicitation of perjury, and there was absolutely no evidence that the person whom she had solicited to give false testimony, had ever solicited any one to commit a crime. Since he could not be liable to prosecution for the identical offense, such an instruction had no place in the trial. As to the perjury count, clearly there was no evidence that Beedle was an accomplice of appellant. As to the conspiracy count there is no evidence pointed out by appellant that Beedle conspired with any one. Appellant says that it is incredible that a police officer of

Beedle's years of experience would innocently make an arrest contrary to section 836 of the Penal Code, and that the jury could just as well conclude that he participated knowingly in any offense which was committed. There is evidence that Beedle received an order from his superior to bring McClure in. There is no evidence that Beedle knew anything about McClure's activities in reference to the police prior to this night, or that he had any reason to question the order of a superior officer. If the lieutenant was believed, and the jury concluded that he did not give the order, then the inference would be that Beedle made the arrest on his own, and was attempting to lay the blame on the appellant. McClure's testimony was that Beedle had taken him directly in to the booking room where he was searched and booked by appellant's co-defendants. Beedle's testimony is somewhat inconsistent with this, for he claims to have taken McClure first to appellant's office asking him if he were the man he wanted brought in. It will be remembered that McClure knew appellant. It would seem that he would remember that incident as the first thing that happened in the station. This testimony may be said however, not to tend to prove that Beedle was an accomplice of appellant's, but rather that he was acting independently of appellant in making the arrest. An accomplice is one who knowingly, with common intent with the principal offender unites in the commission of the crime, and who must be liable for prosecution for the same offense. *People v. Frahm*, 107 Cal.App. 253, 290 P. 678. Appellant in his argument that the evidence was insufficient to support the conspiracy charge stated that there was no evidence "that appellant agreed or joined with any person or persons in any conduct on his part relating to McClure, and that at best no more than a mere suspicion of such an association can be raised." According to appellant's own appraisal of the evidence, there was nothing on which to base the accomplice instruction. It is urged that prejudicial error was committed in giving an instruction relating to counts one and two, which is Caljic instruction No. 26 relating to the duty of the jury to accept the construction pointing to defendant's

innocence where two reasonable constructions are possible; and where two constructions are possible, one reasonable and one unreasonable, the jury's duty is to reject the unreasonable construction. Furthermore, if the reasonable deduction points to defendant's guilt, the entire proof must carry the convincing force required by law to support a verdict. Respondent maintains that the court correctly limited the instruction to the first two counts and did not so instruct in regard to the perjury charge because the evidence supporting that charge was principally direct testimony, that given by Officer Beedle. In *People v. Simeone*, 26 Cal.2d 795, 807, 161 P.2d 369, 375, where such an instruction was refused altogether, it was argued that as to Counts I and II the instruction was applicable. The court held, however, that its refusal was not prejudicial error, "since the prosecution's case was based primarily on direct testimony of eyewitnesses and the circumstantial evidence was merely incidental and corroborative of the direct evidence." Since that is true in the present case in regard to the perjury count, no prejudice could have resulted. And, see, *People v. Monge*, 109 Cal.App. 2d 141, 144, 240 P.2d 432.

[20] The trial court instructed the jury on the usual limitations on prior inconsistent statements of a witness and then instructed that "if the witness was the defendant and if evidence of some prior or contradictory statement assertedly made by him has been received, such evidence may be considered in determining the truth or falsity of such statement as well as for the purpose of testing the credibility of the defendant as a witness, and along with all other evidence in determining his innocence or guilt." The instruction does not appear to be subject to the interpretation made by appellant, that it could mean to the jury that a prior inconsistent statement made by any one of defendants could be used for the purpose of establishing the truth of the matters referred to therein by any of the defendants. The instruction clearly states that when a contradictory statement has been "made by *him*", it may be considered in determining the truth or falsity of such statement and in making a determination

of that defendant's innocence or guilt. The instruction is not ambiguous.

It is claimed that although the jury was correctly instructed that an essential element of perjury is materiality, the trial court then instructed that "The question of materiality of the statements is one of law for the court to decide, and not a fact for the jury. I, therefore, instruct you, ladies and gentlemen, that as a matter of law, that the particular matters set forth in the third count of the indictment and alleged to be false were material to the investigation being conducted by the Grand jury at that time." He also instructed that when it was charged in one count that defendant made more than one perjured statement, it need be shown only that he made one of such statements, "provided that as to that one statement, the proof is adequate under the law and shows that every essential element of the crime of perjury, as I have defined those elements, was present in the making of such statements."

One of the excerpts of testimony which the court read to the jury from the appellant's testimony before the Grand Jury related to the telephone call which Beedle claimed had been made giving instructions for McClure's arrest. Appellant says in view of the instructions a conviction could have been had on the answer to the first question in this excerpt. "Q. You don't know any reason why Officer Beedle should lie about it, do you? A. No, I don't. I have no idea why." Prior to this appellant had given testimony that he could not recall having phoned instructions to Beedle. This inconsequential question was simply a part of the excerpts of testimony relating to the telephone call which was a very material matter. Whatever his answer to that question, it would be only an opinion of the witness, and would not meet the test of perjury under the other instructions given. The excerpt of testimony from which this question was extracted was from a series aimed at finding out whether or not the telephone call was made.

[21, 22] There was no error in instructing the jury as a matter of law that certain excerpts from the testimony before the grand jury were material. It is settled

that it is the exclusive right of the trial judge in a criminal action to determine the materiality of the alleged perjured testimony and to instruct the jury thereon. *People v. Macken*, 32 Cal.App.2d 31, 41, 89 P.2d 173; *People v. Brophy*, 49 Cal.App. 2d 15, 24, 120 P.2d 946; *People v. Lem You*, 97 Cal. 224, 32 P. 11. Appellant says the *Lem You* case and those following it are in error, but these authorities have not been overruled.

[23, 24] The court instructed that the testimony of the witnesses McClure and Beedle before the Grand Jury was read into evidence against the appellant and was admitted merely for the purpose of showing that such testimony had been given and was limited to that purpose, and was not admitted to prove that testimony anew. This instruction properly informed the jury of the limited purpose for which it was introduced. Furthermore since the jury was instructed by the trial court as to what parts of the Grand Jury testimony were material, those were the only portions that could be considered by it in its deliberations.

[25] It is charged that the trial court made numerous erroneous rulings in the admission and rejection of evidence. McClure was permitted to answer over objection a question as to whether he was familiar with the interior of Eastern Police Station. He answered that he had never been there before. This could not possibly have been prejudicial to appellant, and the claim that this question and answer counteracted the adverse effect of McClure's history of drinking by giving the impression that if he had not been in that police station he had never been previously arrested, is unfounded. Objection was sustained to questions relating to whether McClure had been an alcoholic in November, 1954, and whether within the six month period prior to the trial in May, 1955, he had been treated at a sanatorium for alcoholism. Appellant relies on *People v. Salladay*, 22 Cal. App. 552, 135 P. 508, but in that case the offer of proof was that the witness had been constantly drunk for sixteen days and was drunk on the evening in controversy. It is proper to prove that the witness was in-

toxicated at the time the events narrated occurred, *People v. Singh*, 19 Cal.App.2d 128, 129, 64 P.2d 1149, but it has been held not error to exclude testimony of intoxication of a witness when the question was asked as to his condition *on the day of the crime* was not directed to his condition at the time when the crime was committed. *People v. Acosta*, 21 Cal.App.2d 57, 65-66, 68 P.2d 298. Furthermore, appellant achieved his objective by introducing in evidence the fact that McClure had entered a sanatorium for alcoholism on November 22, 1954, and remained there for several days.

[26] Appellant contends that an objection should not have been sustained to a question asked Officer Beedle as to whether he had told any one of the Police Department, or any one else, that he had arrested McClure because he was drunk. The purpose, appellant says, was to show prior inconsistent statements. If that was the purpose, then he should have introduced the prior inconsistent statements as prescribed in Section 2052, Code of Civil Procedure. And, see, *People v. Ronsse*, 26 Cal.App. 100, 105, 146 P. 65.

[27] There is no merit in appellant's assertion that the appellant's oath before the Grand Jury was limited to February 4, 1954, the date of his first appearance before it. The oath prescribed by Section 2094 of the Code of Civil Procedure is "that the evidence you shall give in this issue (or matter), pending" shall be the truth. The original oath bound him for the duration of the proceeding, and he did not have to be sworn on succeeding days.

[28] Appellant asserts that it was prejudicially erroneous to permit the police stenographer to testify that he was present on December 2 when Campisi was questioned in regard to a matter involving McClure; that he was present on December 4 when Officer Warren was questioned regarding the same matter; and on December 6 and 7 when Shelton and Simin were interrogated. Two of these instances being after December 5, could have no bearing on a motive for the false arrest. The testimony was admitted over objection, and

the court admitted it subject to a motion to strike if the prosecution did not later show the connection. Appellant does not show that he ever made such a motion. A failure to move to strike is a waiver of the objection. *People v. Cucco*, 85 Cal.App.2d 448, 452, 193 P.2d 86.

[29] Appellant objected to the reading into evidence of McClure's and Beedle's testimony before the Grand Jury. As above noted, the court instructed that this testimony was not read to prove the facts therein, but only to show that such testimony had been given. It was necessary for the trial judge to have this testimony in the record in order that he could judge of the materiality of the statements in the indictment made by appellant.

[30-32] All of appellant's testimony before the Grand Jury was read into evidence over his motion to strike. A defendant's extra-judicial declarations are subject to the same restrictions as those of any other person, except admissions and confessions. This testimony, appellant argues, did not constitute an admission, and was extremely prejudicial because it contained statements of the District Attorney and Jury Foreman which showed antagonism toward appellant. The District Attorney said at one point "You are even more involved in what happened the 4th of December then you are the night of the 16th of November so far as we know. May be you are more involved than we know about." And again appellant was accused of not cooperating with the District Attorney. Respondent maintains that since the entire conduct of the accused may be looked to, his extremely evasive testimony before the Grand Jury could be introduced as evidence of corroborative circumstances. The statements of the District Attorney and Grand Jury Foreman were not evidence of appellant's conduct, and the jury could not be permitted to so consider them. Appellant made a motion to strike the testimony as a whole. But there is no showing that he made any specific objections to the portions now pointed out as prejudicial. Such a specific objection was essential because a general objection was not good. Furthermore, the jury was properly instructed to the effect

that statement of counsel are not evidence and are to be disregarded by them. We find no prejudicial error here.

[33] The question was asked of defendant Yothers: "Well, did Officer Gaudinier say anything to you when—as he came back to the booking room?" Yothers replied: "The first time—first time I noticed Gaudinier, he came out, and he says, 'The Lieutenant told me to come out here and stay right with you and help book this man'". The testimony was clearly inadmissible as to appellant, and was hearsay as to him. However considering the entire testimony in the record this error was not prejudicial and there was no miscarriage of justice. Art. VI, Sec. 4½, State Const.

It is our view that no prejudicial error appears in the record before us and that appellant had a fair and impartial trial.

Judgment and order denying a new trial affirmed.

NOURSE, P. J., and DOOLING, J.,
concur.



139 Cal.App.2d 859

The CITY OF LOS ANGELES, a Municipal Corporation, and the Department of Water and Power of the City of Los Angeles,
Plaintiffs and Appellants,

v.

Thomas M. FREW, Jr., Clara G. Frew, Frank Lombardi, also known as Frank S. Lombardi, Marie A. Lombardi, Julio Lombardi, also known as Jullo J. Lombardi and Ida C. Lombardi, Defendants and Respondents.

Civ. 4950.

District Court of Appeal. Fourth District,
California.

March 16, 1956.

Rehearing Denied April 12, 1956.

Hearing Denied May 9, 1956.

Action to condemn right of way over farm land for electrical transmission line. The Superior Court of Kern County, Gordon L. Howden, J., entered a judgment from which the condemnors appealed. The District Court of Appeal, Mussell, J., held,

inter alia, that since damages awarded were substantially lower than amounts testified to by defendants' witnesses, damages could not be held excessive.

Judgment affirmed.

1. Eminent Domain $\S$ 262(5)

In condemnation proceeding to acquire right of way for electrical transmission line, court committed no prejudicial error in permitting defendants' witnesses to testify that cost of installing irrigation system would be increased after taking where trial court permitted such testimony only as to fact of increased cost but not as to specific amounts thereof and permitted it not to prove amount of cost separately but only as element of severance damage.

2. Eminent Domain $\S$ 262(5)

In proceeding for condemnation of right of way for electrical transmission line over farm land, court committed no prejudicial error in permitting a defense witness to testify that cost of leveling land would be increased after taking.

3. Eminent Domain $\S$ 262(5)

In proceeding to condemn right of way over farm land for electrical transmission line, court committed no prejudicial error in permitting a defendant landowner to testify as to cost of installing well on property approximately three years before agreed date of valuation, where only objection interposed was to any testimony as to improvements on property after that date.

4. Evidence $\S$ 498½

Trial court is judge of qualifications of witnesses to testify to land values.

5. Evidence $\S$ 546

In condemnation proceeding for right of way for electrical transmission line over farm lands, there was no abuse of discretion in trial court's permitting real estate broker who had sold some 3,000 acres to different persons in area and farmer who farmed adjacent land to testify as to land values and as to damages which would result from condemnation.

6. Evidence $\S$ 546

In condemnation proceeding for right of way for electrical transmission line

over farm lands, there was no abuse of discretion in permitting concrete irrigation pipe manufacturer to testify that cost of irrigation system would be more with easement than without it.

7. Eminent Domain $\S$ 203(1)

In proceeding to condemn right of way over farm land it was permissible for jury, in assessing damages, to consider increase in cost in installation of irrigation system with easement over cost without it.

8. Evidence $\S$ 474(18, 20)

In proceeding for condemnation of right of way for electrical transmission line over farm land, it was proper for court to admit testimony as testimony of farmers who owned property in vicinity and who were familiar with section over which right of way was condemned to give their opinions as to market value and severance damages.

9. Evidence $\S$ 474(18)

In proceeding for condemnation of right of way for electrical transmission line over farm land, it was proper to permit owners of property involved who had extensive experience in farming to express their opinions as to value of property.

10. Evidence $\S$ 546

In proceeding for condemnation of right of way for electrical transmission lines, there was no abuse of discretion in permitting qualified appraiser who had been previously employed by condemner to testify for landowners as to market value and severance damages.

11. Eminent Domain $\S$ 262(5)

In condemnation proceeding, court committed no prejudicial error in refusing to limit number of witnesses testifying. West's Ann.Code Civ.Proc. $\S$ 1871.

12. Trial $\S$ 57

Witnesses $\S$ 225

Trial court may confine examination of witnesses to reasonable limits and may limit number of witnesses testifying concerning a fact. West's Ann.Code Civ.Proc. $\S$ 1871.

13. Eminent Domain $\S$ 246(2)

In condemnation proceeding, court committed no abuse of discretion in denying condemners' motion to amend complaint to abandon portion of right of way sought

to be acquired by modifying terms of easement, where such motion was made on sixth day of trial during examination of defendants' last witness.

14. Pleading ⚡236(3)

Amendments should be liberally allowed so that all issues may be properly presented, but question of whether filing of amended pleading should be allowed at time of trial is ordinarily committed to sound discretion of trial court.

15. Evidence ⚡142(1)

Evidence of prices paid in comparable sales was inadmissible in condemnation proceeding.

16. Trial ⚡217, 250

It is sufficient if court gives instructions which give well balanced statement of essential legal principles to guide jury in its deliberations, and merely because instruction may be said to be applicable to case from viewpoint of party offering it, court by reason thereof, is not required to give it.

17. Trial ⚡229, 244(1, 2)

Instructions should not draw jury's attention to particular facts, and it is error to give and proper to refuse instructions that unduly overemphasize issues, theories or defenses either by repetition or by singling them out or making them unduly prominent although such an instruction might be a legal proposition.

18. Appeal and Error ⚡1004(1)

Eminent Domain ⚡262(4)

Damages, to be excessive so as to require reversal of judgment, must be so disproportionate to reasonable compensation for money loss sustained by plaintiffs as to be explicable only on ground that passion or prejudice was allowed to play a strong part in rendition of verdicts, and only means of discovering existence of passion or prejudice as influencing verdict is by comparing amount of verdict with evidence before court, and where damages awarded in condemnation proceeding were substantially lower than amount of damages testified to by defendants' witnesses, damages could not be deemed excessive.

19. Appeal and Error ⚡218(1)

Any defect in verdict was waived by parties complaining thereof by their failure to raise any objection until opening brief.

20. Trial ⚡345

When verdict is not in proper form and jury is not required to clarify it, any error in verdict is waived by party relying thereon who at time of its rendition fails to make request that its informality or uncertainty be corrected.

Roger Arnebergh, City Atty., Gilmore Tillman, Chief Asst. City Atty., and Russell B. Jarvis, Asst. City Atty., Los Angeles, for appellants.

A. V. Falcone, Los Angeles, for respondents.

MUSSELL, Justice.

This is a proceeding in condemnation in which the appellants, City of Los Angeles and Department of Water and Power of said city, obtained an interlocutory judgment condemning a right of way easement for electrical transmission lines through a section of farm land in Kern county, owned by the defendants. The land sought to be condemned is described in the complaint as parcel 88 and is 250 feet wide and 6,032.29 feet long. It extends diagonally through section 32, township 10 north, range 13 west, S.B.B. & M., crossing the northerly line of section 32 about 900 feet westerly of the northeast corner thereof and angles southwesterly until it crosses the south line of the section about 1300 feet easterly of the southwest corner. The appellants took immediate possession by ex parte order and constructed its first line of 6 towers and a permanent hardpack road along the entire right of way. The towers vary in height from 76 to 91 feet and the sides of their bases vary from 27 feet 2½ inches to 31 feet 10¾ inches. The towers rest on cement legs or foundations 20 inches in diameter, placed in the ground from 9 to 9½ feet deep. The easement provides for a second line of towers, to be "staggered" in relation to the first line. The first line of towers and the present 15 foot road occupy 115 to 120 feet of the

easterly one-half of the 250 foot right of way. The right of way divides section 32 so that the original 640 acres are severed as follows: 34.62 acres in the right of way, 285.03 acres to the east, and 320.35 acres to the west of the right of way. The easement expressly includes all secondary easements "in, under, over and across" the right of way and these include underground wires or "dissipators" which will be installed 3 feet below the ground and fan out on the right of way.

A jury ascertained and assessed the value of the easement and rights of way sought to be condemned to be the sum of \$4,673.70 and the severance damages to be \$22,171.96, a total of \$26,845.66. Plaintiffs appeal from the judgment entered in accordance with the verdict and contend that the damages are excessive; that the trial court committed prejudicial error in overruling appellants' objections and denying their motions to strike; that the verdict was defective; that improper evidence was received; that the court erred in denying appellants the right to abandon a portion of the easement sought to be acquired; that the court erred in limiting the testimony of appellants' witnesses, and in refusing to give certain offered instructions.

It was conceded that the highest and best use of the land in section 32 was for potential agricultural use and twelve witnesses testified in the nine-day trial relative to the issue of damages. Witnesses for the defendants testified that the value of the entire section before taking was from \$96,000 to \$128,000 and after taking from \$57,375 to \$61,251.40. They valued the right of way from \$4,680 to \$6,231, the severance damages from \$33,945 to \$60,538, and the total damages from \$38,625 to \$66,769.70. Two experts testified for plaintiffs that the right of way value was from \$1,675 to \$1,800, and that there were no severance damages.

George Hummel, called as a witness in behalf of defendants, testified that he was and had been a real estate broker for 15 years; that he was familiar with the Frew and Lombardi ranches in sections 32 and 31; that the defendants owned all of sec-

tion 32 and the east one-half of section 31 adjoining it; that Frew and the Lombardis bought the property in 1949; that he was familiar with section 32; that the soil was good and that substantial water production was established on said section in 1949; that he had sold some 3,000 acres to different persons in the area and, based on his experience as a real estate broker and in participating in sales of property in the area, his opinion was that the market value of the land on February 3, 1950 (the date agreed upon by the parties as the date of valuation) was \$200 per acre; that the market value of the remainder of section 32 was reduced by 50 per cent by the taking of the right of way and easement; that his \$200 valuation was based upon evidence that water had been found in commercial quantities and the land was in position to be developed for agricultural purposes; that it was especially good for the growing of row crops, such as potatoes, onions, cotton and alfalfa seed; that the remaining land in the section would be worth only 50 per cent with the right of way through it by reason of the added difficulty and additional labor in irrigating and cultivating crops thereon.

Paul Adler testified that he was a farmer and owned 320 acres adjoining section 32; that he was familiar with section 32 and had made inquiries as to the relative values of sales of neighboring properties in 1949 and 1950; that the right of way, 250 feet by 6,032.29 feet, extending diagonally across section 32, with the towers, a permanent road for vehicular travel, and the installation of underground wires for lighting purposes which go from each tower, north, south, east and west and practically to the outskirts of the 250 foot right of way, would constitute a barrier to normal farming of section 32, making it difficult to cultivate because of the varying length of furrows; that it would be extremely expensive to install an irrigation system on the east portion of the property; that it would be more difficult to operate farm machinery on the property; that the fair market value of section 32 on February 3, 1950, with the well on it, was about \$200 per acre and that the market value of the re-

maining land after the taking would be reduced by fifty per cent.

Frank Rattman, an experienced well driller, testified that he drilled a water well on the northwest quarter of section 32 in 1949 and that the section was one of the best water areas he had found in that locality.

Earl W. McGowan, a concrete irrigation pipe manufacturer and installer, testified that he was familiar with section 32 and installed an irrigation system for row crops on section 31, which the Lombardis and Frew were farming; that he was employed by the defendants, Lombardis and Frew, to inspect section 32 and compute the cost of installation of an irrigation system thereon with and without the power line and right of way. The trial court sustained an objection to testimony as to the specific cost but permitted McGowan to testify that it would definitely cost more to install the system with the power line, the road and the right of way across the property.

Virgil Alleso, a land leveler and farmer in Antelope Valley, testified that he was employed by the defendants to make an estimate on section 32 on leveling and grading and that it would cost more to do the leveling and grading on the property after the power line was put in and the right of way was taken.

Albert Icardo, owner and farmer of 900 acres, farmed with row crops, in the Palm-dale area, testified that he was familiar with section 32 in February, 1950, and purchased some land in that area; that he inspected the general area and learned the value of different ranches and the prices asked by prospective sellers; that the fair market value of section 32 on February 3, 1950, with the well on it, was around \$200 an acre; that after the right of way went in, the value of the remaining land was reduced to \$100 per acre because of the trouble in irrigating, cultivating and plowing.

Walter Parks, a farmer for 15 years, who owned and farmed 520 acres in the Willow Springs area close to section 32,

testified that before he purchased his property, about three years prior to the time of the trial, he inspected the area and obtained information as to the value of land. After the easement and right of way was described to Parks, he stated that the value of the land on February 3, 1950, with the well, was \$200 per acre and with the easement he "would hate to have to buy that land for \$100 an acre"; that they had a right of way through their property running on an angle and that "there is a lot of labor involved that shouldn't be."

Thomas M. Frew, Jr., testified that he had experience in installing commercial irrigation systems and started farming in 1949; that he acquired sections 32 and 31 with the Lombardi brothers; that since acquiring the property they have farmed section 31 and made some improvements on section 32; that he was familiar with the surrounding farms and ranches and that the fair market value of section 32 on February 3, 1950, was \$200 per acre, with the well on it; that the 34.62 acres in the right of way for a permanent easement was worth 90 per cent of \$200 per acre; that the damage to the remaining property was \$100 per acre. He based this statement on the inability to farm the land and control the water, the extra time needed to farm and the necessity for extra pipe lines by reason of the easement.

Julio Lombardi, part owner of section 32 and a farmer for many years, testified that when they brought the well in on section 32 the land was worth \$200 per acre; that the fair market value of the easement was 90 per cent of \$200, multiplied by 34.62 (the number of acres taken); that the remaining portion of section 32 would be damaged fifty per cent by the easement; that with the easement, the leveling cost would be greater; that the remaining land could not be farmed with "good efficiency, only at an angle"; that the pipe lines would have to be higher; that the irrigation problem would be increased and the expense thereof would be twice as much; that a lot of land would be lost by reason of the limitation on turning the farm equipment to keep it off the right of way.

Joseph Gallagher, Sr., a real estate broker, appraiser and right of way specialist for many years, testified on behalf of defendants that he was employed by them for the purpose of making an appraisal of the market value of section 32, the value of the easement, and the severance damages; that he inspected geological maps of the area and personally inspected the property on several occasions; that he secured information from many farmers and others in the area; that he considered that the highest, best and most profitable use the land was adapted to was progressive farming, such as was conducted on section 31; that the land was adaptable for the raising of various types of row crops; that the market value of the easement was 90 per cent of the fee value. He fixed the value of the easement at \$4,680 and testified that in his opinion the severance damages was \$33,945. He further testified that the soil on the Lombardi-Frew property was good and was easily cultivated; that the supply of water was excellent and that there were good returns from crops planted in the area; that there was a strong buyers' interest in the district as indicated by the number of purchases; that he talked to many people in the vicinity relative to the capability and market value of the land, the cost of preparing and installing a complete irrigation system and clearing and leveling the land; that the information he obtained and the investigation he made furnished the basis for his opinion as to valuation; that he estimated the value of the land in section 32 at \$150 per acre before the taking; that the utility of the land remaining has been interfered with by the easement; that the leveling and irrigation costs will be increased; that the cost for dusting the crops will be increased; that approximately 55 acres have been lost for farming operations by reason of the distance required to turn heavy equipment when the farmers work in the field; that the rows will be pointed and shortened and there will be trouble in controlling the water flow which will require additional labor and man power on the land itself to take care of the water flow along and through the short rows in comparison with longer rows; that there

will be heavy and serious objection on the part of prospective purchasers of the land by reason of the existence of the transmission line across it in a diagonal direction.

Cloice D. Carll, whose business had been real estate appraisals for 25 years and who was called as a witness in behalf of plaintiffs, testified that he had appraised many properties, including rights of way for steel transmission lines; that he had been on section 32 about 17 times and that the soil is all good agricultural soil; that a sales map was prepared, market data was gathered, and there were many interviews in confirmation of sales of property in the area; that in his opinion the fair market value of the right of way and easement on section 32 as of February 3, 1950, was \$1,675, and that there were no damages to the remaining land by reason of the taking of the right of way and the easement.

Thomas P. Mason, realtor and appraiser, testified in behalf of plaintiffs that he had appraised many rights of way, including those for construction of transmission lines; that from his investigations and studies of section 32 it was his opinion that the highest and best use of the section was potential agricultural use; that the easement rights sought in this case as of the date of valuation were \$1,800; that in his opinion the remaining land would sell for just as much after the right of way as it did before, and that there was no severance damage.

[1-3] Appellants first contend that it was prejudicial error for the court to permit Mr. McGowan and Mr. Adler to testify that the cost of installing the irrigation system on the land would be increased after the taking; permitting Mr. Adler to testify that the cost of leveling the land would be increased after the taking; and permitting Mr. Frew to testify as to the cost of the well on the property. We find no prejudicial error in the rulings of the trial court in admitting the questioned testimony.

In *San Bernardino & E. Ry. Co. v. Haven*, 94 Cal. 489, 493, 29 P. 875, it was held that the increased cost of irrigating uncultivated land which is shown to be adapted for cultivation, and to require irrigation,

which would be caused by the building of a railroad through the land involved, is a legitimate subject of inquiry for the purpose of ascertaining the damage sustained by the owner. The same rule is applicable to admission of evidence as to increase in the cost of leveling such land.

In *Colusa & Hamilton R. R. Co. v. Leonard*, 176 Cal. 109, 119, 167 P. 878, 881, the court said:

"In the case of *Colusa & H. R. R. Co. v. Glenn*, reported in 25 Cal.App. 634, 144 P. 993, the rule for computing damages was stated as given in *Blunck v. Chicago & N. W. Ry. Co.*, 142 Iowa 146, 120 N.W. 737, as follows: 'The real question in such cases being how much has the market value of the property been diminished by taking the right of way therefrom, it is manifest that in determining and fixing such damages all matters and conditions which may reasonably be expected to follow the location and operation of the road and affect the value of the land should be considered.'"

The record shows that the trial court permitted testimony as to the fact of such increased costs but not the specific amounts thereof and that such evidence was permitted not to prove the fact or amount of said costs separately but only as elements of severance damage. The record shows that Frew testified that the total cost of the well on the property, the pump and the drilling was \$22,000 and the only objection made by appellants to this testimony was the general objection to any testimony as to any improvement on the property after February 3, 1950. Frew testified that the well was drilled in the summer of 1949 and there was no prejudicial error in admitting the testimony under the circumstances shown.

Appellants next contend that it was prejudicial error for the court to allow witnesses Hummel, Adler, Icardo, Parks, Frew, Lombardi and Gallagher to testify on value and damages as they were unqualified to give opinion evidence, or they did not understand the terms of the rights sought to be taken and the rights remaining in the

owners. We are not in accord with these contentions.

In *People v. La Macchia*, 41 Cal.2d 738, 746, 264 P.2d 15, 21, the court said:

"All that is necessary to be shown to entitle a witness to give an opinion is to show 'that he has some peculiar means of forming an intelligent and correct judgment as to the value of the property in question * * * beyond what is presumed to be possessed by men generally.'" ⁴ *Spring Valley Water-Works v. Drinkhouse*, 92 Cal. 528, 534, 28 P. 681, 683. The usual expert is qualified by showing his familiarity with the property and with other property in the neighborhood, his experience in the business, his familiarity with the state of the market and of sales of similar property in the vicinity. *Estate of Ross*, supra, 171 Cal. [64] at pages 66-67, 151 P. [1138] at page 1139. A property owner, on the other hand, is generally considered competent to estimate the value of his property upon a showing that he has resided thereon for a number of years. *Long Beach City High School Dist. v. Stewart*, supra, 30 Cal. 2d [763] at page 772, 185 P.2d [585] at page 590 [173 A.L.R. 249]; *Spring Valley Water-Works v. Drinkhouse*, supra, 92 Cal. at page 534, 28 P. at page 683."

In *Los Angeles City High School Dist. v. Rodriguez*, 135 Cal.App.2d 760, 287 P.2d 871, 875 (hearing denied by the Supreme Court), it is said that the right of an owner to testify as to the value of his property is so well established as to call for but a token citation of authority; that the court has rather broad discretion in ruling upon the sufficiency of a qualification of a witness to express an opinion as to value; that one does not have to be a so-called expert to be competent to express an opinion as to the value of real property, nor is it necessary that he be engaged in business as a broker or professional appraiser; that it is sufficient that the witness have some peculiar means of forming an intelligent judgment beyond that which is presumed to be possessed by men generally; that

owners of land in the vicinity familiar with the property in question are competent witnesses and that owners of land in the vicinity, familiar with the character of the land in question frequently have a better idea of land values than strangers who are engaged in the business of selling land. The rule is there stated, quoting from *City of Stockton v. Ellingwood*, 96 Cal.App. 708, 716, 275 P. 228:

"If a witness, by reason of his skill, learning or technical training, understands the adaptability of the lands in question for a particular purpose, and the demand for land for such purpose, he may state the market value of the land, although he may be entirely unacquainted with the other elements which would be considered by different buyers competing for the same property. On the other hand, if the witness has knowledge of the market value of the lands, even though he possesses no technical skill, training, or ability, he may state the market value. The different elements considered by the witnesses in giving their opinions as to market value may be inquired into upon cross-examination, and if, upon such cross-examination, it appears to the court that the witnesses' testimony is based upon improper considerations, or upon what is usually termed as speculative only, it should be stricken from the record or withdrawn from the consideration of the court or the jury."

In *Long Beach City H. S. Dist. v. Stewart*, 30 Cal.2d 763, 772, 185 P.2d 585, 590, 173 A.L.R. 249, it was held that "Appellant, by virtue of ownership and residence on his property for a number of years, qualified as a person entitled to express an opinion as to its value."

In *Bagdasarian v. Gragnon*, 31 Cal.2d 744, 754, 192 P.2d 935, the court held that there was no merit in appellant's contention that the farmers, farm appraisers and real estate brokers who gave expert testimony for respondents on the subject of value were not properly qualified where all of them were shown to be familiar with

the value of farming land in the community, and, although some of them did not see the farm in 1944, there was evidence that it was then in substantially the same condition as at the time the appraisals were made.

[4] The trial court is the judge of the qualifications of the witness to testify as to land values. *Redwood City Elementary School Dist. v. Gregoire*, 128 Cal.App.2d 766, 770, 276 P.2d 78. The court held in that case 128 Cal.App.2d at page 769, 276 P.2d at page 80, that:

"It is well settled in this state that fair market value is to be arrived at by considering all the purposes for which the property is adaptable. In the recent case of *People v. La Macchia*, 41 Cal.2d 738, 751, 264 P.2d 15, 24, it was said: 'This court "has definitely aligned itself with the great majority of the courts in holding that damages must be measured by the market value of the land at the time it was taken, that the test is not the value for a special purpose, but the fair market value of the land in view of all the purposes to which it is naturally adapted * * *"' And, see, *Sacramento Southern R. Co. v. Heilbron*, 156 Cal. 408, 412, 104 P. 979; *City of Los Angeles v. Cole*, 28 Cal.2d 509, 518, 170 P.2d 928; *Orgel on Valuation Under Eminent Domain*, § 30, pp. 98-102."

In *Wells Truckways, Ltd. v. Cebrian*, 122 Cal.App.2d 666, 677, 265 P.2d 557, 564, this court held:

"The qualification of a witness to testify as an expert is a matter within the sound discretion of the trial court, and where there is no showing of a clear abuse of that discretion, the ruling of that court will not be disturbed on appeal. Where the witness has disclosed a sufficient knowledge of the subject to entitle his opinion to go to the jury the question of the degree of his knowledge goes more to the weight of the evidence than its admissibility. *People v. Haussler*, 41 Cal.2d [252], 260 P.2d 8; *Pitt v. Southern Pac. Co.*,

121 Cal.App. 228, 236, 9 P.2d 273;

10 Cal.Jur. 963, sec. 220."

[5-10] In the instant case the record shows that the provisions of the easement were read to each of the seven witnesses named in appellants' first contention, with additional explanation, and there is no evidence that the witnesses did not understand the terms of the rights shown to be taken. The record also shows that Hummel testified, without objection, that the reasonable value of section 32, with the development of water, was \$200 per acre. He was a real estate broker, familiar with the property and had sold some 3,000 acres to different persons in the area. He knew that substantial water production was established in 1949 and that the land was in a position to be developed for agricultural purposes and that it was especially adapted for the growing of row crops. Adler, who was a farmer and owned 300 acres adjoining section 32, was likewise familiar with the section and had made inquiries as to relative values and sales of neighboring properties in 1949 and 1950. He was qualified to express his opinion that the easement would add to the difficulty of farming the remaining portion of section 32. There was no abuse of discretion shown in the trial court's ruling permitting both he and Hummel to testify as to value and damages under the rules stated in the decisions heretofore cited herein. McGowan did not testify as to market value or severance damages. His testimony was in substance that the cost of installation of an irrigation system would be more with the easement than without it, a fact permissible for the jury to consider in assessing the damages. Icardo and Parks are both farmers and owners of property in the vicinity of section 32 and were familiar with this section and as such, were entitled to state their opinions as to market value and severance damages under the rules herein announced. Frew and Lombardi, owners of the property involved, each had extensive experience in farming and were competent to express their opinions as to the value of their property. Los Angeles City High School Dist. v. Rodriguez, supra. The

witness Gallagher qualified as an expert appraiser and right of way specialist and in fact had been previously employed by the plaintiff Department of Water and Power to acquire rights of way for it. He made an extensive investigation and study of the area involved. The reasons he gave for his opinions as to market value and severance damages are supported by his investigations and information.

[11,12] Appellants' contention that it was prejudicial error for the court to refuse to limit the number of witnesses is without merit. The trial court may confine the examination of witnesses to reasonable limits and may limit the number of witnesses who may testify concerning a fact. (27 Cal.Jur. 62-63.) It may also limit the number of expert witnesses called by either party. Code Civ.Proc., sec. 1871. We find no prejudicial error in this connection.

[13,14] It is next contended that it was prejudicial error for the court to deny appellants' right to abandon a portion of the right sought to be acquired by modifying the terms of the easement. On the sixth day of the trial, during the examination of defendants' last witness, the appellants offered an amendment to paragraph five of their complaint, changing the allegation that public interest and necessity required the taking by plaintiffs of the right to construct and maintain roads to read "to construct and maintain one roadway" and plaintiffs also proposed by amendment to provide for certain exceptions and reservations of rights to the owners. Counsel for appellants stated that it had been their endeavor in drafting and preparing the proposed amendment to "merely clarify the position they had taken from the first witness on through * * * in the last analysis, if it states any reservation of any right to the owners which they do not have as a matter of law under the complaint as filed, it would then in a sense constitute a partial abandonment * * * very minor, not substantial, certainly in our minds." The record does not disclose that appellants filed or offered to file a written notice of abandonment or dismissal or abandonment of any of the proceedings.

The trial court observed that had the motion been made at the outset the situation would have been entirely different than at the time it was made; that it was then the beginning of the sixth day of the trial; that all the land owners' witnesses had testified with the exception of the last witness whose testimony had not been completed; that if the amendment was permitted, the experts who would follow for the contending agency would, in effect, be testifying to a different easement than had been testified to by the witnesses for the land owners; that because of the point they had reached in the case then, it would confuse the previous testimony by changing the description of the easement. While amendments should be liberally allowed so that all of the issues may be properly presented, the question of whether the filing of an amended pleading should be allowed at the time of trial is ordinarily committed to the sound discretion of the trial court. *Moss Estate Co. v. Adler*, 41 Cal.2d 581, 585, 261 P.2d 732. In the instant case, under the circumstances, there was no abuse of discretion shown.

[15] Appellants next argue that it was error for the court to limit appellants' expert witnesses on value and damages in their direct testimony and the giving as their reasons comparable sales as a basis for their values. This contention is not supported by the record. The direct examination of plaintiffs' expert witness Carll occupies over 100 pages in the transcript and that of expert Mason some 29 pages. Carll testified as to his preparation for the formation of his opinion and that such preparation included the study of a comparable sales map. The court properly ruled that the witnesses could not testify as to the prices paid in comparable sales. *People v. La Macchia*, supra, 41 Cal.2d 748, 264 P.2d 15. It appears that both Carll and Mason were allowed full scope under direct examination including the consideration of comparable sales although after one day of direct examination, appellants were not permitted to go into every detail of the many sales.

[16, 17] It is next contended that it was error for the court to refuse to give

certain instructions requested by appellants. Many of the offered instructions were refused on the ground that they were covered by other instructions and it appears from the instructions actually given that the court clearly, fairly and fully instructed the jury on all the essentials of the case and that no prejudice to plaintiffs resulted from the failure to elaborate in many details as to the law applicable. It is not the rule that merely because an instruction may be said to be applicable to the case from the viewpoint of the party offering it, that the court by reason thereof is required to give it. It is sufficient if the court gives instructions which give the jury a well balanced statement of the essential legal principles which are to guide them in their deliberations. *Chandler v. Benafel*, 3 Cal. App.2d 368, 371, 39 P.2d 890. If the subject matter is properly covered and the law applicable to the case fully and fairly given, that is sufficient, and as is said in *Dodge v. San Diego Electric Ry. Co.*, 92 Cal.App.2d 759, 764, 208 P.2d 37, 40:

"Instructions should not draw the jury's attention to particular facts. It is error to give and proper to refuse an instruction that unduly overemphasizes issues, theories or defenses either by repetition or by singling them out or making them unduly prominent although the instruction may be a legal proposition. *Chutuk v. Southern Counties Gas Co.*, 21 Cal.2d 372, 132 P.2d 193; *McNally v. Casner*, 128 Cal. App. 680, 18 P.2d 94; *Robertson v. Brown*, 37 Cal.App.2d 189, 99 P.2d 288."

[18] Appellants further argue that the damages are excessive. However, as conceded by them, in order to be excessive the amount must be so disproportionate to reasonable compensation for the monetary loss sustained by plaintiffs as to be explicable only on the ground that passion or prejudice was allowed to play a strong part in the rendition of the verdict and that the only means of discovering the existence of passion or prejudice as influencing the verdict is by comparing the amount of the verdict with the evidence before the court. *Burke v. City and County of San Francisco*,

111 Cal.App.2d 314, 322, 244 P.2d 708. In the instant case the verdict was substantially lower than the amount of damage testified to by the defendants' witnesses and the record does not disclose that passion or prejudice played a strong part in the verdict of the jury.

[19,20] Finally, it is argued that the verdict is defective as only seven jurors agreed upon it. The record shows that the verdicts provided for two separate items of damages, as first returned, (1) The value of the easement and right of way in the sum of \$4,763.70, and (2) Severance damages of \$22,171.96, a total of \$26,845.60. When the jury was polled, five of the jurors stated that was not their verdict. The trial court then remarked that perhaps there was a mistake in polling both verdicts at the same time and proceeded to poll the jury on the separate items thereof. The jurors then stated that the verdict for \$4,763.70 was the value of the easement and right of way and when polled as to the second verdict, approved it, assessing the severance damages as \$22,171.96, nine in favor of this amount and three not in favor of it. It thus appears that the required number of jurors agreed on the sums assessed, both for the easement taken and severance damages and no prejudicial error appears. Furthermore, if there was a defect in the verdict, it was waived by appellants' failure to raise any objection to it until filing their opening brief. As is said in *Brown v. Regan*, 10 Cal.2d 519, 523, 75 P.2d 1063, 1066:

"It is well established by numerous authorities that, when a verdict is not in proper form and the jury is not required to clarify it, any error in said verdict is waived by the party relying thereon who at the time of its rendition failed to make any request that its informality or uncertainty be corrected." (Citations.)

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

139 Cal.App.2d 880

SUTTER PACKING COMPANY, a Corporation, Plaintiff and Appellant,
v.

STATE BOARD OF EQUALIZATION of the State of California, et al., Defendants and Respondents.
Civ. 16609.

District Court of Appeal, First District,
Division 2, California.
March 19, 1956.

Hearing Denied May 15, 1956.

'Action by taxpayer for refund of sales tax. The Superior Court, City and County of San Francisco, Albert C. Wollenberg, J., entered judgment adverse to taxpayer, and taxpayer appealed. The District Court of Appeal, Kaufman, J., held that, where canning company, incidental to its food processing business which was exempt from sales tax, made several retail sales of supplies and equipment in some three and one-half year period prior to effective date of cancellation of its seller's permit, final sale of supplies and equipment after such cancellation but pursuant to negotiations commenced prior to cancellation was subject to sales tax in that company was then a retailer and in that final sale required permit as one of a series of retail sales, notwithstanding that final sale was in liquidation of company's business.

Judgment affirmed.

1. Licenses ⇐28

If sale is a retail sale covered by statute pertaining to sales tax, seller is liable for the tax regardless of whether he holds a seller's permit. Revenue and Taxation Code, §§ 6015, 6066.

2. Courts ⇐97(6)

Views expressed by federal courts in cases involving state taxes would not be controlling in state courts.

3. Licenses ⇐15.1(8)

Where canning company, incidental to its food processing business which was exempt from sales tax, made several retail sales of supplies and equipment in some three and one-half year period prior to

effective date of cancellation of its seller's permit, final sale of supplies and equipment after such cancellation but pursuant to negotiations commenced prior to cancellation was subject to sales tax in that company was then a retailer and in that final sale required permit as one of a series of retail sales, notwithstanding that final sale was in liquidation of company's business. Revenue and Taxation Code, §§ 6006.5 (a, b), 6015, 6051, 6066, 6359, 6367.

4. Licenses ⇨ 15.1(5)

Where property was sold to a stranger, sales tax exemption which exists in case of sale of business when it is property used in activity for which seller is required to hold a seller's permit, if, after such transfer, the real or ultimate ownership of the property is substantially similar to that which existed before such transfer, was not applicable. Revenue and Taxation Code, § 6006.5(b).

5. Licenses ⇨ 15.1(5)

Fact that sale is a liquidation sale is not controlling in determining whether, for sales tax purposes, a sale is an occasional one. Revenue and Taxation Code, § 6006.5.

Orrick, Dahlquist, Herrington & Sutcliffe, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., James E. Sabine, Asst. Atty. Gen., Ernest P. Goodman, Deputy Atty. Gen., for respondent.

KAUFMAN, Justice.

Plaintiff appeals from a judgment rendered in favor of defendant in an action for a refund of sales tax. On June 1, 1949, appellant made a sale of all of its furniture, fixtures, machinery and other equipment to a single purchaser for a price of \$700,000, subject to sales tax, and it is this tax which appellant sought to recover in the present suit.

The action was tried on a stipulation of facts and no additional evidence was introduced. Sutter, a California corporation, was engaged in the business of processing, packing, selling and distributing canned fruits and vegetables for resale. During the period beginning September 1, 1945 and

ending March 31, 1949, appellant made several retail sales of used equipment and various supplies on which sales tax was paid. In the fourth quarter of 1945 it sold all of its equipment for the sum of \$264,819.72, paying the sales tax thereon. During the period beginning in August, 1933 and ending March 31, 1949, Sutter held a seller's permit from the State Board of Equalization as required of any person making retail sales. Rev. & Tax. Code, Sec. 6066. On April 15, 1949, Sutter obtained a cancellation of its seller's permit to be effective March 31, 1949.

Having decided to discontinue operations on or about March 15, 1949, Sutter entered into negotiations with a non-affiliated company. On March 26, 1949, it transferred its entire inventory of finished goods and goods in process to an affiliated company for a purchase price of \$2,799,235.93, receiving a resale certificate therefor. On May 4, 1949, the sale of the equipment, furniture and fixtures to a non-affiliated company was completed for a consideration of \$700,000. The transfer of these assets took place on June 1, 1949. Sutter does not contend that the assets involved in this latter sale were sold for resale.

The trial court adopted the Partial Stipulation of Facts as Findings of Fact. It further found that every allegation in the complaint not included in said Stipulation or admitted by the answer was untrue. As inferences from the Stipulation the court found that Sutter was a retailer at time of the sale here in question; that the sale was one of a series of retail sales made in the period, September 1, 1945 to and including June 1, 1949; that said sale was part of a series of retail sales sufficient in number, scope and character to constitute plaintiff a retailer; that the property involved in the sale was held and used by plaintiff in the course of an activity for which a seller's permit was required.

Appellant contends that it was not a retailer at the time it sold its cannery equipment. Section 6051, Revenue and Taxation Code, imposes a tax for the privilege of selling tangible personal property at retail, and section 6015 of the same code defines a "retailer" as a person "engaged in the busi-

ness of making retail sales * * * of tangible personal property owned by the person or others." Appellant admits that it made retail sales of obsolete equipment and incidental supplies prior to March 21, 1949, but contends that it was not a retailer on June 1, 1949, because more than two months earlier it had terminated the business which theretofore had made it a retailer. It is to be noted that it was not appellant's principal business, operating a cannery, which had made it a retailer, for the food processing business is exempt from the sales tax. Rev. & Tax.Code, sec. 6359. It was the incidental sales of supplies and obsolete equipment for which it had held a seller's permit. In the last quarter of 1948, appellant made ten retail sales. The last sale (prior to the sale here in question), the sale of an obsolete printing press, had occurred in the first quarter of 1949, the quarter in which it was decided to discontinue business and in which negotiations were begun which culminated in the sales agreement of May 4, 1949, involving furniture, fixtures, machinery, equipment, repair supplies, tools, etc., in the plant. This transfer was completed on June 1, 1949, by delivery of a bill of sale, and the buyer removed the aforesaid equipment from the plant prior to the close of 1949. It will be recalled that inventory of goods in process, finished goods, shipping and packing supplies, had been sold on March 26, 1949, to an affiliated company.

[1] Appellant maintains that the above stipulated facts conclusively establish that it was not on June 1, 1949, engaged in the business of making sales at retail. The agreement was, however, actually made on May 4, 1949, and negotiations leading to the sale had apparently commenced before appellant on April 15, 1949, mailed in its seller's permit for cancellation. These facts would allow the inference which was drawn by the trial court that this sale was part of a series of retail sales made by appellant in the period September 1, 1945 to and including June 1, 1949. The fact that appellant did not hold a seller's permit at the time that the sale was completed would be of no significance, since if the sale is a retail sale covered by the act, the

seller is liable for the tax whether or not he holds a seller's permit.

Appellant contends that the sale of all the remaining assets of a business is distinguishable from the prior retail sales made by it. The series of earlier sales were incidental and a by-product of its principal, non-retailing, non-taxable operations. They were generally sales of pieces of obsolete equipment, or supplies sold to farmers. The sale of June 1, 1949, was a sale in termination of a business rather than in pursuance of a business. The sales tax, it is argued, is a tax upon the privilege of conducting a retail business. *Western Lithograph Co. v. State Board of Equalization*, 11 Cal.2d 156, 164, 78 P.2d 731, 117 A.L.R. 838; *National Ice & Cold Storage Co. of California v. Pacific Fruit Express Co.*, 11 Cal.2d 283, 79 P.2d 380; *Bigsby v. Johnson*, 18 Cal.2d 860, 862, 118 P.2d 289. The federal cases have noted the distinction between cases of retail sales made in the course of conducting a business, and those made in liquidation of a business. *State Board of Equalization of State of California v. Boteler*, 9 Cir., 131 F.2d 386; *California State Board of Equalization v. Goggin*, 9 Cir., 191 F.2d 726, 729, 27 A.L.R. 2d 1211. In the *Goggin* case in which the trustee in bankruptcy had made a sale of certain trucks, the court stated that "the sale was not made in the course of conducting a business but in the process of putting an end to a business." The cases where the tax has been held applicable are those made while the seller was conducting a business. *Northwestern Pac. R. Co. v. State Board of Equalization*, 1943, 21 Cal.2d 524, 133 P.2d 400, sale of used rolling stock; *Bigsby v. Johnson*, 1941, 18 Cal. 2d 860, 118 P.2d 289, sale of used printing equipment by printing establishment; *Los Angeles City High School Dist. v. State Board of Equalization*, 1945, 71 Cal.App.2d 486, 163 P.2d 45, sales of miscellaneous equipment no longer needed for school purposes.

[2] While it is true that the cases cited above, decided by the courts of this state, were cases in which the retail sales were all made by sellers still engaged in their principal business activity, none of those cases

dealt with the issue now before the court, and shed no light on the problem. As to the views expressed by the federal courts in the cases cited, *supra*, they are not controlling in the state courts. These cases were recently discussed in *Market Street Ry. Co. v. California State Board of Equalization*, 137 Cal.App.2d 87, 290 P.2d 20, 27, the court there stating that "It is possible that these cases can be explained on the theory that the federal courts there involved felt that a trustee in bankruptcy was not a retailer because of his status under federal law. It seems most likely that the federal courts construed the term 'business' in the federal statute in its ordinary commercial sense and not as the California courts have construed the term in the Sales Tax Act. At any rate, even if these cases are contrary to the views herein expressed, this court, as an intermediate state appellate court, is bound in interpreting a state statute to follow the rule laid down by the Supreme Court of this state."

Appellant relies on *Novak v. Redwine*, 89 Ga.App. 755, 81 S.E.2d 222, a Georgia case wherein the sales tax of that state was held not applicable to the sale of bakery and store fixtures by a person who had ceased operating his bakery business. The court stated that the sole question was whether a casual and isolated sale at retail by a person not engaged in the selling of tangible personal property was taxable. The court concluded that it was not a transaction by a person engaged in the business of buying and selling bakery fixtures and equipment, and therefore not taxable. The cases in this state, however, prior to the amendments of 1947 did not exempt occasional sales made at retail. In the Georgia case the sale was a single, isolated sale, whereas in the present case the seller had admittedly been a retailer of used equipment since 1945.

[3] Appellant urges that the recently decided *Market Street Ry.* case, *supra*, supports its position. That case involved the taxability of more than 900 sales between 1933 and 1948. One of these sales was that of all of its operating properties on September 29, 1944, without any interrup-

tion in its business theretofore. At that time the occasional sales exemption was not in the amendment. The court pointed out that in 1947 section 6367 was amended so as to exempt from the tax occasional sales of personal property, and that although *Market* contended that this was merely a codification of existing law, this was not true, since "these changes were intended to and did modify the definition of 'business' set forth in *Bigsby v. Johnson*, 18 Cal.2d 860, 118 P.2d 289, and *Los Angeles City High School Dist. v. State Board of Equalization*, 71 Cal.App.2d 486, 163 P.2d 45." Therefore, *Market* being a retailer at the time, the sale of all of its operating properties being prior to the 1947 amendment, could not be exempt. Appellant points out that the cited case stated that the term "business" requires that the seller engage in more than one isolated sale, that the number, scope and character of the transfer are to be considered, and asserts that its single sale of machinery and fixtures was insufficient to put it in the business of making sales at retail. This is true, if it be conceded that this sale must be viewed without reference to the preceding series of retail sales. However, the stipulated facts show that the decision to sell was made about March 15, 1949, and that *immediately* after this decision negotiations for the sale which culminated on June 1, 1949, were begun. It may certainly be inferred that *Sutter* began these negotiations while it was still in both the cannery business and the business of selling used equipment at retail. The fact that it secured the cancellation of its seller's permit some days before it completed those negotiations cannot establish a barrier between this sale and those which were made earlier.

The *Market Street Ry.* case declared that an exemption from taxation must be found in the statute itself, and that if the statute applies to all sales of tangible personal property by a retailer, the courts cannot say that "the statute does not apply to this sale by a retailer because of some undisclosed general 'intent.'"

[4] The 1947 amendments concerned with exemption of occasional sales exempt

the sale of a business when it is property used in an activity for which the seller is required to hold a seller's permit, "when after such transfer the real or ultimate ownership of such property is substantially similar to that which existed before such transfer." Rev. & Tax.Code, sec. 6006.5(b). In the instant case the property was sold to a stranger, hence this exemption does not apply.

Subsection (a) of Section 6006.5 provides that an occasional sale includes "a sale of property not held or used by a seller in the course of an activity for which he is required to hold a seller's permit, provided such sale is not one of a series of sales sufficient in number, scope and character to constitute an activity requiring the holding of a seller's permit." The machinery and equipment which was sold, appellant says, had been used in the food processing business, an activity for which a seller's permit was not required. Rev. & Tax.Code, sec. 6359. Appellant maintains that the second condition of Section 6006.5(a) has also been met, namely, that this sale was not one of a series of sales sufficient in number, scope and character to constitute an activity requiring a seller's permit.

Whether or not the retail sale made here can be considered exempt from the tax, depends finally upon the interpretation of the language "one of a series of sales sufficient in number, scope and character to constitute an activity requiring * * * a seller's permit." The sales prior to the sale here in question undoubtedly required such a permit. While it may be said that Sutter was conducting a side line of selling used equipment and certain other supplies requiring such permit, it is argued that this sale was of an entirely different nature—that it was an isolated transaction, since it was clear that Sutter was not making a business out of selling its business. Appellant refers to the selling of its business as if there was a single sale of its entire operation. However, it had previously sold for a sum of \$2,799,235.93, its inventory of goods and packing supplies. The equipment in the sale now under discussion, was situated in a plant leased by appellant. Appellant had begun negotiations to acquire

the packing plant from the lessor, when it learned that the prospective purchaser was no longer interested in the entire plant. The machinery and fixtures were purchased and removed from the aforesaid plant by the buyer. It is true that with the exception of the sale of all the equipment in 1945, none of the other sales of used equipment approached the amount of the final sale which was in the sum of \$700,000. Between these sales, the largest was that of certain obsolete spinach equipment in the sum of \$12,063.69 in the last quarter of 1948. There appears to be nothing, however, inherently different in the nature of the items sold in the final sale than in the earlier sales of used equipment, although it is true that it was a much larger sale of a greater variety of items. Appellant says that this was truly an occasional sale since the sale of the entire assets could happen only once. However, the same may be said for each smaller item sold. Similar sales might be made, and appellant herein had, in fact, made a similar sale of all of its equipment and machinery in the plant in 1945.

[5] The fact alone that the last sale was made in liquidation of a business is apparently not such a distinction in the nature of the sale as to warrant an exemption if it would otherwise have been considered part of a series of sales sufficient in number, scope and character to constitute an activity requiring a seller's permit and subjecting it to the tax. In the Market Street Ry. case, supra, it was held that several sales of personal property made between December 29, 1944, and December 31, 1948 in liquidation of Market's non-operative properties were liable for the sales tax. This includes some sales made after the 1947 amendments and supports our holding that the fact that the sale is a liquidation sale is not controlling in determining whether a sale is occasional.

We conclude that the trial court was correct in determining that the tax had been validly assessed in the instant case.

Judgment affirmed.

NOURSE, P. J., and DOOLING, J., concur.

